IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC-04-393

CARNIVAL CORPORATION,

Petitioner,

v.

DARCE CARLISLE

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA MARITIME LAWYER'S ASSOCIATION (FMLA)

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The Florida Maritime Lawyer's Association (FMLA) is a non-profit association, consisting of trial lawyers located in Florida, who specialize in the handling of maritime matters for a wide variety of different clients. The members of the FMLA and similarly situated attorneys will be significantly affected by the Court's decision in this case, particularly since the FMLA believes that the lower court ruling adversely impacts upon the constitutionally mandated uniformity of the general maritime law of the United States. As such, the lower court's opinion has a significant negative effect on the application and administration of maritime law and the court's of this state.

The FMLA believes that it can assist this Court, through the experience and expertise of its members, in helping to explain the practical impact and affect of the lower court's ruling in this case on the continued application and practice of maritime law in the state courts of Florida.

Summary of Argument

It is a fundamental principle of U.S. Maritime law that while *in personam* actions may be filed in state court, that they are nevertheless governed by federal maritime law. As a result, any state judicial or legislative action which contravenes the essential purpose, or works a material prejudice to the characteristic feature of the general maritime law, or interferes with the proper harmony and uniformity of that law is

invalid.

The importance of uniformity to the application of maritime law has been repeatedly reiterated by the United States Supreme Court since the 1800's, clearly establishing its paramount importance to the proper functioning of the system envisioned by our Constitution. This rule of uniformity applies to federal judicial law as well as to acts of Congress.

Since the existence and applicability of the rule of uniformity is without doubt, the only basis upon which the lower court's opinion may be affirmed is if this Court finds that the opinion does not violate the rule of uniformity or if it fits within a recognized exception. Since neither of these circumstances exist in the present case, it was legally inappropriate for the lower court to even enter into an analysis of the continued viability of the virtually unbroken line of cases dating back nearly 100 years, which have refused to impose vicarious liability upon a shipowner for the purported negligence of a ship's physician in a lawsuit brought by a passenger.

The lower court attempted to circumvent the rule of uniformity by implying that there was a split of authority between two divergent line of cases. In fact, at the time of the lower court's opinion, there were not two divergent line of cases, only a long line of virtually unbroken cases and a single contrary case rendered by a trial judge in California nearly a half century ago.

It is equally apparent that the subject case does not fit into any exception recognized by the principle of uniformity. The issues involved are not limited to local matters, but instead have worldwide application. Likewise, it is clear that the lower Court's opinion will negatively impact the principle of uniformity as cruise ships literally sail along both coasts of the United States and in its inland waterways as well as throughout the entire world. The Third District's opinion has already resulted in attempts at forum shopping. Perhaps even more importantly, however, if the lower court's decision recognizing a "conflict of authority" by virtue of a single case is validated, the principle of uniformity will effectively be destroyed in this state.

ARGUMENT

I. The Lower Court's Ruling Violates the Fundamental Rule of Uniformity in Maritime Matters

Perhaps the most fundamental underlying principle of U.S. maritime law is that while state courts have concurrent jurisdiction with the federal courts to hear *in personam* actions, "the source of the governing law applied is in the national, not the state, governments." *E.g. Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 245 (1942). As a result, no state judicial or legislative action

> is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferers with the proper harmony and uniformity of that law in its international and

interstate relationships.

So. Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917). *Also see Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918).

Since the beginning of this nation's existence, "federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states – not derived from or dependent on their will." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). As pointed out by the United States Supreme Court in *U.S. v. Locke*, 529 U.S. 89, 99 (2000):

> . . . the federal interest [in maritime commerce] has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution. *E.g. The Federalist* Nos. 44, 12, 64.

The importance of uniformity to the application of maritime law has been repeatedly reiterated by the United States Supreme Court over the decades and centuries, clearly establishing its paramount importance to the proper functioning of the system envisioned by our Constitution:

> . . . That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesman of the country when the Constitution was adopted, was almost

> certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'
>
> . . .
>
> *One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country.* It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

The Lottawanna, 88 U.S. 558, 574-5 (1974)(emphasis added).

As further reiterated by the United States Supreme Court in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 166 (1920):

> Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

It is equally well established that the rule of uniformity applies to federal judicial law as well as to acts of Congress. *See e.g. The Lottawana*, 88 U.S. 558 (1874); *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *So. Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Stires v. Carnival Corp*, 243 F. Supp. 2d 1313 (M.D. Fla. 2002).

Since the existence and applicability of the rule of uniformity is without doubt, the only basis upon which the lower court's opinion may be affirmed is if this Court

finds that the opinion does not violate the rule of uniformity or fits within a recognized exception. Since neither of these circumstances exist in the present case, it was legally inappropriate for the lower court to even enter into an analysis in the first instance of whether "the *Barbetta* cases are based upon flawed and out moded assumptions regarding the cruise industry and the provision of medical services to passengers." *Carlisle v. Carnival Corp*, 864 So.2d 1, 3 (3d DCA 2004).

The lower court's opinion ignores the existence and applicability of the principle of uniformity through the fiction of implying that a conflict exists in maritime law, because of the existence of a single federal trial court decision in California rendered back in the 1950's. Other than this single decision, the law on this subject has been so virtually unanimous that the Fifth Circuit Court of Appeals noted:

> An impressive number of Courts for many jurisdictions have, for almost 100 years, followed the same basic rule: When a carrier undertakes to employ a doctor aboard ship for its passengers convenience, the carrier has a duty to employee a doctor who is competent and duly qualified. If the carrier breaches its duty, it is responsible for its own negligence. If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier.

Barbetta v. S/S Bermuda Star, 848 F.2d 1364, 1371 (5th Cir. 1988)(emphasis added).

This rule has been adopted by not only the Fifth Circuit, but also the Second and Ninth Circuit Courts of Appeal as well. *See e.g. Cummiskey v. Chandris, S.A.*,

895 F.2d 10 (2d Cir. 1990); *The Korea Maru*, 254 Fed 497 (9th Cir. 1918); *The Great Northern*, 251 Fed 826 (9th Cir. 1918). Although the Eleventh Circuit has not expressly rendered an opinion on this issue, it did affirm the decision in *Nanz v. Costa Cruises, Inc.*, 1991 AMC 48 (S.D. Fla. 1999), which followed the principle rejecting vicarious liability reiterated in *Barbetta*. *See Nanz v. Costa Cruises, Inc.*, 932 F.2d 977 (11th Cir. 1991)(unpublished). Likewise, there have been over 19 reported District Court decisions reaching the same conclusion. Therefore, if one were to prepare a chart of reported decisions of the law existing at the time of the lower court's opinion on the issue, it would look like the following:

Federal Cases Finding No Vicarious Liability

Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988); *Cummiskey v. Chandris, S.A.*, 895 F.2d 107 (2d Cir. 1990); *Nanz v. Costa Cruises, Inc.* 1991 AMC 48 (S.D. Fla. 1990) *aff'd* 932 F.2d 977 (11th Cir. 1991)(unpublished); *The Great Northern*, 251 F. 826 (9th Cir. 1918); *The Korea Maru*, 254 F. 397 (9th Cir. 1918); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367 (S.D. Fla. 2002); *Doe v. Celebrity Cruises, Inc.*, 145 F. Supp. 2d 1337 (S.D. Fla. 2001); *Warren v. Ajax Navigatin Corp*, 1995 AMC 2609 (S.D. Fla. 1995); *Mascolo v. Costa Crociere, S.P.A.*, 726 F. Supp. 1285 (S.D. Fla. 1989); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313 (M.D. Fla. 2002); *Hillard v. Kloster Cruise*, Ltd., 1991 AMC 314 (E.D. Va. 1990); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F.Supp. 488 (D.P.R. 1992); *Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300 (S.D. N.Y. 1996); *Malmed v. Cunard Line, Ltd.*, 1995 WL 505915 (S.D.N.Y.); *Bowns v. Royal Viking Lanes, Inc.* 1977 AMC 2159 (S.D.N.Y. 1977); *Metzger v. Italian Line*, 1976 AMC 453 (S.D.N.Y. 1975); *Ludena v. The Santa Luisa*, 112 F.Supp. 401 (1953) (S.D.N.Y.);

Federal Cases Allowing Vicarious Liability

Neites v. American President Lines, Ltd. 188 F.Supp. 219 (N.D. Cal. 1959)[1]

[1]Subsequent to the lower court's ruling in this case, its decision was cited with approval in *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372 (S.D. Fla. 2004)

Federal Cases Finding No Vicarious Liability	**Federal Cases Allowing Vicarious Liability**
Di Bonaventure v. Home Lines, Inc., 536 F.Supp. 100 (E.D. Penn. 1982); *Cimini v. Italia Crociere Int's S.P.A.*, 1981 AMC 2674 (S.D.N.Y.); *Amdur v. Zim Israel Navigation Co.*, 310 F.Supp. 1033 (S.D.N.Y. 1969); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F.400, (D. Mass. 1923); *The Neopolitan Prince*, 134 F.159 (E.D.N.Y. 1904).	

There is simply no way in which one can reasonably view the line up of reported decisions and conclude that there is a legitimate split of authority under maritime law on the subject. Contrary to the lower court's choice of words, there are not two divergent 'line of cases,' there is one long line of virtually unbroken cases and a contrary case.[2] *Id*. at p. 1274.

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[2] The question of when conflicting cases creates a split of authority was touched upon by the Fourth District in *Nurkiewicz v. Vacation Break USA, Inc.*, 771 So.2d 1271 (Fla. 4th DCA 2000), another case in which the Third District chose not to follow the overwhelming weight of maritime authority. In this case, the Fourth District reviewd the potential circumstances in which a legitimate conflict in maritime law could arise

> When a state appellate court is asked to decide a federal question as to which there is no Supreme Court authority directly on point, and the circuit courts of appeal are divided, there is no established rule to guide such a state court. One mechanical method might be

The rule of non-liability is so entrenched in maritime law that it has been repeatedly described by courts in the Southern District as a "long-established rule in admiralty," *[Mascola, 726 F.Supp. at 1286; Doe, 145 F.Supp 2d at 1345,]* "well settled under general maritime law" and a "clear rule of law." *Warren*, 1999 WL 2609 at p. 3.

In Mascolo, the Court went on to further characterize the overwhelming acceptance of this principle by observing:

> The mere fact that the controlling principals [sic] of law have been in existence for over a century is an indication that the rule is a sound one. The Plaintiff's argument that the rule is unduly harsh and not contemporary is a mere house of cards. *Under the doctrine of stare decisis, we will not and cannot abolish a century-old rule of law*.

Mascolo, 726 F.Supp at 1286 (emphasis added).

Apart from the obvious numerical discrepancy and the fact that the lower court was the first court in 44 years to follow the *Neites* decision, it is important to also weigh the difference in precedential value in determining whether there is a true split of

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> to add up the federal circuits and go with the weight of decisions. Another arguable method is to accord unusual weight to a decision on the issue, if there is one, of the federal circuit in which the state is located . . .

No matter which of the methods utilized above are selected, one can still only come to the same conclusion– that the rule rejecting vicarious liability must be followed.

maritime authority on this issue. The *Neites* decision *is not binding on any other court anywhere in the United States*, not even among other trial court judges in the Northern District of California. On the other hand, every Circuit Court of Appeal which has considered this issue has ruled the same way. To elevate a single isolated trial court decision into a "split of authority" when faced with an overwhelming line up of both appellate and trial decisions in the magnitude that exists here is simply not intellectually honest or legally supportable.

The lower court's failure to grasp and apply the applicable maritime law is further evidenced by the rationale which it used to reach its final conclusion,

> In imposing such vicarious liability we note that, on any given cruise, the cruise line is already held vicariously liable for the negligence of the same ship's doctor in the treatment of hundreds of people – the crew– under the maritime duty to provide maintenance and cure [citations omitted]. Thus, in the case of a seaman, a shipowner is liable for the negligence of the ship's doctor regardless of the degree to which the ship's doctor's medical activities, or the doctor - patient relationship, can be controlled by the shipowner.

Carlisle, 864 So.2d at 7.

This rationale ignores the elementary maritime principle that the liability of shipowners for the medical negligence of a physician treating its crew member is based upon a totally different legal concept, which has no applicability whatsoever to passengers. Liability in the crew member context arises solely out of the unique

relationship between the seaman and his vessel and the resulting non-delegable duty to provide the seaman with maintenance and cure for injuries arising out of his service to his vessel. *See e.g. DeZon v. American President Lines, Ltd.*, 318 U.S. 660 (1943); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *Fitzgerald v. A.L. Burbank & Co., Ltd.*, 451 F.2d 670 (2d Cir. 1971); *Olsen v. American Steamship Co.*, 176 F.3d 891 (6th Cir. 1999).[3] As a result, such claims must be brought under the Jones Act. *Id.* Therefore, there is no conceptual relationship between the law applicable to a passenger and a seaman, the latter of which occupies a special relationship under maritime law because of its unique status.

It is equally as obvious that the issues in the subject case can in no means be considered to fall within an exception to the principle of uniformity.[4] Initially, it is abundantly clear that this case does not deal with a purely local issue, but instead one which has broad implications for the entire cruise industry throughout the world.

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[3] Likewise, seaman are entitled to the benefit of many additional legal remedies, not applicable to passengers, such as the warranty of seaworthiness. *See e.g. Stires v. Carnival Corp.*, 243 F.Supp. 2d 1313 (M.D. Fla. 2002); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984); *Doe v. Celebrity Cruises, Inc.*, 145 F.Supp 2d 1337 (S.D. Fla. 2001).

[4] In fact, this point is so obvious that the lower court did not even attempt to go this route.

Secondly, as noted by the broad range of jurisdictions which have upheld the rule of non-liability (literally ranging from coast to coast), if the lower court's decision is allowed to stand, it would clearly interfere with the proper harmony and uniformity of maritime law as defined under *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). *Also see e.g. Garrett v. Moore-McCormick Co., Inc.*, 317 U.S. 239 (1942)(state law on burden of proof interfered with uniformity requirement); *Pope & Talbot v. Hawn*, 346 U.S. 46 (1953)(application of state law contributory negligence rule barred by uniformity doctrine); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918)(state law fellow servant doctrine barred by uniformity rule); *Knickerbocker Ice Co., v. Stewart*, 253 U.S. 149 (1920)(state worker's compensation defense inapplicable to bar seaman's maritime remedy).

As recently observed in a case arising from the Middle District of Florida upholding the maritime rule rejecting vicarious liability,

> Only when neither statutory nor judicially created maritime principles provide an answer to a specific legal question, the courts may apply state law provided that the application of state law does not frustrate national interest in having uniformity in admiralty law. [citations omitted]. Therefore, courts cannot look to Florida law to decide the matter . . .

Stires, 243 F.Supp at 1313.

The practical effects of the lower courts refusal to follow this well established

principle of maritime law, which has existed for well over a century, are already being felt in the legal community. Members of this organization are already witnessing cases involving forum shopping by passengers, who are attempting to take advantage of the Third District's decision by dismissing a case filed in another state and refiling it in Miami-Dade Circuit Court.

On a broader scope, by permitting the lower court to ignore the uniformity principle in this manner will open the doors to further intrusions into the uniform maritime law in every other substantive area of the law. To affirm the Third District's holding in this case, which recognizes a split of authority any time there is a single contrary isolated trial court decision, will in effect render the principle of uniformity meaningless creating the confusion and uncertainty in maritime law "which [the] framers of the Constitution both foresaw and undertook to prevent." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 166 (1920).

Conclusion

The rule of uniformity in maritime cases derives from the U.S. Constitution and plays a critical role in the operation of both the maritime industry and the body of law known as admiralty. Accordingly, it is not sufficient for courts to merely pay lip service to this principle and then to ignore it. There is no question here that the principle of uniformity applies to this case and that the overwhelming body of law

rejecting the principle of vicarious liability is as uniform as humanly possible. As such, it was not even legally appropriate for the lower court to even entertain an analysis in first instance the continued validity of the reasons expressed in the *Barbetta* line of cases. Instead, the lower court was obligated to follow the well established maritime rule enunciated by these cases and to adhere to the principle of stare decisis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of May, 2004 to: **Rodolfo Sorondo, Jr. and Lenore C. Smith**, Holland & Knight, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, **Jeffrey B. Maltzman and Darren W. Friedman, Esq.**, Kaye Rose & Maltzman, LLP, One Biscayne Tower, 2 South Biscayne Boulevard, Suite 2300, Miami, Florida 33131, **John Campbell, Esq.**, Campbell & Malafy, 2655 Lejeune Road, Suite 201, Coral Gables, Florida 33134, **Charles Lipcon, Esq.**, Lipcon, Margulies & Alsina, P.A., 2 S. Biscayne Blvd., Suite 2400, Miami, Florida 33131 and **David H. Pollack, Esq**., The Law Office of David H. Pollack, LLC, The Ingraham Building, 25 S.E. 2nd Avenue, Suite 1020, Miami, FL 33131.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2), Fla. R. App. P. the foregoing Brief of Amicus Curiae was prepared in Times New Roman, 14 point.

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