

CASE NOTE: *MCCLUSKEY EL V. CELEBRITY CRUISES, INC.*

By: Benjamin Sposito

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I. INTRODUCTION

The surge in slip-and-fall incidents leading to lawsuits cannot be ignored in today's society. As individuals affected by the negligence of major corporations seek rightful compensation for their misfortunes, large companies have taken extra measures to protect themselves from potential negligence claims. Within their contracts, these companies have strategically inserted provisions like modified statutes of limitations and forum selection clauses, effectively influencing the conditions under which clients can initiate legal action. This growing trend calls for careful consideration and an unwavering commitment to ensure that justice prevails for those seeking rightful accountability and restitution. Courts generally permit amended statutes of limitations and forum selection clauses in contracts,¹ as long as sufficient notice of these changes is given to the contract's principal.² In rare cases, courts may exercise their discretion to grant the principal an equitable tolling remedy, as “tolling is an extraordinary remedy which should be extended only sparingly.”³ This discretion presents a fair and just approach to addressing unique circumstances that may arise in contractual matters.

This case note discusses the United States Court of Appeals for the Eleventh Circuit's decision in *McCluskey El v. Celebrity Cruises, Inc.* and its implications for similar disputes in the future. Section II of this case note reiterates the facts and holdings established by the United States District Court for the Southern District of Florida. Section III of this case note discusses how precedent cases influenced the legal outcome of this case. Section IV demonstrates how the court discretionarily reached its legal conclusion. Lastly, Section V analyzes how the court's decision affects current and future law and policy.

II. FACTS AND HOLDINGS

On September 29, 2019, McCluskey El, the appellant, experienced a slip-and-fall incident while exiting a jacuzzi during a cruise around Spain.⁴ Subsequently, in November 2020, the appellant filed a negligence lawsuit against Celebrity Cruises, the appellee and operator of the ship.⁵ In her complaint, the appellant explained that the reason for submitting her claim after September 29, 2020, and beyond the one-year statute of limitations, was due to the COVID-19 pandemic and the injuries she sustained.⁶ In response to the lawsuit, the appellee moved to dismiss the case and presented a contract signed by the appellant, along with each ticket sale.⁷ Additionally, the appellee provided an affidavit from an employee of the appellee's parent company, which stated that actions under maritime law must be filed within one year of the incident date.⁸ The affidavit further revealed that the appellant's travel agent, Life Journeys, had requested and received a copy of the contract before the cruise.⁹ Further, the contract was also accessible on Celebrity's website

¹ 46 U.S.C.A. § 30526(b)(2).

² *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009).

³ *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993).

⁴ *McCluskey El v. Celebrity Cruises, Inc.*, No. 21-14139, 2023 WL 3035216, at *1 (11th Cir. Apr. 21, 2023).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *McCluskey El*, 2023 WL 3035216, at *1.

before, during, and after the cruise.¹⁰ The appellant, in a sworn statement, contested having received the contract either before or after her voyage, asserting that she had no opportunity to become adequately informed about the cruise line's alteration of the default statute of limitations.¹¹ Notably, the appellant complied with the contract's forum selection clause which required her to bring the suit in the Southern District of Florida.¹²

In her appeal, the appellant argued that the statute of limitations should be considered equitably tolled.¹³ She cited alleged unconscionability in the contract and claimed that the pandemic interfered with her ability to file the complaint in a timely manner.¹⁴ Additionally, she stated that a lawyer had misrepresented the fact that the statute of limitations had not expired, telling her that she had two years to file her complaint.¹⁵ Furthermore, the appellant accused Celebrity Cruises of failing to inform her that the statute of limitations was about to expire.¹⁶ In an effort to strengthen her position, McCluskey El also cited persuasive authority, referencing California state courts that had allowed some statutes of limitations to be equitably tolled during the pandemic.¹⁷ However, this argument was not previously discussed in the district court.¹⁸

In summary, McCluskey El's lawsuit against Celebrity Cruises involves the contention of equitable tolling of the statute of limitations due to alleged unconscionability in the contract, the pandemic's impact on her ability to file in a timely manner, a lawyer's purported misinformation, and a lack of notification from the cruise company.¹⁹

The appellate court affirmed the district court's motion to dismiss for summary judgment under Federal Rules of Civil Procedure 12(d) in favor of the appellee.²⁰ The Court held that (1) the appellant was meaningfully informed of the contract's terms and was given the opportunity to reject them through the agent's acceptance on behalf of the appellant;²¹ (2) the contract was not unconscionable because federal statute permits parties to use contracts to alter the statute of limitations;²² (3) generalized assertions about the pandemic were insufficient proof of "just cause" for equitable tolling;²³ (4) authority of another jurisdiction is only persuasive at best and need not be considered in the ruling;²⁴ (5) a lawyer's purported misinformation is not the kind of error

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *McCluskey El*, 2023 WL 3035216, at *1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *McCluskey El*, 2023 WL 3035216, at 3.

²⁰ *Id.* at 1.

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ *Id.*

²⁴ *McCluskey El*, 2023 WL 3035216, at *3.

sufficient to enforce equitable tolling;²⁵ and (6) the appellee had no duty to inform potential plaintiffs that the statute of limitations was running its course.²⁶

III. BACKGROUND

A. Adjustments to Statutes of Limitations and Reasonably Communicated Notice

A district court's entry of summary judgment is reviewed *de novo* by the appellate court,²⁷ in which facts and inferences are drawn in favor of the non-moving party.²⁸ A district court's denial of equitable tolling of the statute of limitations is reviewed *de novo*²⁹ and will only be reversed if clearly erroneous.³⁰ When a summary judgment motion is based on the running of the applicable statute of limitations and the defendant shows that the prescribed period has elapsed, the plaintiff may be able to defeat summary judgment by introducing facts – using affidavits or other evidence – that raise a genuine issue of whether the statute should be suspended.³¹

Generally, there is a three-year statute of limitations to file maritime tort actions.³² However, federal statutes permit parties to adjust that time period via contract.³³ These adjustments are valid if they are reasonably communicated to the passengers; specifically, passengers must have the ability to become meaningfully informed of the contract's terms and to reject them.³⁴ In *Krenkel v. Kerzner Int'l Hotels Ltd.*, “reasonably communicated” contract terms were stipulated by a two-part test, which considers “(1) the clause's physical characteristics and (2) whether the plaintiffs had the ability to become meaningfully informed of the contractual terms and to reject its terms.”³⁵

As supported by *Baer v. Silversea Cruises Ltd.*, courts consider the font size, conspicuousness of terms, and typeface when determining adequate physical characteristics of contract terms.³⁶ In this instance, the court ruled that the first part of the test was satisfied³⁷ based

²⁵ *Id.* (citing *Cadet v. Florida Dep't of Corr.*, 853 F.3d 1216, 1227 (11th Cir. 2017)).

²⁶ *Id.* (citing *Raziano v. United States* 999 F.2d 1539, 1542 (11th Cir. 1993)).

²⁷ *Brady v. Carnival Corp.*, 33 F.4th 1278, 1281 (11th Cir. 2022).

²⁸ *Cotriss v. City of Roswell*, No. 19-12747, 2022 WL 2345729, at *4 (11th Cir. June 29, 2022) (citations omitted).

²⁹ *Booth v. Carnival Corp.*, 522 F.3d 1148 (11th Cir. 2008) (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005)).

³⁰ *Crist v. Carnival Corp.*, 410 F. App'x 197, 199 (11th Cir. 2010) (citing *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992)).

³¹ 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2734 (4th ed. 2015).

³² 46 U.S.C. § 30106.

³³ *See* 46 U.S.C. § 30526.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Baer v. Silversea Cruises Ltd.*, No. 18-10911, 2018 U.S. App. LEXIS 29494, at *865 (11th Cir. Oct. 19, 2018) (citing *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1245-46 (11th Cir. 2012)).

³⁷ *Baer*, 2018 U.S. App. LEXIS 29494, at *865.

on the presence of notices exchanged between the principal and the agent.³⁸ These notices provided directions on how to access the contract's terms and conditions and prominently displayed a clear notice that would be easily comprehensible to an average passenger.³⁹

Furthermore, in *Estate of Myhra*, the plaintiff did not have direct contact with the seller of the services, so a principal-agent relationship had to be established before determining whether the terms and conditions were “reasonably communicated.”⁴⁰ The court stated that the relationship was established by the exchange of invoices between the principal and agent, the provision of an easily accessible web address containing the contract's terms and conditions, and the inclusion of relevant trip details, such as reservation number, passenger names, voyage dates, and costs, in the transferred notice.⁴¹ Additionally, the agent forwarded the principal a large brochure with specific instructions to view the terms inside the document.⁴² For these reasons, the court held that although the plaintiff used a travel agent, the contract terms had been “reasonably communicated” to the plaintiff.⁴³

Building on the concept of reasonable communication, *Nash v. Kloster Cruise A/S*, a persuasive precedent from the First Circuit, emphasized that when determining whether a passenger is bound by the provisions of the ticket, the circumstances surrounding the passenger's possession of and familiarity with the ticket should also be considered.⁴⁴ Express familiarity with terms of the contract indicates an understanding of them, which further aids in identifying reasonable communication.⁴⁵

B. Equitable Tolling for Maritime Tort Actions

In rare cases, an equitable tolling remedy has been applied by the courts⁴⁶ because “tolling is an extraordinary remedy which should be extended only sparingly.”⁴⁷ A court may equitably toll a limitation period where,

“(1) the plaintiff was misled by defendant’s actions into allowing the limitations period to elapse; (2) the plaintiff was unaware that her rights had been violated; or (3) the plaintiff actively pursued her judicial remedies but filed a technically defective pleading during the limitations period but has acted with proper diligence in all other respects.”⁴⁸

³⁸ *Id.* at *865-66.

³⁹ *Id.*

⁴⁰ *See Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1245 (11th Cir. 2012).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1246.

⁴⁴ *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1568 (11th Cir. 1990).

⁴⁵ *Id.*

⁴⁶ *See Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (citing *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990)).

⁴⁷ *Id.*

⁴⁸ *Love v. Carnival Corp.*, No. 11-22920-CIV, 2012 WL 13050571, at *3 (S.D. Fla. Oct. 19, 2012) (citing *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993)).

Due diligence is a necessary, yet not sufficient, prerequisite that a plaintiff must satisfy for consideration of equitable tolling.⁴⁹

In *Booth v. Carnival Corp.*, the court held that equitable tolling was applicable because the plaintiff, subject to a forum-selection clause, filed a federal suit late, after previously filing a timely state court action in an improper forum.⁵⁰ The equitable tolling remedy was applied only because:

“(1) the state court possessed subject matter jurisdiction concurrently with the federal courts, (2) the state suit was dismissed solely on improper venue, (3) the defendant was aware prior to the expiration of the limitation period that the plaintiff intended to file suit, and (4) the plaintiff was entitled to believe that his state filing might be sufficient given the fact that defendants can, and often do, waive their defense of improper venue.”⁵¹

Equitable tolling is also not warranted due to a lawyer’s misrepresentation of the terms and conditions of a contract.⁵² In *Cadet v. Florida Dep’t of Corr.*, the Supreme Court explained that if credited, an attorney’s mistake in miscalculating the limitations period entitling his client to equitable tolling would essentially equitably toll any limitation period for any person whose attorney missed a deadline.⁵³ Following this reasoning, the Court held that “attorney miscalculation is simply not sufficient to warrant equitable tolling.”⁵⁴

Lastly, in *Raziano v. United States*, the Eleventh Circuit Court of Appeals held that potential defendants are under no duty to inform potential plaintiffs that the statute of limitations is running; the plaintiffs endure this duty.⁵⁵

IV. COURT’S DECISION

A. Enforcing Adjustments to Statute of Limitations

In the *McCluskey El* decision, the court used the two-part test from *Estate of Mhyra*, which takes into account “(1) the clause’s physical characteristics and (2) whether the plaintiffs had the ability to become meaningfully informed of the contractual terms and to reject its terms.”⁵⁶ The physical characteristics aspect was not at issue; therefore, the appellate court did not discuss it further.⁵⁷ As for the second part of this test, the court held that the adjusted terms were reasonably communicated to the appellant because constructive notice exists when an agent accepts contract documents on behalf of his/her/its principal.⁵⁸ Accordingly, sufficient notice was provided to the

⁴⁹ *Justice*, 6 F.3d at 1479.

⁵⁰ *Booth v. Carnival Corp.*, 522 F.3d 1148, 1153 (11th Cir. 2008).

⁵¹ *Id.*

⁵² *Cadet*, 853 F.3d at 1235 (citing *Lawrence v. Florida*, 549 U.S. 327, 336 (2007)).

⁵³ *Id.*

⁵⁴ *Cadet*, 853 F.3d at 1235 (quoting *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007)).

⁵⁵ *See Raziano*, 999 F.2d at 1542.

⁵⁶ *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1244 (11th Cir. 2012) (quoting *Krenkel v. Int’l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009)).

⁵⁷ *McCluskey El*, 2023 WL 3035216, at *2.

⁵⁸ *McCluskey El*, 2023 WL 3035216, at *2 (citing *see, e.g., Windward Traders, Ltd. v. Fred S. James & Co.*, 855 F.2d 814, 820 (11th Cir. 1988)).

appellant once her agent received notice.⁵⁹ Also, the court noted that the appellant expressed familiarity with the contract in her complaint. This complaint followed the filing insisted by the forum selection clause in the correct venue and attempted to justify the reasoning for the late submission after the expiration of the statute of limitations.⁶⁰

B. Equitable Tolling

In its decision, the court used a variety of factors to determine whether equitable tolling was warranted.⁶¹ First, the court held that the contract was not unconscionable because valid federal law permits alterations to the statute of limitations, provided that reasonable notice is given to the principal of the contract.⁶² Next, the court held that generalizations about the COVID-19 pandemic were insufficient just cause for equitable tolling because there was no precedent within the 11th Circuit that resulted in equitable tolling of a statute of limitations.⁶³ The court affirmed the lower court's ruling, stating that the appellant "filed her Complaint despite these obstacles, without an attorney, in the midst of the pandemic ..." and failed to assert any individualized facts about her situation that would make her case analogous to past instances where the statute of limitations was waived in the maritime tort context.⁶⁴ Third, the court held that even if the issue of waiving the statute of limitations was not first raised on appeal (making it moot), California state court decisions are only persuasive authority at best for this specific case.⁶⁵ Fourth, the court held that an attorney erroneously telling the appellant that she had two years to file her claim is insufficient to create equitable tolling.⁶⁶ Lastly, the court held that the appellee was under no duty to inform the appellant that the statute of limitations was running.⁶⁷ Thus, the appellate court affirmed the district court's determination that each of these arguments was an insufficient basis to equitably toll the statute of limitations, and stated that the dismissal of the action as untimely was proper.⁶⁸

V. ANALYSIS

The appellate court's decision regarding the appellee's constructive notice and rejection of equitable tolling was correct. It adhered to established case law and further clarified the application of the principal-agent relationship in ensuring sufficient and reasonable notice while emphasizing the rarity of granting an equitable tolling remedy. This case aimed to underscore the importance of "reasonable communication" between corporations and travel agencies when representing clients. Additionally, the *McCluskey El* decision highlighted the challenges in seeking equitable tolling, particularly in dealings involving large corporations and travel agencies. By reaffirming related jurisprudence, the court bolstered previous decisions and provided lawyers with a solid foundation of case law to guide them when assessing similar cases. To support its findings

⁵⁹ *McCluskey El*, 2023 WL 3035216, at *2.

⁶⁰ *Id.*

⁶¹ *See id.* at *3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *McCluskey El*, 2023 WL 3035216, at *3.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

regarding reasonable notice, the court relied on the decisions of *Krenkel*, *Stevens*, and *Windward Traders Ltd.* to determine the impact of travel agencies as advocates for providing adequate legal notice to reach the principles of contracts. The court's reasoning for refusing equitable tolling relied upon the cases of *Justice*, *Booth*, *Walker*, *Cadet*, and *Raziano*.

The court correctly identified the existence of constructive notice between the appellant and appellee. Federal statute permits parties to adjust the period of the statute of limitations, as long as the principal of the contract became meaningfully informed of the contract's terms and was given the opportunity to reject them, as established by *Krenkel* and *Stevens*. The appellant was not given actual notice of the terms but was subjected to constructive notice of contractual obligations because of the established principal-agent relationship between the travel agency and herself. The appellant's travel agency accepted notice on behalf of the appellant, which is deemed adequate constructive notice, under *Windward Traders, Ltd.*

The court did not need to expand upon the "physical characteristics" aspect of reasonable notice because it was conceded by the appellant in the district court. However, it would have aided future cases if there was an explicit ruling on this aspect of reasonable notice. Further, a ruling on the second part of the test would have provided clarity in determining the respective weight of each factor. Also, the court noted that familiarity of the contract was useful in determining reasonable notice—a seemingly ambiguous term that could be expanded upon for clarity in later cases.

Furthermore, the court correctly concluded that the arguments presented by the appellant exhibited an insufficient basis to equitably toll the statute of limitations. First, the court followed the federal statute that permits the adjustment of the statute of limitations as long as reasonable notice is given. Since the court ruled that adequate and reasonable notice of the contract was given, appellee had the right to exercise this statute. Next, extenuating circumstances alone are insufficient in permitting equitable tolling; the extenuating circumstances must impede on the plaintiff's ability to perform or fulfill contractual obligations. Since the appellant capably filed her complaint during the pandemic without an attorney and without providing additional individualized facts that would make her case similar to other cases where the statute of limitations was waived, the court correctly held this factor to be insufficient. Third, the court correctly noted that California state court decisions are only persuasive authority in Florida and would not carry as much weight without the other factors. Fourth, an erroneous statement from an attorney is not sufficient to create equitable tolling, as seen in numerous precedent cases such as *Cadet*. Lastly, the court correctly held that would-be defendants are under no duty to inform potential plaintiffs of the running of the statute of limitations since the burden is placed on the plaintiff to perform their due diligence.

Throughout its opinion, it becomes apparent that the court solely focuses on the arguments presented by the appellant, without reference to the three factors established in *Love v. Carnival Corp.* that typically guide such decisions. Instead, the court considers additional factors raised to establish the possibility of equitable tolling. This approach sets a precedent that one of the original three factors may not be the exclusive basis for granting equitable tolling. However, to avoid confusion and provide clarity on the requirements for obtaining equitable tolling, the court could have linked each of the factors they considered to specific aspects found in the *Love* test. This would have ensured a more straightforward and consistent framework for evaluating the eligibility of equitable tolling in similar cases.

VI. CONCLUSION

In the case of *McCluskey El*, the United States Court of Appeals for the 11th Circuit arrived at the correct decision. The appellant's contentions regarding the appellee's failure to provide sufficient and reasonable notice were effectively countered by a wealth of case law that established a well-defined principal-agent relationship between the contract's principal and the travel agency. Moreover, the appellant's attempts to advocate for an equitable tolling remedy beyond the statute of limitations lacked substantial support in precedent case law pertaining to comparable matters. This court's ruling emphasized and strengthened the definition of reasonably communicated notice while also underscoring the infrequent application of an equitable tolling remedy in maritime tort actions. Following the court's reinforcement of the law, deserving people who are rightful candidates for compensation from negligence will be more likely to receive the restitution they rightly deserve. Simultaneously, this reinforcement will act as a safeguard against undeserving people who might attempt to exploit circumstances in the judicial system with the aim of achieving quick and improper financial gains.