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Cruise Lines and Passenger Ships Committee Newsletter

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Contact Us

Please note new contact information:

Robert D. Peltz
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, FL 33133
305-854-4900
peltz@leesfield.com
Committee Chair

W. Sean O'Neil
12651 Briar Forest
Suite 220
Houston, TX 77077
281-496-0193
wsoneil@wsolaw.com
Committee Vice-Chair

Paul E. Calvesbert
Calvesbert Law Office PSC
Centro de Seguros
Suite 214
Ponce de Leon Avenue
San Juan, PR 00907
787-721-1804
paul@calvesbertlaw.com
Committee Secretary

Immediate Past Chairperson

Pamela Milgrim
pamela.milgrim@skuld.com

Shipboard Releases - The Next Battle Ground

By: Robert D. Peltz and Carol L. Finklehoffe
Leesfield & Partners, P.A.
Miami, Florida

Although there are several reported decisions involving the validity of releases executed by passengers for excursions and other activities occurring off of a cruise ship, there is surprisingly little authority regarding the enforceability of attempts to disclaim liability for shipboard activities. With the escalation of new and potentially dangerous shipboard activities, such as rock climbing walls, FlowRiders and even ballooning, the battle over the validity of releases for such activities will only become more prominent in the future.

One of the obvious impediments to the enforceability of such releases is the existence of 46 U.S.C. §30509 f/k/a 46 U.S.C. §183 c which provides:

> (a) Prohibition.
>
> (1) In general. The owner, master, or agent of a vessel transporting passengers between Ports in the United States or between a Port in the United States and a Port in a foreign country, may not include in regulation or contract a provision limiting:
>
> (A) The liability of the owner, master, or agents for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or

(B) The right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

(2) Voidness. A provision described in paragraph (1) is void.

Therefore, under the clear and unambiguous wording of 46 U.S.C. §30509, a shipowner is prohibited from disclaiming liability for its negligence on cruises which stop at a U.S. port.

A handful of cases have dealt with the issue of whether releases for shoreside excursions and activities occurring off of the cruise ship, such as snorkling, scuba diving and the use of jet skis are valid. The courts in these cases have upheld the releases, generally in reliance upon state law principles. *See e.g. Borden v. Phillips*, 752 So.2d 69 (Fla. 1st DCA 2000)(concluding there was no admiralty jurisdiction for recreational boating and scuba diving injuries).

None of these earlier cases, however, have involved claims occurring on the cruise ship itself or even discussed the application of 46 U.S.C. §30509. *See e.g. In Re: The Complaint of Royal Caribbean Cruises, Ltd.*, 459 F.Supp.2d 1275 (S.D. Fla. 2006)(wave runner operated at out island during excursion), *In Re: The Complaint of Royal Caribbean Cruises Ltd.*, 403 F.2d 1168 (S.D. Fla. 2005)(jet ski operated at out island during excursion).

In one of the first decisions to directly consider the application of 46 U.S.C. §30509 to releases involving shipboard activities, one federal district judge from the Southern District of Florida has recently concluded that the statute was inapplicable to prevent the enforcement of a release executed by a passenger to bar her claim arising from injuries during the course of a FlowRider shipboard activity. *Johnson v. Royal Caribbean Cruises, Ltd.*, 2011 WL 1004583 (S.D. Fla. 2011). In this case, the court upheld a disclaimer signed by the passenger in which she agreed to "fully release and forever discharge" the carrier from "any and all actions" arising from "any accident or injury" in any way connected to her use of the FlowRider.

In its initial analysis, the court held that admiralty jurisdiction did not apply to the Plaintiff's claim, thereby rendering 46 U.S.C. §30509 inapplicable. Although noting that the accident occurred on navigable waters, the court concluded that the activity had an insufficient connection to maritime commerce and traditional maritime activity as required under *Gerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

The court next determined even if admiralty jurisdiction existed that 46 U.S.C. §30509 would not bar the operation of the release, since it is only applicable to a carrier's activities "in providing transportation and other essential functions of common carriers." The judge reasoned that

> "while courts have expanded the essential functions of a ship as common carrier to include the provision of 'comfortable accommodations' to passengers [citation omitted] recreational

> and inherently dangerous activities such as the FlowRider can hardly be considered essential functions of a common carrier, nor are they at all related to a passenger's duty to provide safe transportation to its passengers."

The court's threshold presumption that the prohibition contained in 46 U.S.C. §30509 only applies to situations coming within admiralty jurisdiction belies the clear wording of the statute, which contains no such limitation on its face. Therefore, as a preliminary matter there appears to be no legal basis to add a judicial limitation to the operation of the statute, which is not contained within the statute itself.

Even if the operation of the statute could be considered limited to situations falling within admiralty jurisdiction, the court's reasoning also clearly conflicts with over 50 years of nearly unanimous decisions from the United States Supreme Court, numerous Circuit Courts and countless District Courts, which have concluded that passenger accidents occurring aboard a cruise ship are subject to admiralty jurisdiction. In fact in the landmark case of *Kermarec v. Compagnie Generale Trans-atlantique*, 358 U.S. 625 (1959), the U.S. Supreme Court expressly held that a trip and fall by a guest of a crew member on a stairway carpet fell within admiralty jurisdiction. *See e.g. Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990)(trip over fire door threshold); *Monteleone v. Bahamas Cruise Lines, Inc.*, 838 F.2d 63 (2d Cir. 1988)(trip and fall on stairway in cruise ship); *McCormick Shipping Corp. v. Stratt*, 322 F.2d 648 (5th Cir. 1963)(passenger injured by defective closet door). To accept the court's rationale in *Johnson* would be to exclude virtually every passenger claim occurring aboard a cruise ship from the application of admiralty jurisdiction and maritime law.

The second basis for the court's conclusion, that 46 U.S.C. §30509 only applies to the shipowner's activities in "providing transportation and other essential functions of common carriers," also ignores the overwhelming body of maritime law applicable to cruise ships, which has uniformly concluded that passenger injuries occurring during the course of recreational activities fall within admiralty jurisdiction. *See e.g. Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990)(passenger injured while playing basketball on ship); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983)(fall over stool in cruise ship's disco dance floor); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989)(slip and fall on wet spot on deck in cruise ship's outdoor disco); *Moore v. American Scantic Line*, 121 F.2d 767 (2d Cir. 1941)(passenger injured while skipping rope on the bridge deck).

Even if such a limitation was applicable on the operation of the statute, it is obvious that recreational activities such as the FlowRider are an essential part of the purpose and function of modern cruise ships. Whether one is reading a newspaper or magazine, watching television or using the Internet, it is hard to miss ads for cruise ships focusing on shipboard activities and amenities.

Maritime law has also long recognized that the function of a cruise ship is not limited to transportation, but also includes the recreational activities of its passengers. Accordingly,

maritime cases have provided seaman's status to hair dressers, musicians, waiters, busboys, bartenders and entertainers, to name just a few. *See e.g. Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973)(hair dresser)(and cases cited therein). In fact, cases taking such an expansive view of the function of the vessel date back several hundred years. In the 1910 decision in the *J.S. Warden. The Orient. The MT. Desert*, 175 F.314 (S.D. 1910), the great Learned Hand relied upon a similar decision in 1806 to conclude that a bartender served an essential ships function on a steam paddle wheeler.

As a result, previous cases have applied the provisions of 46 U.S.C. §30509 and its predecessor, 46 U.S.C. §183 c to render releases and disclaimers appearing in tickets invalid for injuries occurring to passengers during the course of a cruise. *See e.g. Moore v. American Scantic Line*, 121 F.2d 767 (2d Cir. 1941)(disclaimer inapplicable to bar claim by passenger injured while skipping rope on the bridge deck); *Hawthorne v. Holland American Line*, 160 F. Supp. 836 (D.Mass. 1958)(barring enforcement of ticket provision disclaiming liability where the passenger was guilty of contributory negligence). Significantly, even prior to the adoption of 46 U.S.C. §183 c in 1936, such disclaimers have been rejected under maritime law on public policy grounds. *See e.g. Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984)(citing *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397 (1889).

CASE LAW UPDATE

Admiralty Jurisdiction

Gossettv. McMurtry, 2010 AMC 2122 (D.S.C. 2010)

A defamation claim by one sports fisherman against another for taking embarrassing photographs and then showing them to others ashore after the conclusion of a fishing trip did not meet either element necessary to establish admiralty jurisdiction. Initially, the court concluded that the tort of defamation was not completed until the defendant showed the photographs to others. Since this occurred ashore, the location requirement for asserting admiralty jurisdiction was not met. The court further held that the claim also failed to meet the requirement that the actions have an impact on maritime commerce.

Maintenance and Cure

Stanton v. Buchanan Marine, L.P., 2010 AMC 2170 (SD.N.Y. 2009)

In upholding a collective bargaining agreement provision that limited maintenance payments to 90 consecutive days, even if the injured seaman had not reached maximum medical cure, the court relied upon a long line of cases upholding limitations on maintenance in legitimately negotiated CBA's. *See e.g. Frederick* v. *Kirby Tanks Ships, Inc.*, 305 F.3d 1277 (11th Cir. 2000); *Baldassaro* v. *United States*, 64 F.3d 206 (5th Cir. 1995); *Barnes* v. *Andover*

Co., L.P., 900 F.2d 630 (3rd Cir. 1990); *AI-Zawkari* v. *Am. S.S. Co.,* 871 F.2d 585 (6th Cir. 1989); *Macedo* v. *F/V Paul and Michelle, 868* F.2d 519 (11th Cir. 1989); *Gardiner* v. *Sea-land SVRV. Inc.,* 989 F2d 943 (9th Cir. 1986); *Ammar* v. *United States,* 342 F.3d 133 (2nd Cir. 2003).

Punitive Damages

Nes v. *Sea Warrior, Inc.*, 2010 AMC 2297 (Wash. Sup. Ct. 2010)

A Washington trial court concluded that the Supreme Court's decision in *Atlantic Sounding v. Townsend,* 129 S.Ct. 2561 (2009) which upheld the imposition of punitive damages in maintenance and cure cases also allowed the recovery of such damages under the Jones Act. In rejecting the long line of cases to the contrary, the court concluded that the dissent in *Townsend* "makes it clear that it understands the majority decision to allow punitive damages under the Jones Act."

Royal Caribbean Cruises Ltd. v. Doe, 44 So.3d 230 (Fla. 3d 2010)

Under Florida Statutes '768.72, which precludes the assertion of a claim for punitive damages in the absence of Aa reasonable showing by evidence in the record or proffered by the claimant which provides a reasonable basis for such damages,@ it was error for the court to permit an amendment in a seaman=s claim filed in state court without undertaking the requisite evidentiary analysis.

Arbitration

In *Thomas* v. *Carnival Corp.,* 573 F.3d 1113 (11th Cir. 2009), the Eleventh Circuit concluded that an arbitration clause in a seaman's collective bargaining agreement was unenforceable where it operated in conjunction with a Panamanian choice of law provision to deprive a seaman of his right to bring an action under the Seaman's Wage Act. In over a dozen recent cases, different judges in the Southern District of Florida have construed *Thomas* in often conflicting manners. These cases, include:

Lindo v. *NCL (Bahamas) Ltd.,* 2009 WLD 7264038 (S.D. Fla. 2009) (J. Graham).

In *Lindo,* the Plaintiff's CBA required that he submit his claims to arbitration proceedings in his home country (Nicaragua), which would apply the law of the vessel's flag (Bahamas). Although the Plaintiff argued that the provision would therefore deprive him of his claims under the Jones Act, the court refused to extend the holding in *Thomas* to bar enforcement of claims arising outside of the Seaman's Wage Act. Instead, it held that it must rely upon the Eleventh Circuit's explicit holding that a Jones Act claim is subject to arbitration in *Bautista* v. *Norweigian Cruise Line, Ltd.,* 396 F.3d 1289, 1302 (11th Cir. 2005). *But see contra Williams v. NCL (Bahamas) Ltd.*, 2011 WL 1206820 (S.D. Fla.)(Lenard).

Bulgakova v. *Carnival Corp.,* 2010 WL 5296962 (S.D. Fla. 2010) (J. Seitz).

In *Bulgakova,* another federal district judge utilized a different analysis, but reached the

same result in refusing to void an arbitration provision for a seaman's claims under the Jones Act, unseaworthiness and for maintenance and cure. The court concluded that while Panamanian substantive law might bar the seaman's Jones Act claim, it would likely recognize his non-statutory claims as a basis for recovery. Therefore, while the choice of law provision might "threaten to extinguish the plaintiffs claims," there was no indication in the case that the court would subsequently be deprived of an "opportunity for review" at the award enforcement stage. Thus, it held that if the plaintiff was in fact denied his U.S. maritime remedies during the course of the arbitration, his remedy would be to come back after the arbitration and raise the

claim in the post proceeding enforcement stage. Accordingly, the court ruled that the plaintiff s request for relief was "premature" until after the arbitration was actually conducted.

Sorica v. *Princess Cruise Lines, Ltd.,* 2010 Fed. FLW D437 (8/14/09) (J. Huck)

Another judge rejected the seaman's request to have an arbitration provision declared null and void after the cruise line had stipulated to having the case governed by U.S. substantive law, even though it was to be arbitrated in Bermuda. Although this stipulation removed the crux of the *Thomas* objection to arbitration, the court nevertheless went on to note in dicta:

> the fact that the arbitration agreement may not be enforceable because it is purportedly null and void, does not mean that the arbitration agreement does not exist or that the dispute is not one that "relates to an arbitration agreement ... covered by the convention." ... in other words, jurisdiction is not contingent upon the validity or enforceability of the arbitration agreement, but simply whether the four jurisdictional prerequisites have been met and the claims relate to the arbitration agreement.

See also Orozco v. Princess Cruise Line, Ltd., 2010 WL 3942854 (S.D. Fla.)(King) (compelling arbitration based upon cruise line's agreement to waive choice of law provision); *Gawin v. Princess Cruise Lines, Ltd.,* 706 F.Supp.2d 1261 (S.D. Fla. 2010)(Ungargo)(same); *Matthews v. Princess Cruise Lines, Ltd.,* 728 F.Supp.2d 1326 (S.D. Fla. 2010)(Gold)(same); *Krstic v. Princess Cruise Lines, Ltd.*, 706 F.Supp.1271 (S.D. Fla. 2010) (Gold)(same).

Harrison v. NCL (Bahamas) Ltd., 2011 WL 1595170 (S.D. Fla. 2011)(Cook)

Yet another district court judge reached the opposite result in *Harrison*, concluding that since it takes two parties "to stipulate" that the cruise lines agreement to waive a choice of law provision was ineffective, thereby causing the contract to run afoul of *Thomas*. The court further determined that since the contract did not have a severability clause, that it would have been inappropriate in any event to severe the offensive choice of law provision.

Kovacs v. Carnival Corp., 2010 Fed. FLW D438 (S.D. Fla. 2009) (J. Huck)

In yet another variation on the theme, the cruise line stipulated to arbitrate the plaintiff's Seaman's Wage Act claim under U.S. law, but refused to similarly stipulate as to the

accompanying Jones Act claim. The Court concluded that Panamanian law does not provide a seaman with a reasonable equivalent to the rights provided by the Jones Act. Accordingly, it held that it would be against public policy to compel arbitration of the plaintiff's Jones Act claim "because to do so would deprive her of important statutory rights provided by Congress to effectuate public policy." The court went on to further hold that it would be inefficient to bifurcate the plaintiff's separate claims and accordingly, granted the seaman's request to remand the case back to state court.

Morocho v. Carnival Corp., 211 U.S. Dist. LEXIS 4316 (So. Dist. Fla. 2011)(J. Martinez)

Still another judge concluded that a seaman's complaint seeking recovery for violation of the Jones Act, unseaworthiness, failure to provide maintenance and cure, failure to treat and for penalty wages was not subject to arbitration where the employment contract contained a choice of law provision requiring the application of Panamanian law in reliance upon *Thomas*. In reaching this conclusion, the Court noted that while the validity of the seafarers agreement is typically a question for the arbitrator to determine, the issue of the validity of the arbitration clause contained within the contract is appropriate for resolution by the court.

Doe v. Princess Cruise Lines, Ltd., 696 F.Supp. 2d 1282 (S.D. Fla. 2010)

In another crew member case arising in a different context it was held that an arbitration provision in a crew contract did not apply to sexual assault claim by one crew member against another, since the dispute "did not arise out of the seaman's employment."

Forum Non Conveniens

Wilson v. Island Fees Investments, Ltd., 590 F.3d 1264 (11th Cir. 2009)

In an opinion arising from a case against a resort in the Bahamas, the Eleventh Circuit Court of Appeals reversed a dismissal based upon forum non conveniens, which will likely have an impact on cruise line cases involving similar issues. In its opinion, the court concluded that while the financial inability of a Plaintiff to bring a lawsuit in a foreign forum will not affect the analysis of whether the forum provides a reasonable alternative, nevertheless, a patty's claim of financial hardship "is a factor to be considered in the balancing of interests that bears upon convenience, a balancing process that is to be performed *after* identifying an alternative forum." *See also Gross v. British Broad. Corp.*, 386 F.3d 224 (2d Cir. *2004); Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996).

Discovery

Schulte v. NCL (Bahamas) Ltd., 2011 WL 256542 (S.D. Fla.)

A security video is not privileged from disclosure on the grounds of work product and a carrier is not entitled postpone the production of the video until after it deposes a passenger, whose fall was captured on the video. The fact that the carrier "preserved the video from destruction" in anticipation of litigation did not transform the video into work product protected

material.

Shore Excursions

Koens v. Royal Caribbean Cruises, Ltd., 2011 WL 1197642 (S.D. Fla. 2011)

A suit arising out of a shoreside excursion during which the passengers were robbed at gun point was dismissed by a federal judge in reliance upon an old intermediate Florida appellate court decision, *Carlisle v. Ulysses Line Ltd.*, 475 So.2d 248 (Fla. 3d DCA 1985). The plaintiffs had purchased a ticket aboard the ship for a segway tour conducted on a remote 162 acre private nature preserve in the Bahamas known as "Earth Village." During the course of the tour, a number of the excursion participants were attacked by armed robbers, who stole their possessions after terrorizing them at gun point. The court dismissed the Plaintiff's complaint on the grounds that "the duty to warn [of foreseeable criminal activity] is limited to dangers known to exist in the *particular* place where the passenger is invited to, or reasonably may be expected to visit." Accordingly, the court concluded that allegations of the rising crime rate in Nassau in general were insufficient to give rise to a duty to warn of the potential for crimes occurring at the Earth Village Nature Preserve. The court went on to further hold that the failure to allege any

specific deficiencies in regard to the safety record of the excursion operator would preclude a claim against the cruise line for negligent misrepresentation based upon the claimed failure to "fully vet and vouch for the safety record of the tour operator."

Bridgewater v. Carnival Corp., 2011 WL 817936 (S.D. Fla. 2011).

In order to state a claim against a cruise line for the purported negligence of a shore excursion operator under the theory of apparent agency, the Plaintiff must allege a sufficient basis to establish the required elements that: (1) the carrier made representations which caused the passenger to believe that the excursion operator had authority to act for it; (2) such belief was reasonable and (3) the passenger reasonably relied upon this belief to its detriment. The court similarly held that in order to state a claim under the theory of joint venture, the Plaintiff would have to sufficiently plead facts to support the following five elements: (1) the intention of the parties to create a joint venture, (2) joint control or right of control, (3) joint proprietary interest in the subject matter of the venture, (4) the right of both venturers to share on the profits and (5) the duty of both to share in the losses.

Samuels v. Holland American Line - USA, Inc., 2010 WL 3937470 (W.D. Wash. 2010)

A passenger who was rendered a quadriplegic during a beach excursion as a result of being flipped by a wave so that he landed on his neck was barred from recovery against the carrier on the grounds that the sea conditions were considered to be open and obvious.

Criminal Law

U.S. v. Williams, 2011 WL 1057550 (11th Cir. 2011)(unpublished)

U.S. Customs did not need "reasonable suspicion" to search a passenger's cabin and accordingly, the discovery of cocaine while the vessel was docked in Port Everglades following

a return from Costa Rica did not constitute a violation of the passenger's Fourth Amendment rights. *See also U.S. v. Alfaro-Moncada,* 607 F.3d 720 (11th Cir. 2010)(reasonable suspicion not necessary for Customs officers search of a crew member's cabin while vessel was docked in U.S. territorial waters).

Shipboard Medical Care

Wajnstat v. Oceania Cruises, Inc., 2011 WL 465340 (S.D. Fla. 2011)

In an effort to circumvent the *Barbetta* line of cases, which hold that a cruise line may not be held vicariously liable for the negligence of a ship's doctor, *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), the Plaintiff alleged that the carrier was negligent in equipping the vessel's medical center, training the shipboard medical staff, failing to provide communication equipment to reach shoreside medical providers and for failing to timely evacuate the Plaintiff. The court rejected the first three arguments on the grounds that they were barred by that portion of the *Barbetta* rule which provides that "a cruise ship is not a floating hospital." The court rejected the Plaintiff's evacuation claim on the basis that there were no allegations that the Captain had overruled any order by the ship's doctor to evacuate the passenger.

Rinker v. Carnival Corp. __ F.Supp. 2d ___ (2010 WL 4811760) (S.D. Fla. 2010)

The court rejected additional attempts to circumvent the *Barbetta* rule by arguing that the carrier was negligent for failing to hire a ship's doctor licensed by either the state of the vessel's home port (California) or its flag (Bahamas) on the grounds that no such duty exist. The court rejected the Plaintiff's further argument that vicarious liability could be imposed on the grounds that the carrier violated the international safety management code on the grounds that the ISM does not create any legally enforceable duties to cruise ship passengers. *See also Calderon v. Reederei Claus-Peter Offen,* 2009 WL 3429771 (S.D. Fla. 2009).

Time Bar

Crist v. Carnival Corp., 2010 WL 4904166 (11th Cir. 2010)(unpublished).

In an unpublished decision, the Eleventh Circuit Court of Appeal concluded that a passenger's prior unsuccessful filing of a lawsuit in state court did not equitably toll the one year time bar provision contained in the carriers ticket, where the cruise line had expressly informed the passenger prior to the filing of suit that all lawsuits were required to be filed in federal court and that it would not waive any of the ticket provisions. The Court distinguished the prior opinion in *Booth v. Carnival Corp*., 510 F.Supp. 2d 985 (S.D. Fla. 2007), which had applied the doctrine of equitable estoppel on the grounds that the carrier in that case had not advised the passenger prior to the filing of suit of its intent to insist upon the forum selection clause or other ticket provisions. The Eleventh Circuit concluded that in the absence of such an express declaration, the passenger in *Booth* was justified in believing that the carrier might waive its

contractual venue provision. Where the carrier advised the passenger in advance that it would insist upon enforcing its forum selection clause, any resulting belief by the passenger to the contrary would be unwarranted and insufficient to give rise an equitable estoppel.

Palmer v. Norwegian Cruise Line, 741 F.Supp.2d 405 (E.D. N.Y. 2010)

The one year time bar provision was binding upon the passenger, even though her ticket was purchased by her traveling companion. The court concluded that the passenger "knew or should have known that she needed a ticket to board the cruise ship," regardless of who purchased it.

Ship's Design

Rodgers v. Costa Crociere, 210 WL 5065251 (11th Cir. (unpublished)

In a passenger suit based upon a slip and fall down a flight of stairs which were alleged to have been defectively designed, the 11th Circuit affirmed a summary judgment in favor of the shipowner on the grounds that the Plaintiff had failed to present any evidence establishing that the owner had actually designed the stairs. A similar result was reached in *Groves v. Royal Caribbean Cruises Ltd.*, 2011 WL 109639 (S.D. Fla. 2011)(Torres).