

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

THOMAS LESLIE AND
KATHRYN BARRY,
Appellant(s)/Petitioner(s),

CASE NO.: 3D06-2228

CONSOLIDATED: 3D06-2226

v.

CARNIVAL CORPORATION,
ETC.,
Appellee(s)/Respondent(s).

LOWER
TRIBUNAL NO. 05-12509
05-18925

LAURINE SPIVEY-FERGUSON,
Appellant(s)/Petitioner(s),

CASE NO.: 3D07-1009

v.

CARNIVAL CORPORATION, ETC.,
Appellee(s)/Respondent(s).

LOWER
TRIBUNAL NO.: 06-15055

GRACE GARCIA,
Appellant(s)/Petitioner(s),

CASE NO.: 3D07-627

v.

CARNIVAL CORPORATION, ETC.,
Appellee(s)/Respondent(s).

LOWER
TRIBUNAL NO.: 06-16370

BRIEF OF CONSUMER PROTECTION
LAW COMMITTEE OF THE FLORIDA BAR

AMICUS CURIAE

AUSLEY & MCMULLEN, P.A.
Douglas L. Kilby, FBN 0073407
P. O. Box 391
Tallahassee, FL 32302
850-224-9115

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST1

QUESTION PRESENTED2

SUMMARY OF ARGUMENT3

ARGUMENT4

 A. The Right To A Jury Trial Is A Cornerstone Of Our Legal System,
 And Is Of Special Importance In The Arena Of Consumer Protection
 Law4

 B. Any Curtailment Of The Right To Jury Trial Should Be Strictly
 Scrutinized With The Utmost Care, And Courts Must Indulge Every
 Reasonable Presumption Against Waiver Of That Right.6

 C. The Forum Selection Clause In The Instant Case Did Not Provide
 Sufficient Notice To Florida Consumers That It Was Implicitly
 Waiving Their Right To Jury Trial.10

CONCLUSION13

CERTIFICATE OF FONT COMPLIANCE14

CERTIFICATE OF SERVICE15

TABLE OF AUTHORITIES

DRAFT

IDENTITY AND INTEREST

The Consumer Protection Law Committee of The Florida Bar (“Committee”) is a group of Florida lawyers who practice in the area of consumer protection law, and who are dedicated to serving all Florida lawyers and the public in that field of practice. The Committee produces educational materials and seminars, assists the public *pro bono*, and provides non-partisan technical assistance memoranda on proposed legislation upon request by the Florida Legislature.

The Committee’s interest in this case stems from its members’ expertise in the consumer protection issues presented by the Court, and from the Committee’s concerns regarding issues raised by the parties and the Court itself. In particular, the right to a trial by a jury of one’s peers is a cornerstone of our legal system and is important to maintain the public’s perception and confidence that consumers are on a level playing field when pitted against powerful companies in legal disputes. This is evident in factors courts consider when determining whether a jury trial waiver is enforceable, including the relative bargaining power of the parties, the negotiability of the contract terms, and the relative sophistication of the parties, all factors that are particularly relevant in standardized consumer transactions. Finally, and equally important, this Court invited the Committee to participate in

this case by filing an amicus brief, and the Committee believes it is its professional duty to assist the Court in matters of this nature.

The Committee consulted with, and wishes to thank, the Business Law, International Law and Trial Lawyers Sections, as well as the Admiralty Law Committee, of The Florida Bar, for their review of this brief. The Committee is authorized to represent to the Court that the _____ Sections have approved the position taken by the Committee in this brief, and the International Law Section and Admiralty Law Committee take no position on the issues addressed in this brief. This filing was approved by the Executive Committee of the Board of Governors of The Florida Bar on _____, 200_, consistent with applicable standing board policies. It is tendered solely by this Committee – not in the name of The Florida Bar – but otherwise consistent with applicable case law and policy that limit any political or ideological activities of this unified bar and its organic committees.

QUESTION PRESENTED

On November 21, 2008, this Court entered an order, on its own motion, inviting the Committee to file an amicus brief in this case. Although the parties, as well as two associations, were instructed to address four questions, the Committee was not given a specific question to address.

Accordingly, the Committee accepts the Court's invitation to file an amicus brief. Its discussion focuses on the question of implied waiver of a consumer's right to jury trial in admiralty cases as a result of enforcement of the federal forum selection clause in the passenger ticket contracts in these consolidated cases.

SUMMARY OF ARGUMENT

The right to trial by a jury is a cornerstone of the American legal system. The constitutionally protected right to jury trial can be waived, but only where such waiver is "knowing, voluntary, and intelligent." Implied waivers of the right to jury trial have been recognized in limited circumstances, generally only where the waiver of the right to jury was such a necessary and obvious result of the parties' agreement that it would effectively satisfy the requirement that the waiver be "knowing, voluntary and intelligent."

The language of the passenger ticket contracts in this case did not contain an express waiver of right to jury trial. That waiver would instead occur because of the complex interplay of diversity jurisdiction and admiralty jurisdiction, and the differing rights to jury trial in the "law" versus "admiralty" sides of federal district court. The waiver of right to jury trial by Florida residents, but not the residents of the other 49 states, was not such a necessary and obvious result *in this context* that the waiver could be considered "knowing, voluntary and intelligent." Thus the forum selection clause should not be enforced to the extent that it results in an

implied waiver of the right to jury trial as guaranteed under the Florida Constitution.

ARGUMENT

A. The Right To A Jury Trial Is A Cornerstone Of Our Legal System, And Is Of Special Importance In The Arena Of Consumer Protection Law.

The United States Constitution, Amendment VII, provides "In suits at common law, the right of trial by jury shall be preserved." The Florida Constitution, Article I, Section 22, provides that "[t]he right of trial by jury shall be secure to all and remain inviolate. The right to trial by jury is broader under the Florida Constitution than under the United States Constitution because Article I, Section 22 does not contain the restriction "suits at common law" and contains the stronger, unequivocal language of "inviolate" in lieu of merely "preserved." The right to jury trial is also found in Rule 1.430(a), Florida Rules of Civil Procedure:

(a) *Right Preserved.* --The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.

The right to trial by a jury of one's peers in civil cases is a defining feature of our state and federal judicial systems. See Florida Power Corp. v. Smith, 202 So.2d 872, 882 (Fla. 2nd DCA 1967) ("The jury system is the foundation stone of our whole judicial concept. It is designed to provide all persons with a fair factual determination before judgment."); Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935) ("Maintenance of the jury as a fact-finding body is

of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”).

These consolidated cases, involving injuries allegedly suffered by passengers on cruise ships, are governed by admiralty law. For over 200 years, suitors in admiralty disputes have enjoyed the right to bring their actions in either federal court or state courts of competent jurisdiction. See Carnival Corp. v. Carlisle, 953 So.2d 461, 470 (Fla. 2007)(holding that, under the savings to suitors clause of the Judiciary Act of 1789, state courts have concurrent jurisdiction with federal courts as to *in personam* claims based on maritime torts).

In admiralty cases, however, the parties’ right to a trial by jury may be very different in state versus federal court. For cases filed in Circuit Court in Florida, the parties have the right to trial by jury pursuant to Article I, section 22, of the Florida Constitution. In federal district court, the existence of that right depends on whether the parties satisfy the diversity jurisdiction requirements, in which case they are guaranteed the right to trial by jury under the Seventh Amendment. If not, they may maintain their claims under the admiralty side of federal court jurisdiction pursuant to 28 U.S.C. § 1333, in which case there is no guarantee of a right to trial by jury. Neenan v. Carnival Corp., 2001 WL 91542 (Dist. Ct. S.D. Fla. 2001).

Thus, enforcement of the instant forum selection clause, *in the admiralty context*, results in the implied waiver of the right to jury trial for Florida resident passengers because they are not diverse with Appellee. In contrast, the rights of Non-Florida resident passengers are not affected.

B. Any Curtailment Of The Right To Jury Trial Should Be Strictly Scrutinized With The Utmost Care, And Courts Must Indulge Every Reasonable Presumption Against Waiver Of That Right.

Constitutionally protected rights, including the right to a jury trial, are subject to waiver, but such waivers will only be enforced where the waiver is “knowing, voluntary, and intelligent.” Chames v. DeMayo, 972 So.2d 850, 860-62 (Fla. 2007)(waiver of constitutionally protected right must be knowing, intelligent and voluntary); Sullivan v. Ajax Navigation Corp., and Celebrity Cruises, Inc., 881 F.Supp. 906 (SDNY 1995)(“It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally...A presumption exists against waiving the right to jury trial.”); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 1247 (1966)(“There is a presumption against the waiver of constitutional rights...and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege.”).

Courts must scrutinize any curtailment of the right to jury trial with the utmost care, and “must indulge every reasonable presumption against waiver” of the right to jury trial. Bowles v. Bennett, 629 F.2d 1092, 1095 (5th Cir. 1980)(citing Dimick, *supra*, and Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937)); Loiselle v. Gladfelter, 160 So. 2d 740, 742 (Fla. 3rd DCA 1964)(“when a constitutional right is vested in a party, and there is doubt as to whether he has waived that right, such doubt should be resolved in his favor.”)

Appellant has pointed to a number of cases, including disputes between passengers and cruise ship companies, where courts have rejected express waivers of the right to a jury trial, holding that such waivers were not sufficiently prominent or clear to satisfy the stringent requirements for waivers of right to trial by jury. See e.g. Ginsberg v. Silverseas Cruises, Ltd., 2004 WL 3656827 (S.D. Fla.)(holding that cruise line had not overcome presumption against waiver of jury trial right despite express waiver language in passenger ticket contract); Sullivan, 881 F. Supp. at 911 (holding cruise line did not overcome presumption against waiver of right to jury trial, and express waiver in cruise passenger ticket contract did not establish knowing and voluntary waiver by passengers). These cases illustrate the extent to which *express* jury trial waivers are disfavored, particularly in the context of cruise ship passenger tickets.

Appellee points to decisions where the right to jury trial has been *implicitly* waived, such as in cases where the agreement between the parties contains an arbitration clause, or a forum selection clause providing for disputes to be litigated in a foreign jurisdiction under the law of the foreign nation. Appellee's Response to Motion for Panel Rehearing, Rehearing on Banc, and Certification, pp. 3-4.

The rationale behind the arbitration cases is that parties who agree to arbitrate disputes should reasonably be expected to understand that arbitration, by definition and necessity, means that an arbitrator and not a jury will decide the case. See Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483, 492 (6th Cir. 2001)(rejecting assertion that arbitration clause was unconscionable, and holding "As to the failure of the arbitration clause to include a jury waiver provision, the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.").

Similarly, a number of cases have enforced forum selection clauses requiring disputes to be litigated in foreign tribunals under foreign law, and have rejected claims that the lack of jury waiver language rendered the clause unenforceable. Such holdings are based upon the premise that the parties should reasonably have understood that by agreeing to litigate in foreign legal systems they would not enjoy the same rights afforded under the American legal system. For example, in Alternative Delivery Solutions, Ind. v. R.R. Donnelley & Sons Co., 2005 WL

1862631 (W.D.Tex.), the Court upheld a forum selection clause in a commercial contract calling for disputes to be resolved by a Mexican tribunal, applying Mexican law. In so holding the court stated:

[T]o the extent Plaintiff is implicitly arguing that it did not knowingly waive its right to jury trial, the Court rejects that argument as well. *Although the forum selection clause in this case did not specifically state that the parties would waive their right to jury trial, it would have been naive for Plaintiff to assume that Mexican courts and Mexican law provide all the same rights and procedures as the United States and Texas do. Cf. Haynsworth*, 121 F.3d at 967-68 (“The sophisticated individuals entering into these agreements are hardly so naive as to believe that by choosing only a foreign forum and not the law to be applied therein, they thereby retain some inalienable privilege of litigating their disputes under American law.”). *Surely the fact that Mexico might not provide a jury was foreseeable to Plaintiff*, and Plaintiff voluntarily entered the contract to choose Mexico City as the forum and Mexican law as the governing law, with all the attendant rights and procedures of the Mexican forum. Thus, Plaintiff waived the right to a jury trial under federal or state law when it entered into the contract designating Mexico City and Mexican law.

Id. (emphasis added).¹

¹ Note that cases enforcing forum selection clauses where a foreign jurisdiction is designated generally arise in the commercial, and not consumer, context. Even in the commercial context, courts have refused to enforce such forum selection clauses based upon the failure to adequately advise the parties that they were implicitly waiving their right to jury trial. See DHX, Inc. v. Allianz AGF MAT Ltd., 2002 WL 31421952 (C.D.Cal.)(holding that forum selection clause requiring action to be filed in England was unenforceable for violation of public policy as a result of deprivation of right to jury trial, citing Aetna).

Thus, despite the fact that the agreements in those cases did not contain express waivers of the right to a jury trial, the Courts held the parties there should reasonably be deemed to have made a knowing, intelligent and voluntary waiver of their right to jury trial because the waiver was an “obvious” and “foreseeable” result to the parties.

C. The Forum Selection Clause In The Instant Case Implicitly Waives The Right To Jury Trial For Florida Residents Without Their Knowing, Voluntary And Intelligent Waiver.

The Court is required to “indulge every reasonable presumption against waiver” of the right to jury trial. Aetna, 301 U.S. at 393. Here, the contract contains no jury trial waiver language. Instead, as discussed above and in the briefs submitted by the parties, the waiver would occur by implication for Florida residents because diversity jurisdiction requirements would not be met, the parties would be on the admiralty side of federal district court jurisdiction, they would have no right to jury trial, in federal court, and, if the Court’s ruling is upheld, the right to trial by jury in state court is lost.

The implied waiver cases discussed above do not support a finding by the Court that the passengers in this case made a knowing, voluntary, and intelligent waiver of their right to a jury trial. The loss of the right to a jury trial is “a necessary and fairly obvious consequence of an agreement to arbitrate.” Burden,

267 F.3d at 492. Similarly, it is foreseeable that the right to a trial by jury as afforded under the American legal system is lost if parties agree to litigate claims in a foreign tribunal under the laws of that foreign country. Alternative Delivery Solutions, 2005 WL 1862631.

The same cannot be said here. The implied waiver of the right to jury trial in this case is anything but “a necessary and fairly obvious consequence” of the agreement to litigate claims in the Southern District of Florida. The Committee believes that very few consumers, if any, have any understanding, or should be expected to have any understanding, of this interplay between the requirements of diversity jurisdiction, admiralty jurisdiction, and the limits to the right to trial by jury under the Seventh Amendment in federal court, much less the unintended consequence of the loss of their right to trial by jury.

Indulging “every reasonable presumption against waiver,” as required under Aetna and Loiselle, the Court should conclude that an ordinary passenger should not be expected to understand that the instant forum selection clause, *as applied in the admiralty context*, would implicitly waive his or her constitutionally protected right to a jury trial. Thus, the implied waiver of the right to jury trial in Circuit Court under Article I, section 22 of the Florida Constitution should not be deemed to be knowing, voluntary, and intelligent under the circumstances presented in this case.

D. The Forum Selection Clause Should Not Be Enforced To The Extent It Results In The Unintended Waiver Of The Constitutionally Protected Right To Jury Trial.

For a waiver of a constitutionally protected right to be effective it must be clearly established that there was an *intentional* relinquishment or abandonment of a known right or privilege. Brookhart, 384 U.S. at 4. Stated differently, courts should exercise great restraint and caution in enforcing a contractual provision where it would result in the *unintended* waiver of a constitutionally protected right.

Clearly the Appellants in this case did not intend to waive their right to jury trial. While there is no factual record from which Appellee's intent can be discerned, a number of points indicate that Appellee did not intend to strip its customers of their right to jury trial, including: (i) the lack of an express jury trial waiver in Appellee's passenger cruise ticket agreement; (ii) the fact that non-Florida resident passengers will continue to enjoy the right to a jury trial in federal court under the Seventh Amendment; and (iii) Appellee's statement that it will not oppose Appellants' request for a jury trial in federal court.² Instead, the forum selection clause appears designed to ensure that claims will be litigated in Miami-Dade County, preferably in federal district court, but where the federal courts lack jurisdiction, in Circuit Court in Miami-Dade County.

² Appellee's Response to Motion for Panel Rehearing, Rehearing on Banc, and Certification, pp. 7-8.

If the Court has any doubt whether the waiver of Florida passengers' constitutionally protected right to jury trial was knowingly and intentionally relinquished, the Court should exercise every presumption against waiver. Brookhart, 384 U.S. at 4; Aetna, 301 U.S. at 393.

CONCLUSION

For these reasons, the forum selection clause in the passenger contracts at issue in this case should not be enforced to the extent that it deprives Floridians of their right to trial by jury under Article I, section 22 of the Florida Constitution.³ That right would be preserved if Florida residents were allowed to litigate their claims in the Circuit Court in Miami-Dade County, the backup forum designated in the forum selection clause.

³ The Committee wishes to emphasize that it is focusing on a very narrow issue, i.e. the enforcement of this particular forum selection clause in the admiralty context as it relates to Florida residents.

Respectfully submitted,

THE FLORIDA BAR STANDING
COMMITTEE ON CONSUMER
PROTECTION LAW

AUSLEY & MCMULLEN, P.A.
Douglas L. Kilby, FBN 0073407
P. O. Box 391
Tallahassee, Florida 32302
850-224-9115

Douglas L. Kilby, FBN 0073407
Committee Chairman

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that this Brief complies with the font requirements of Rule
9.210(a)(2), Florida Rules of Appellate Procedure.

Douglas L. Kilby, FBN 0073407

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing was mailed on this ____ day
of _____, 2009 to:

Michael D. Eriksen, Esq.
Eriksen Law Firm
2161 Palm Beach Lakes Boulevard
Suite 217
West Palm Beach, FL 33416-1349
Attorneys for Appellant

Curtis Mase, Esq.
Mase & Lara
80 S.W. Eighth Street
Suite 2700
Miami, FL 33130
Attorneys for Appellee

Philip Burlington, Esq.
Burlington & Rockenbach
2001 Palm Beach Lakes Boulevard
Suite 410
West Palm Beach, FL 33409
Attorneys for Amicus Curiae FJA

Roberta G. Mandel, Esq.
Stephens, Lynn, Klein, et al.
Two Datan Center – PH II
9130 South Dadeland Boulevard
Miami, FL 33156
Attorneys for Amicus Curiae FDLA

Douglas L. Kilby, FBN 0073407