

Third District Court of Appeal

State of Florida, January Term, A.D. 2010

Opinion filed June 2, 2010.

No. 3D07-555
Lower Tribunal No. 04-23514

Walter Wiesenberg,
Appellant,

vs.

Costa Crociere, S.p.A.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Margarita Esquiroz, Judge.

Michael Guilford; Philip D. Parrish, for appellant.

McAlpin Conroy and Richard J. McAlpin and Gabriela M. Prado, for appellee.

Before COPE, SHEPHERD and SUAREZ, JJ.

On Motion for Rehearing or Certification

COPE, J.

We deny the motion for rehearing but grant the motion for certification of a question of great public importance.

Plaintiff Wiesenberg argues that we should grant rehearing and remand the case to the trial court. The plaintiff argues that it was not established that the plaintiff ever received a ticket, or if he did, which form of ticket he received.

We cannot see that this argument was made below. In response to the defendant Costa's motion to dismiss or for summary judgment, the plaintiff made no claim that he traveled without a ticket. Indeed, the summary judgment record contains a copy of the plaintiff's federal court complaint. In federal court, the plaintiff specifically alleged that Costa had delivered to the plaintiff "a contract ticket or contract of passenger carriage[.]"

The defendant Costa also filed a copy of the standard form ticket it provided to the plaintiff. In the trial court, the plaintiff did not challenge the authenticity or text of the ticket.

The plaintiff also argues that there remains a question whether the forum selection clause adequately communicated (a) the necessity to file suit in federal court, and (b) that in federal court there would be no jury trial. However, those are the issues which divided this court in its denial of rehearing en banc in Leslie v. Carnival Corp., 22 So. 3d 567 (Fla. 3d DCA 2009). Compare id. at 574 (Shepherd, Gersten, Wells, Suarez, and Lagoa, JJ., concurring in denial of rehearing en banc)

("[U]nder federal maritime law, the passengers in these cases received the notice to which they were legally entitled. . . . There is no requirement under general maritime law that ticket recipients be advised of any unstated ramification of those limitations."), with id. at 585 (Cortiñas, Ramirez, Cope, Rothenberg, and Salter, JJ., dissenting from denial of rehearing en banc) ("[W]e would grant the motion for rehearing en banc and find the federal court portion of the Forum Clause at issue here is unenforceable as it operates to deprive appellants of their constitutional right to a jury trial without notice and without consent."). For the stated reasons, we deny the motion for rehearing.

The forum selection clause in this case states, in part:

(19) CHOICE OF FORUM; NO ARREST

....

(b) For cruises which depart from, return to, or make any port call at a United States port, Passenger further agrees that any suit against CARRIER shall be filed exclusively in the United States District Court for the Southern District of Florida located in Broward County, Florida, and that any such suit shall be based exclusively upon the admiralty jurisdiction of the United States District Court.

The clause now before us differs somewhat from the clause construed in Leslie. In the clause now before us, all passenger suits must be brought in admiralty in the United States District Court for the Southern District of Florida. In Leslie the forum selection clause did not specify the basis for federal jurisdiction, so that a passenger was free to rely on diversity of citizenship (where it exists) as a basis of

federal jurisdiction. The difference is that the Leslie clause required some passengers (those who cannot establish diversity of citizenship) to proceed on the admiralty side of the federal district court, whereas in the forum clause now before us, all passenger suits must proceed on the admiralty side of the federal district court.

As stated in our original opinion, we upheld the validity of the just-quoted forum selection clause on authority of Leslie. We certify that we have passed on a question of great public importance:

IS A FORUM SELECTION CLAUSE ENFORCEABLE
IN CIRCUMSTANCES WHERE ITS EFFECT IS
THAT PASSENGERS WAIVE THE RIGHT TO A
JURY TRIAL BUT THE CLAUSE DOES NOT
EXPRESSLY SO STATE?

Rehearing denied; question of great public importance certified.*

SUAREZ, J., concurs.

* The question is similar, but not identical to, the question that this court certified in Spivey-Ferguson v. Carnival Corp., 22 So. 3d 566 (Fla. 3d DCA 2009). The question is worded differently because the clause is worded differently.

SHEPHERD, J., concurring in part, dissenting in part.

I respectfully dissent on granting certification in this case.¹ In my view, this is not a case of great public importance, or even great urgency. As with Leslie v. Carnival Corp., 22 So. 3d 561 (Fla. 3d DCA 2008), rehearing en banc denied, 22 So. 2d 567, the decision in this case accords with ancient concepts of freedom of contract, pursuant to which Mr. Wiesenberg and Costa Crociere have agreed the dispute between them will be resolved in a court which has existed for this purpose for more than 200 years. See Judiciary Act of 1789 Ch. 20 § 9, 1 Stat. 77 (1789); 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 1-6 (4th ed. 2004).

What constitutes a question of great public importance is not defined. However, we must be mindful that when the provision first appeared in the Florida Constitution in 1957, it was part of a revision and modernization of the Florida appellate structure prompted by the great number of cases reaching the Florida Supreme Court and the consequent delay in the administration of justice. Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). Under this revision, the Florida Supreme Court became charged to serve as a supervisory body, heavily oriented toward the preservation of uniformity of principle and practice. Id. Concomitantly, review by the district courts was thereafter intended “in most

¹ I concur in the majority’s denial of the motion for rehearing.

instances” to be final and absolute.” *Id.* Undiscriminating certification of matters as being of great public importance thwarts this constitutional scheme. It also inhibits the salutary functioning of the courts of appeal of this state as legal laboratories.

The case before us is a garden variety personal injury case with a contractual twist. As a practical matter, the clause in question affects a narrow class of Costa Crociere cruise ship customers—those with a dispute arising out of their cruise experience. Although the clause is challengeable and remains so in courts outside our jurisdiction, there is no court which has reasoned to a result contrary to the one we have reached here, or in our more fulsomely reasoned decision, Leslie v. Carnival Corporation.² Nor is there any reason to believe Mr. Wiesenberg will be mistreated or shortchanged by a judge of the United States District Court absent immediate intervention by our High Court.³

² Lest there be any confusion, *see supra* p. 2, the Leslie panel (and hence the en banc panel) did not have before it the question whether the contractual limitations in the cruise passenger’s ticket were “reasonably communicated” to the passenger under federal maritime law. *See Leslie*, 22 So. 3d at 562, n.2 (“The passengers do not contest that this clause, which was referenced expressly in a bold-faced ‘**Important Notice to Guests**’ on the first page of the Ticket Contract, was ‘reasonably communicated’ to them as required by federal maritime law.”). The sole issue presented in Leslie, and the cases consolidated with Leslie for en banc consideration, was whether the forum selection clause was unenforceable because it deprived some Carnival Cruise Line passengers of an absolute right to have their case decided by a jury in the United States District Court.

³ Although cast in the idiom of jury sanctity, I deduce this is Mr. Wiesenberg’s true concern. However, analyses of empirical data from federal cases compiled by the

This may be a case of some legal panache. However, in my opinion, it is not a case of great public importance. The former, of course, is not a basis for certification.

Administrative Office of the United States Courts strongly suggest otherwise. See, e.g., Theodore Eisenberg, *Judicial Decisionmaking in Federal Products Liability Cases, 1978-1997*, 49 DePaul L. Rev. 323, 323 (1999) (“The striking difference in trial win rates between judge and jury trials continues. Plaintiffs prevail in over 40% of the judge trials and only about 30% of the jury trials.”); Carol J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996*, Bur. Justice Stats. Bul., Sept. 1999, at 1, 6 (“Plaintiffs were more likely to win in bench trial cases (62%) than in jury trial cases (49%).”); see also Thomas A. Eaton, et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L. Rev. 1049, 1084 (2000). Moreover, Federal Rule of Civil Procedure 39(c) authorizes a claimant, such as Mr. Wiesenberg, to request a jury trial of his claim in admiralty, subject to the consent of Costa Crociere and the federal trial judge.