IN THE SUPREME COURT OF FLORIDA

Case No. SC01-1316
L.T. No. 3D00-1012

JUDITH ROSE, CHARLES R. AULT,
on behalf of themselves and all others
similarly situated,

Plaintiffs/Petitioners,

vs.

NORWEGIAN CRUISE LINES LIMITED
d/b/a NORWEGIAN CRUISE LINES,

Defendant/Respondent.
_____________________________________/

ON CONFLICT REVIEW OF DECISION BY
THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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INTEREST OF AMICUS

The Academy of Florida Trial Lawyers ("Academy") is a statewide voluntary association of approximately 4,000 attorneys whose practices emphasize litigation. The objectives of the Academy are: (a) to uphold and defend the principles of the Constitution and the United States and the Florida Constitution; (b) to advance the science of jurisprudence; (c) to train in all fields and phases of advocacy; (d) to promote the administration of justice for the public good; (e) to uphold the honor and dignity of the profession of law; (f) to encourage mutual support and cooperation among members of the Bar; (g) to diligently work to promote public safety and welfare while protecting individual liberties; (h) to encourage public awareness of the adversary system and uphold and improve such system, assuring that the courts shall be kept open and accessible to every person for redress of injuries and that the right to trial by jury shall be secure to all and remain forever inviolate.

The Academy, representing its member attorneys, is substantially interested in the issues involved in this action. The Academy is interested in the development of a body of correct precedent by this Court that will be instructive to litigants, their attorneys and the trial and appellate courts. Class actions serve as a valuable tool for the efficient handling by the courts of common claims by numerous litigants where the individual damages are relatively low, and the incentive to bring individual actions is low, thus permitting violations of law to go unchecked. Moreover, even when the individual damages are high, the courts of Florida would be overwhelmed, and thus rendered unavailable to other litigants, if class treatment of common claims could not be utilized. This case is a good example of the appropriateness of class treatment of

numerous common claims as correctly found by the trial court after reviewing both the pleadings and evidence relevant to class certification.

STATEMENT OF THE FACTS AND CASE

The Academy relies upon the statement of the facts and case and record citations contained in Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The majority opinion below was clearly wrong. Had the majority simply followed its own well-reasoned precedent in *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *review denied*, 654 So. 2d 919 (Fla. 1995), on the commonality requirement for class actions, it would have affirmed, as the dissent noted. Florida and federal cases hold that the commonality requirement has a low threshold. All that is required is that at least one common issue of fact or law—and particularly one concerning liability—arise from the same course of conduct by a defendant; that resolution of such a common question affect all or a significant number of class members; and that the class members' claims are based on the same legal theory. Even claims that arise from different factual contexts are appropriate for class treatment if they present a question of common interest. And the fact that class members may be entitled to different amounts of damages is not an impediment to class treatment. In this case, commonality was easily satisfied as the trial court correctly ruled after thoughtful consideration and review of the parties' evidence submitted relevant to the certification decision. The trial court correctly determined that at least four common issues of law and fact both existed and predominated over

any alleged individual issues. Each of these common questions concerns liability and each concerns a common course of conduct by NCL. Moreover, all class members' claims are based on the same legal theories—breach of warranty and negligence, and all such claims are susceptible to class-wide proof of liability as the reports of the Center for Disease Control ("CDC") and deposition transcripts of the named plaintiffs demonstrate.

Florida courts and courts from other jurisdictions have easily found class treatment appropriate in food and water poisoning cases on cruise ships and in restaurants. Several such cases were cited both by the trial court and by the Fourth District in *McFadden v. Staley*, 687 So. 2d 357 (Fla. 4th DCA 1997)—a restaurant food poisoning case in which class treatment was affirmed and the class action requirements correctly discussed. This case is not meaningfully distinguishable from *Staley* or the cases it cited or the additional food poisoning cases cited by Petitioners. The trial court in this case and the Fourth District in *Staley* got it right and the majority opinion below, for unknown reasons, got it wrong. As this Court has correctly determined, the decision below and *Staley* conflict and are irreconcilable. Thus the Court should reverse the decision below and approve *Staley*.

ARGUMENT

BOTH THE COMMONALITY AND PREDOMINANCE REQUIREMENTS WERE MET AS THE TRIAL COURT CORRECTLY FOUND

Standard of Review

The standard of review in this appeal is the same as it was in the district court: a trial court's ruling on class certification should not be reversed unless it constitutes

an abuse of discretion. *Jenne v. Solomos*, 707 So. 2d 1203 (Fla. 4th DCA 1998). A trial court abuses its discretion only if no reasonable person could agree with the trial court's ruling. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In addition to the stringent abuse of discretion standard, the trial court based its decision to grant class certification both on the allegations of the complaint <u>and</u>, as trier of the facts, on the substantial evidence obtained through discovery and presented by the parties.[1] *See Frankel v. City of Miami Beach*, 340 So. 2d 463, 469 (Fla. 1976) (in most class actions, the information necessary to satisfy the requirements of the rule can only be obtained through discovery). As such, the trial court's ruling should have been afforded due deference by the district court but was not. The fact that the trial court's ruling was based on substantial competent evidence bolsters the conclusion that it did not abuse its discretion in certifying the class.

<u>Rule 1.220</u>

As this Court held almost sixty years ago, the purpose of class actions "is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist." *Tenney v. City of Miami Beach*, 11 So.2d 188, 189 (Fla. 1942). Florida Rule of Civil Procedure 1.220 was promulgated to effectuate that purpose.

Rule 1.220(a) provides that class certification is appropriate where: "(1) the members of the class are so numerous that separate joinder of each member is

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[1]For a list of all the evidence before the trial court on the class certification determination, *see* Appellants' Answer Brief filed in the court below at 1, n. 1.

impracticable; (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class; (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class; [and] (4) the representative party can fairly and adequately protect and represent the interests of each member of the class." In addition to those requirements, Rule 1.220(b)(3) further requires that "the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any questions of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy." These requirements are commonly referred to as numerosity, commonality, typicality, adequacy of representation, predominance and superiority. *McFadden v. Staley*, 687 So. 2d 357, 358 (Fla. 4th DCA 1997).

The Decision Below

In its per curiam opinion, the majority reversed and remanded with instructions to decertify the class, concluding that class certification was improperly granted "because of insufficient commonality."[2] The majority opinion did not discuss the claims, defenses, facts alleged, evidence presented, positions of the parties, the trial court's order or the majorities' rationale for reversal. It merely cited to a prior precedent which while also involving a cruise line defendant, likewise failed to

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[2] (citing *Ulysses Cruises, Inc. v. Calves*, 728 So. 2d 363 (Fla. 3d DCA 1999)). Pet. App. 24. Emphasis added; hereafter all emphasis is added unless noted otherwise.

discuss any of the pertinent information relevant to the class certification decision, thus making it—as well as the decision below—of little persuasive value.[3]

Moreover, *Ulyssess Cruises* reversed class certification based on its conclusion that the predominance requirement of Rule 1.220(b)(3) was not met and not, like the majority opinion here, because the commonality requirement of Rule 1.220(a) was not met. We recognize that there are similarities and overlap between the commonality and predominance requirements since both concern common questions of fact and law. Nevertheless, the two requirements are separate and distinct because commonality tests merely whether common questions of law or fact exist; whereas predominance tests whether such common questions predominate over questions affecting only individual class members.[4] But whether the majority opinion actually concluded that commonality, predominance, or both were lacking, is not important because both requirements were met. The decision below is not only erroneous,

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[3] The majority opinion's citation to *Ulysses Cruises* is also puzzling since the three cases cited in that opinion are inapposite, each turning on facts and issues not present in this case.

[4] Moreover, the two requirements have different burdens of persuasion in that "the threshold of 'commonality' is not high . . .requir[ing] only that resolution of the common questions affect all or a substantial number of the class members." *McFadden*, 687 So. 2d at 359 (citations omitted); *accord Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888 (Fla. 3d DCA 1994), *review denied*, 654 So. 2d 919 (Fla. 1995) (same); *Shipes v. Trinity Idus.*, 987 F.2d 311, 316 (5th Cir. 1993) (threshold for commonality is low); *see also Kreuzfeld, A.G. v. Carnehammer*, 138 F.R.D. 594, 599 (S.D. Fla. 1991) (existence of only one common issue affecting all or significant number of class members is sufficient). Because Rule 1.220 was patterned after Federal Rule of Civil Procedure 23, federal decisions on class actions are persuasive authorities in Florida state courts. *In re Rules of Civil Procedure*, 391 So. 2d 165, 170 (Fla. 1980); *see also Broin*, 641 So. 2d at 689.

conflicts with *McFadden*, is contrary to well-established law on class actions in general, and cruise line food poisoning class action cases in particular, but indeed is in conflict with its own well-reasoned precedent in *Broin*, as Judge Goderich noted in his dissent.[5]

Commonality

In stark contrast to the decision below, *McFadden* is well-reasoned, contains sufficient information concerning the class certification decision to make it a valuable precedent, and is in accord with general law on the issues of both commonality and predominance. In *McFadden*, customers who became ill from eating adulterated food at the same restaurant over a four-day period brought a class action against the restaurant. The complaint alleged that several hundred customers were inflicted with salmonella poisoning or with various gastrointestinal ailments proximately caused by "unsanitary, unsafe and unhealthy food handling practices at the restaurant." 687 So. 2d at 358. The trial court granted plaintiffs' motion for class certification. The Fourth District affirmed finding no abuse of discretion in the trial court's conclusions that the requirements of Rule 1.220 were met, and noted that there was "adequate evidentiary support" for the trial court's ruling. *Id*. at 360.

Concerning the commonality requirement, the district court stated that the trial court found the liability issue to be the same for all class members, and that the damages issue was also the same, "notwithstanding that the extent of individual

[5] We are advised by counsel for Petitioners that no motion for rehearing en banc was filed in the Third District based on intra-district conflict. Nevertheless, the decision below and *Broin* are irreconcilable.

damages may differ." *Id*. at 359. This is a correct statement of law, as the Third District stated in *Broin*. 641 So. 2d 890-91. In determining both commonality and predominance, it is the existence of common issues of law and fact concerning liability—not damages—that controls.[6] The district court also rejected the defendant's argument that class certification was improper because each class member's claims varied somewhat from the others, holding that "[c]laims which arise out of the same course of conduct by a defendant but in differing factual contexts may be pled as a class action if they present a question of common interest."[7]

The Fourth District in *McFadden* noted that the claims were based on the same legal theories—*i.e.*, on "breach of implied warranty of fitness, violation of the Florida Food Act, negligence and strict liability." *Id*.[8] Moreover, the court found that the class members claims arose from defendant's same course of conduct towards all members of the class.

> All members of the class ate at the restaurant within the same period and each became ill. . . . [T]he defendant acted towards each of them in a

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[6] *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 389 (5th Cir. 1989); *Davis v. Southern Bell Tel. and Tel. Co.*, 1993 WL 593999 at *9-11 (S.D. Fla. 1994); *Lifanda v Elmhurst Dodge*, 2001 WL 755189 (N.D. Ill. 2001).

[7] *Id*. (citing *Powell v. River Ranch Property Owners Ass'n, Inc.*, 522 So. 2d 69 (Fla. 2d DCA), *review denied*, 531 So. 2d 1354 (Fla. 1988)) (primary concern for commonality is whether class representative's claim arises from same course of conduct giving rise to other claims and whether the claims are based on same legal theory)). *Accord Broin*, 641 So. 2d at 890; *Kennedy v. Talant*, 710 F.2d 711, 718 (11th Cir. 1983).

[8] The common issues raised by the causes of action in this case are similar to those in *McFadden* since this case also involves food poisoning through bad water: *i.e.*, breach of warranty and negligence. *See* complaint, Petitioner's App. 35.

> similar manner by serving food adulterated by using unsanitary and unhealthy food handling practices.

Id. Here, all members of the class either drank the bad water, ate food or drank beverages prepared with such water, or bathed with the water during the same period of time and each became ill. Moreover, Respondent Norwegian Cruise Lines, ("NCL"), acted toward each of them in a similar manner by serving water to all of them adulterated by its use of unsanitary and unhealthy food and beverage practices. Thus, not only are all class members "in the same boat," common issues of law and fact exist because the claims are based on the same legal theories and arose out of NCL's common course of conduct towards them. By applying the correct legal principles concerning commonality, as stated in *McFadden*, *Broin*, and a host of federal decisions, this Court should easily conclude that the district court below erred in deciding that the low threshold requirement of commonality was not satisfied.

Predominance

Moreover, even if the decision below was based on the predominance requirement, rather than on commonality as specifically stated in the majority opinion, the decision fares no better. First, defendants in class actions always can find some individualized issues and argue from them that predominance is not met. But that argument misses the mark—predominance "requires only that common issues predominate over individual questions, not that all questions of law or fact need to be common." *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 316-17 (S.D. Fla. 2001) (citing *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981)). For example, in *McFadden*, the district court rejected defendant's claim that some

courts in the past have refused to certify class actions in mass tort cases, presumably because individual issues can sometimes predominate over common issues in such cases. 687 So. 2d at 359. But the court noted that several state and federal decisions in analogous factual situations involving food poisoning had indeed recognized the appropriateness of class treatment.[9]

It is difficult to determine why the majority opinion below did not find these analogous cases involving food and water poisoning, including cruise ship cases, persuasive. It is even more difficult to determine why the majority did not follow *Broin*--its own well-reasoned precedent in a mass tort case. If the majority believed that liability was not susceptible to generalized proof on a class-wide basis, it was mistaken. Both the pleadings and evidence presented to the trial court established that class-wide proof of liability is possible. Moreover, at the class certification stage, the movant does not have to establish liability on the merits, it need only show the trial court that a generalized methodology for determining liability class wide exists.

The Center for Disease Control who investigated this incident starting with the

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[9] *Id*. (citing, among others, *Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (655 passengers on 7 day cruise became ill due to contaminated food or water; class certified); *Bentkowski v. Marfuerza Compania Maritima*, *S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (200 passengers on cruise ship became ill due to contaminated food and/or water; class certified); *Brown v. New Orleans Pub. Serv., Inc.*, 506 So. 2d 621 (La. App. 1987) (class action appropriate for mass tort such as food poisoning where causative link between defendant's conduct and plaintiffs' injuries same for all plaintiffs); *Williams v. State*, 350 So. 2d 131 (La. 1977) (class of 600 prisoners made ill by food poisoning at prison certified)). These, and other food poisoning and mass tort cases were cited and argued by Petitioners in the court below, and in this Court. *See* Appellees' Answer Brief; Petitioners' Initial Brief.

first voyage, concluded: (1) that the illness of the passengers on all three voyages arose out of one single continuous outbreak of a virus (SRSV) probably caused by a breach of the integrity of the potable water system; (2) that no changes to such water system were made by NCL after the outbreak on the first voyage; (3) that the identical SRSV virus was found in the passengers and crew of the March 4-14 and March 25-April 4 cruises; and (4) that the most likely cause of the passengers' SRSV was the Royal Odyssey's drinking water. CDC Reports, Pet. App. 1. Importantly, even though NCL had actual knowledge of the outbreak of illness in the passengers and crew on the first voyage, it nevertheless permitted the second and third voyages to depart without making any changes to the water system and in fact, it took the issuance of the CDC's "Recommendation Not to Sail" on April 4, 1997, to finally get NCL to put the Royal Odyssey in wet dock. Pet. App. 1. Such relevant and damning evidence of negligence and breach of warranty by NCL is the same for all class members and the trial court correctly found that because of such evidence, the common questions concerning liability were capable of being established class-wide. Thus, the predominance requirement of Rule 1.220(b)(3) was also met in this case as the trial court found.

CONCLUSION

Based on the reasons and authorities discussed above, the Academy prays that this Honorable Court will reverse the decision below and remand with instructions to reinstate the trial court's order granting class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this brief was served by United States Mail this 26th day of February, 2002, upon Curtis J. Mase, Mase & Gassenheimer, P.A., 1001 Brickell Bay Drive, Ste. 1200, Miami, Florida, 33131, Attorneys for Respondent Norwegian Cruise Lines Limited,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in compliance with Fla. R. App. P. 9.210, using Times New Roman font, size 14.

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