IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-393

CARNIVAL CORPORATION,

Petitioner,

v.

DARCE CARLISLE,

Respondent

_____/

ANSWER BRIEF OF RESPONDENT DARCE CARLISLE

ON REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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INTRODUCTION[1/]

In this appeal, Carnival asks this Court to review a unanimous decision of the Third District Court of Appeals holding a cruise line vicariously liable for the medical negligence of its shipboard physician. Carnival insists review is warranted because the district court exceeded its authority when it rejected the Fifth Circuit's outmoded decision in Barbetta v. S/S/ Bermuda Star, 848 F.2d 1364 (5th Cir. 1988), in favor of the more well-reasoned principle of liability enunciated in Nietes v. Am.President Lines, Ltd., 188 F.Supp. 219 (N.D. Cal. 1959) and Huntley v. Carnival Corporation, 17 Fla.L.Wkly.Fed. D415 (S.Dist. Fla, March 12, 2004). Carnival is wrong. The district court was not only *authorized* to reject the outmoded reasoning in Barbetta, it was entirely *justified* in doing so in light of the modern day realities of the cruise line industry and the medical services cruise lines provide passengers as inducement to sail.

[1/] Plaintiff/Appellant DARCE CARLISLE will be referred to as she stood before the district court of appeals and as CARLISLE. Defendant/Appellee CARNIVAL CORPORATION will be referred to as it stood before the district court of appeals and as CARNIVAL.

Citations to the record on appeal shall be by clerk's volume and page number. References to the district court's decision, appended to Carnival's brief, are to decision page numbers and appendix page numbers. Citations to the Supplemental Record on Appeal shall be referred to by "S.R." and the page number. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS[2/]

The incident. In March, 1997, 14-year-old Elizabeth Carlisle took a cruise onboard the M/S Ecstasy with her parents, Kristopher and Darce. (1R 160). Prior to the vessel departing the Port of Miami, Elizabeth complained to her parents that she was feeling lethargic and experiencing abdominal pain. (2R 433, 586). Elizabeth attempted to see Dr. Mauro Neri, the ship's doctor, prior to sailing; however, because the ship had a policy of keeping the hospital closed while the vessel was in port, she was unable to do so. (2R 433, 586).

After the vessel departed, Elizabeth went back to the infirmary with her parents to see Dr. Neri. (2R 426, 587). Elizabeth told Dr. Neri she was experiencing acute abdominal pain, as well as diarrhea. (2R 434). Instead of examining her, Dr. Neri placed her on an antibiotics and discharged her. (2R 435).

Elizabeth returned to see Dr. Neri the following day, again complaining of abdominal and lower back pain. (2R 443). Once again, Dr. Neri assured Elizabeth that she was suffering from the flu and discharged her without a physical examination. (2R 446). When Elizabeth's condition failed to improve, her parents phoned Elizabeth's pediatrician in Michigan from onboard the vessel. (2R 455-56). The pediatrician

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[2/] While Carnival's Statement of the Facts provides a general summary of the events leading up to and following Elizabeth's injuries, it omits a number of facts that are relevant to both the issue of vicarious liability and apparent agency. Consequently, Carlisle has provided her own Statement of the Facts for the court's consideration.

expressed concern about Elizabeth's health based on the symptoms her parents described and suggested they go back to the ship's doctor. (2R 455-56). Once again, Elizabeth returned to see Dr. Neri, who conducted a brief examination of her abdomen at her mother's insistence. (2R 458). Dr. Neri once again assured Elizabeth's mother that she was suffering from the flu. (2R 458).

The following day, Elizabeth's parents left the ship and flew home with her to Michigan. Upon her arrival, she was taken to the emergency room and diagnosed with a ruptured appendix. (2R 466,476). As a result of the rupture and subsequent infection, Elizabeth was rendered sterile. (2R 492).

Carnival's relationship with Dr. Neri. On each of the occasions he treated Elizabeth, Dr. Neri was wearing a Carnival Cruise Lines name tag. (2R 428). He also was wearing what appeared to be an officer's uniform. (2R 429, 531). The uniform and tag led Elizabeth and her parents to believe that Dr. Neri was Carnival's agent. (2R 429, 533). Elizabeth's parents paid Dr. Neri using their "Sail and Sign" card, which was provided to them by Carnival prior to the beginning of the voyage. (2R 426). Employees of Carnival processed and billed this payment. (2R 426).

At the time they went on the cruise, Elizabeth's parents knew that there was a doctor onboard the ship. (2R 528). The existence of a doctor affected their decision to take the cruise. (2R 531). Indeed, had Carnival not provided medical facilities onboard the Ecstasy, they would likely not have taken the cruise. (2R 531).

Carnival exercised a significant amount of control over Dr. Neri while he worked onboard its vessel. Carnival set and controlled Dr. Neri's working hours. (2R 433, 586). It also selected the nursing staff he worked with and provided him with medical equipment. (2R 649). Carnival's contract with Dr. Neri required Carnival to indemnify him for $1 million in the event he is sued for medical malpractice related to his work onboard the ship. (2R 680). It also required Dr. Neri to permit all claims "to be dealt with by [Carnival] or any insurance association with which [Carnival is insured]." (2R 712). Notably, the contract does not differentiate between treatment of crewmembers and treatment of passengers for purposes of indemnity or cooperation. According to Carnival's own shoreside doctor who is responsible for medical staffing, the ship's doctor is considered an officer of the ship. (2R 691).

The lawsuit. As a result of Elizabeth's injuries, Darce Carlisle filed suit against Carnival for her daughter's injuries. The complaint alleged that Carnival was vicariously liable for Dr. Neri's failure to properly diagnose Elizabeth's appendicitis because he was Carnival's actual and/or apparent agent. (R. 158-171). The complaint also alleged Carnival was independently negligent for hiring an unqualified doctor. Id.[3/]

Carnival moved for summary judgment on all counts. The trial court granted the motion for summary judgment based on the Fifth Circuit's decision in Barbetta v.

[3/] The negligent hiring claim is not at issue in this appeal.

S/S/ Bermuda Star, 848 F.2d 1364 (5th Cir. 1988), which held that a cruise line cannot be vicariously liable for the medical malpractice of its shipboard physician as a matter of law. (R. 336). It also rejected Carlisle's apparent agency argument. (R. 336). Carlisle appealed. (2R 381).

On appeal, Carnival argued that the trial court was correct in following Barbetta because it represented the majority position on the issue of whether a cruise line could be held vicariously liable for the negligence of its shipboard physician. (A3). In response, Carlisle argued that Nietes represented the better reasoned, albeit minority view, given the modern day realities of cruising. (A3). **Carnival never raised the issue of the doctrine of uniformity in admiralty or the court's authority to alter maritime law in either the trial court or in its brief**. (SR 9 n.7).

The district court reversed on the issue of vicarious liability. (2R 728-742). Noting that the issue of a cruise line's liability for the medical negligence of its ship's doctor had never been squarely addressed by either itself or this Court, the district court declined to follow the Fifth Circuit's decision in Barbetta. (A4-7). Instead, it chose to follow the "more persuasive" precedent on the issue in Nietes v. Am.President Lines, Ltd., 188 F.Supp. 219 (N.D. Cal. 1959), which has since been adopted by the United States District Court for the Southern District of Florida against

this same defendant. See Huntley v. Carnival Corp., 307 F. Supp. 2d 1372 (S.D. Fla. 2004). *Id*.[4/]

Carnival moved for rehearing, rehearing en banc, and certification. (SR 1-29). In its motion, Carnival argued for the first time that the district court was without authority to reject Barbetta because it would interfere with the uniformity of maritime law. (SR 8-19). The district court denied the motion for rehearing, but certified the question of whether a cruise line is vicariously liable for the medical malpractice of its shipboard doctor committed on a ship's passenger as one of great public importance. (2R 743). Carnival seeks this Court's discretionary review of that question.

[4/] The district court found it unnecessary to address the issue of apparent agency in light of its decision to reject Barbetta. (A7 n.5)

SUMMARY OF ARGUMENT

The district court correctly held that Carnival could be held vicariously liable for the medical malpractice of its shipboard physician when he failed to properly diagnose Elizabeth Carlisle's ruptured appendix.

The district court in this case was confronted with the decision of whether to follow the majority rule espoused in Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988), which holds that a cruise line cannot be vicariously liable for the medical negligence of its shipboard physician, or to adopt the more well-reasoned view of Nietes v. Am.President Lines, Ltd., 188 F.Supp. 219 (N.D. Cal. 1959), which holds that a cruise line is vicariously liable for the medical negligence of its shipboard physician. After thoroughly examining the legal underpinnings of both views, the extensive criticism of Barbetta by legal scholars, and the present day realities of the cruise line industry, the district court elected to follow Nietes. Not only was the district court authorized to follow Nietes, but it was right in doing so.

In the absence of a controlling decision by the United States Supreme Court or the Florida Supreme Court on an issue of maritime law, where a conflict exists with respect to a rule of maritime law, state appellate courts are free to choose between competing precedents. In this case, the district court was presented with a choice between two conflicting rules of decision on the issue of whether a cruise line may be held vicariously liable for the medical negligence of its shipboard physician: Barbetta

and Nietes. The former, although widely followed, has been roundly criticized for being outmoded and based on false assumptions regarding the ability of passengers to "choose" their doctor. The latter, on the other hand, has not been widely followed but has been uniformly hailed by legal scholars and critics as being the correct decision because it reflects the realities of the modern day passenger cruise business. Since the issue has never been addressed by the Supreme Court or the Florida Supreme Court, the district court was free to choose which decision it believed was the better reasoned of the two.

Furthermore, there is no question that the district court made the right decision in choosing to follow Nietes rather than Barbetta, since Barbetta rests on flawed and outmoded assumptions about a shipboard medical care that do not accurately reflect the passenger cruise experience of today. Barbetta and its progeny are based on the assumption that a shipboard physician exists merely for the "convenience of the passenger" and that sick passengers have a meaningful choice as to whether to seek treatment from the ship's physician. As the Nietes court and virtually every legal scholar who has written about the issue have pointed out, however, neither of these assumptions is accurate. Moreover, as both Nietes and the district court properly recognized, ship's physicians are no more "independent contractors" than any of the other ship's officers, particularly where, as is the case here, the cruise line exercises control over various aspects of their work. To the extent that cruise lines are already

held vicariously liable for the negligence of shipboard physicians in their treatment of crewmembers, there is no logical reason to preclude passengers from being afforded the same remedies.

In addition, the district court also made the right decision to reverse the summary judgment in favor of Carnival because there was a genuine issue of material fact as to whether Dr. Neri was an apparent agent of Carnival. At the time he treated Elizabeth Carlisle. Dr. Neri was wearing a Carnival Cruise Lines name tag and what appeared to be an officer's uniform on each of the three occasions when he saw Elizabeth. Darce Carlisle paid Dr. Neri using a card provided to her by Carnival prior to the beginning of the voyage. Additionally, Carnival controlled Dr. Neri's working hours, as well as the hiring of the nurses who assisted him. It is undisputed that Doctor Neri never told the Carlisles that he was not an employee of the ship. Given the substantial record evidence on this issue, the Third District's decision to reverse the trial court's summary judgment in favor of Carnival was clearly correct.

The issue, however, is academic, since the question of whether a cruise line should be held vicariously liable for the negligence of its shipboard physician for failing to properly treat passengers is not of sufficient public importance to warrant the exercise of this Court's jurisdiction.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT CARNIVAL WAS VICARIOUSLY LIABLE FOR THE MEDICAL NEGLIGENCE OF ITS SHIPBOARD PHYSICIAN IN MISDIAGNOSING CARLISLE'S RUPTURED APPENDIX.

A. The District Court was free to reject Barbetta.

Carnival insists that the district court erred in rejecting Barbetta because it lacked authority to alter established maritime law on this issue. As a threshold matter, Carnival has waived its right to raise this issue because it did not argue it below or on appeal. See Blinn v. Florida Dep't of Transportation, 781 So.2d 1103 (Fla. 1st DCA 2000); Ayer v. Bush, 775 So.2d 368 (Fla. 4th DCA 2000); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1983). The first time Carnival questioned the district court's authority to reject Barbetta was in its motion for rehearing, long after it was permitted to do so.

Carnival's justification for failing to raise the issue of maritime uniformity is that it "could never have anticipated that [the district court] would depart from the overwhelming, binding majority rule." (S.R. 9 n.7). However, a litigant's inability to anticipate the outcome of a case is not an exception to the rule that issues may not be raised for the first time on rehearing. It is obvious why no such exception exists. A party can never be certain how a court will rule until it issues its decision. It is

precisely for this reason that it is obligated to raise all issues and defenses it wishes to present. See Blinn, 781 So.2d at 1103.[5/]

But even if Carnival had timely raised the issue of the district court's ability to depart from Barbetta – which, by its own admission, it failed to do – this Court should still affirm the district court's decision because the district court was free to reject Barbetta in favor of the more well-reasoned decision in Nietes.

In the absence of constraining maritime law or a decision by this Court or the United States Supreme Court, a district court of appeals is free to interpret maritime law as it sees fit. See Beltran v. State, 530 So.2d 1045 (Fla. 3rd DCA 1988). In this case, the district court was confronted with two diametrically opposite decisions on whether a cruise line should be held vicariously liable for the malpractice of its physician, Nietes v. Am. President Lines, Ltd, 188 F.Supp. 219 (N.D. Cal. 1959), and Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988). After extensively considering both the legal and practical considerations underlying both decisions, the district court wisely elected to follow the position espoused by the Northern District of California in Nietes, which has since been

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[5/] Moreover, the claim that Carnival could not have anticipated the need to argue the doctrine of uniformity is suspect, given Carnival's acknowledgment in its initial brief in the district court of the conflict between Nietes and Barbetta and its progeny.

adopted by the United States District Court for the Southern District of Florida. Because the Florida Supreme Court has never addressed the issue of a cruise line's vicarious liability for the negligence of its medical personnel or attempted to resolve the conflict between Nietes and Barbetta and its progeny, the district court was well within its authority to do so.

Carnival argues that the district court was without authority to depart from Barbetta because maritime law is "settled and fixed" on this issue. Initial Brief at 21. Carnival is wrong. While the "Barbetta rule" admittedly represents the majority viewpoint on the issue of whether a cruise line is vicariously liable for the medical malpractice of its shipboard physician, committed on a ship's passenger, the law on this issue is not as "settled" as Carnival suggests. To the contrary, two federal district courts have expressly rejected Barbetta, and a third has criticized the legal foundation upon which it was decided. See Nietes, 188 F.Supp. at 219; Huntley v. Carnival Corp., 307 F.Supp.2d at 1372; Fairley, 1993 AMC at 1639.

In Nietes, the United States District Court for the Northern District of California held that a shipowner could be held vicariously liable for the medical malpractice of its doctor where the doctor caused injury to the ship's passengers. Nietes, 188 F. Supp 219. The plaintiff in Nietes brought an action under the Death on the High Seas Act against a cruise line, alleging that the decedent's death was caused by the malpractice of the ship's doctor. The complaint based liability under a theory of respondent

superior. The shipowner argued, as Carnival did at the hearing on the motion for summary judgment, that it was improper to hold it vicariously liable for the malpractice of its doctors because it could not control their medical decision making. The district court rejected the shipowner's argument, noting that the doctor was not only controlled by the ship, but able through modern communication to communicate with the ship's medical personnel. Nietes, 188 F.Supp. at 220. More importantly, the court noted that the ship should be liable for its doctor's negligence because the doctor provided the ship with an economical alternative to fulfilling its duty of reasonable care to its passengers.

> There is reason for imposing such liability, because the employment of a doctor aboard a ship is a beneficial substitute for the shipowner's otherwise more costly duty to sick passengers. Where the ship carries no ship's physicians or nurses, the carrier is under a duty to provide such care and attention as is reasonable and practicable under the circumstances, and this has traditionally required the master to change course and put in at the nearest port, according to the gravity of the illness.

Id. at 221.

The United States District Court for the Southern District of Florida reached the same result this year in Huntley v. Carnival Corp., 307 F.Supp.2d at 1372. In Huntley, the Southern District joined Nietes and the district court in rejecting Barbetta based on the identical reasons enunciated by the court in Nietes. The plaintiff in Huntley sued Carnival and its shipboard physician for medical malpractice on theories of

apparent agency and vicarious liability. As in this case, Carnival argued that the Court was obligated to follow Barbetta because it represented the majority view on the issue of vicarious liability. The federal district court denied the motion, holding that Nietes represented the better-reasoned rule of law on the issue of a cruise line's vicarious liability for the negligence of its physician.

In arriving at its decision, the Court in Huntley relied on Fairley v. Royal Cruise Line, Ltd., 1993 AMC 1633 (S.D. Fla. 1993), an earlier Southern District decision which criticized the reasoning behind the Barbetta rule. The Court in Fairley rejected the argument that the ship's doctor is carried on board merely "for the convenience of passengers," rather than as a cheap substitute for the shipowner's otherwise more costly duty to sick passengers. Fairley, 1993 AMC at 1639. It also took issue with the notion that passengers have any meaningful choice in their decision to seek treatment from the ship's doctor when they are ill.[6/] Granted, the cruise ship is not a "floating hospital." It

[6/] Although the Court ultimately denied the motion to dismiss in that case based on apparent, rather than actual agency, it clearly found the reasoning in support of Barbetta legally unsound.

is more like a “floating hotel.” But the passengers on a floating hotel are in a radically different situation from the guests in a hotel ashore: they are a captive audience. Contrary to the reaso

ning of Amdur and Barbetta, [passengers] are not "free to contract with [the ship's doctor] for any medical services they may require." If a passenger is ill, and port is distant, the ship's docto

r is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies. Further, the passenger may be reluctant to seek treatment from an unkno

wn docto r in a foreig n count ry.

Fairley, 1993 AMC at 1638-39 (citations omitted).

In addition, the majority of legal scholars who have analyzed the Barbetta rule have questioned its viability because of the shaky foundation upon which it rests. Indeed, scholars who have addressed the issue of a cruise ship's liability for the negligence of shipboard physicians committed on passengers have roundly criticized Barbetta for unfairly requiring passengers to ultimately bear the brunt of any negligent behavior of a ship's physician and have urged courts to adopt the more reasoned principle of liability enunciated in Nietes v. Am.President Lines, Ltd., 188 F.Supp. 219 (N.D. Cal. 1959). See Martin Norris, The Law of Maritime Personal Injuries § 3:10 (4th ed. 1990)("In light of the modern trends with respect to tort liability, it is probable that the earlier cases holding that in passenger matters the shipowner's duty is fulfilled by employing a duly qualified and competent surgeon and medical practitioner, and is only liable for negligence in hiring him but not for treatment by him, will not be followed.")(emphasis added); Beth-Ann Erlic Herschaft, Cruise Ship Medical Malpractic Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?, 17 NOVA L.R. 575 (1992)(advocating vicarious liability for negligence of ship's

physician); Michael J. Compagno, Malpractice on the Love Boat: Barbetta v S/S Bermuda Star, 14 Tul. Mar. L.J. 381 (1990)(same).

Carnival argues that there is not a true split of authority on the issue of vicarious liability because "one lower court case does not a 'split of authority' make." Initial Brief at 21. However, Carnival cites no authority from any Florida court to support the proposition that a "split of authority" requires more than one decision, nor can it, since that is not the law. See United States v. E. I. du Pont De Nemours & Co., 353 US 586, 611, 77 S. Ct. 872, 1 L. Ed. 2d 1057, 1077 (1957)("the Court, in accepting both of these contentions, disregards the language and purpose of the statute, forty years of administrative practice, and all the precedents except one district Court decision") (Burton, dissenting).[7/] **The issue is academic, however, since Nietes is not the only decision to reject Barbetta.** See Huntley, 307 F.Supp.2d at 1372.

Carnival alternatively argues that the Third District was obligated as a matter of *stare decisis* to follow Barbetta because it represents the majority rule on the issue of vicarious liability for the malpractice of a ship's physician. As with Carnival's split of authority argument, however, this argument is flawed for two

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[7/] In fact, the only "authority" Carnival cites in support of this proposition is a West Virginia Supreme Court case, which baldly asserts without any legal support that for a split of authority to exist, the rule of law must be pronounced by either the highest court of a state or by a federal circuit court. Indeed, the most Carnival is able to assert is that "most courts confronted with a clear majority adopt it, especially where there is only one contrary decision." See Initial Brief at 21 n. 15. The tendency of most courts to adopt a majority position, however, does not a legal mandate make.

reasons. First, there was no controlling precedent on the issue before the district court at the time it rejected Barbetta. See page 15, supra. More importantly, while this Court is not free to summarily disregard principles of *stare decisis* in rendering its decisions, it is not obligated to blindly follow precedent when governing decisions are unworkable or badly reasoned. See Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991); Helvering v. Hallock, 309 U.S. 106, 119, 84 L.Ed 604, 60 S.Ct. 444 (1940)(*Stare decisis* is not an inexorable command; rather, it is "a principle of policy and not a mechanical formula of adherence to the latest decision."); State Oil Co. v. Kahn, 522 U.S. 321 118 S Ct. 275, 285, 139 L. Ed 2d. 199, 213 (1997)(overruling antitrust precedent where "theoretical underpinnings of those decisions are called into serious question"); Gately v. Commonwealth of Mass., 2 F.3d.1221, 1226 n.6 (1st Cir. 1993) (analyzing elements of stare decisis and noting that "a decision may be properly overruled if seriously out of keeping with contemporary views or passed by in the development of the law or proved to be unworkable")(emphasis added). Indeed, both the United States Supreme Court and federal appellate courts have repeatedly overruled existing maritime precedents where they cease to make sense in light of the modern day realities of maritime commerce.

In Moragne v. States Marine Lines, Inc., 389 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Supreme Court recognized a claim for wrongful death

under general maritime law, overruling more than 80 years of precedent in the process. In explaining its decision to depart from the well-settled rule of law established in The Harrisburg, 119 U.S. 199 (1886), which held that there was no claim for wrongful death under general maritime law, the Court noted that The Harrisburg had been criticized as "barbarous" for its unjust result, and was based "on a particular set of factors that had, when [it] was decided, long since been thrown into discard even in England, and that had never existed in this country at all."

> The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in Brame, as well as many of the lower court opinions. Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while 'our ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; . . . they brought with them and adopted only that portion which was applicable to their situation."

389 U.S. at 381, 386, 90 S.Ct. 1778, 1781, 26 L.Ed.2d at 345, 348. (emphasis added); accord, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 576 94 S.Ct. 806, 810 39 L.Ed. 2d 9, 16 (1974)(noting that "Moragne reflected dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an adequate remedy for their losses").

Five years later, the Supreme Court reversed another longstanding precedent in United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44

L.Ed. 2d 251 (1975), when it eliminated the doctrine of divided damages from admiralty law.[8/] As in Moragne, the Court in Reliable Transfer found the doctrine of divided damages to be "shrouded in the mists of history" and in need of re-examination. 421 U.S. at 402, 95 S.Ct. at 1711, 44 L.Ed. 2d at 257. And, as in Moragne and in this case, the Court took issue with the "validity of [the rule's] underpinnings" and "the propriety of its present application." 421 U.S. at 402 n.4, 95 S.Ct. at 1711 n.4, 44 L.Ed. 2d at 257 n.4.

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in The Schooner Catharine - the "just and equitable" allocation of damages.

421 U.S. at 402 n.4, 411, 95 S.Ct. at 1711 n.4, 1715, 44 L.Ed. 2d at 257 n.4, 261 (emphasis added). See also Prudential Lines, Inc. v. McAllister Brothers, Inc., 801 F.2d 616, 620 (2nd Cir. 1986)(declining to apply last clear chance doctrine under general maritime law, despite longstanding precedent supporting application of the rule; "[t]he last clear chance doctrine is a time-worn aspect of admiralty law now held in increasing disrespect by legal scholars. There remains little rational basis for the

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[8/] The doctrine of divided damages required the equal division of property damage whenever both parties in a lawsuit are found to be guilty of contributing fault, regardless of the degree of fault attributable to each. 421 U.S. at 402, 95 S.Ct. at 1711, 44 L.Ed. 2d at 257.

last clear chance doctrine in modern admiralty law, and courts have indeed begun to apply the doctrine in a selective manner. In short, the last clear chance doctrine has all the attributes of an idea whose time has passed")(citations omitted)(emphasis added); Flores v. Carnival Cruise Lines, 47 F.3d 1120, 1124 (11th Cir. 1995)(holding that tips are part of a seaman's "unearned wages" in a claim for maintenance and cure; "Until recently, no luxury cruise ships, no cabin stewards, and no system of compensation through tips from passengers existed to complicate the disabled seaman's simple right to recover wages. It is altogether fitting, however, that an ancient remedy born of the reality of the seaman's position should be applied to fit the reality of our modern times")(emphasis added).

Given the absence of any controlling precedent and the serious questions raised by scholars and several courts concerning the ongoing viability of Barbetta, the district court was well within its authority to reject Barbetta in favor of the more reasoned rule of Nietes.

B. The Third District was correct to reject Barbetta because it is based on flawed and outmoded notions of the modern day cruise line industry.

More importantly, the district court was right to reject Barbetta in favor of Nietes because it is based on flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers.

The majority of cases upon which Barbetta was based were decided long before the advent of modern day passenger cruising. See The Korea Maru, 254 F.397, 399 (9th Cir. 1918); The Great Northern, 251 F.826 (9th Cir. 1918); 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 Napolitan Prince, 134 F.159 (E.D.N.Y. 1904); O'Brien v. Cunard Steamship Co., 154 Mass. 272, 28 N.E. 266, 267 (1891); Laubheim v. Maatschappy, 107 N.Y. 228, 13 N.E. 781 (1887). A few date back more than a century, long before cruise lines became "floating hotels" offering a wide range of services to passengers, including twenty four hour medical care. See Bob Dickinson and Andy Vladimir, Selling the Sea: An Inside Look at the Cruise Industry, John Wiley & Sons, Inc., at 210; Costa Crociere v. Family Hotel Serv., Inc., 939 F. Supp 1538, 1557 (S. D. Fla. 1996) (noting that "drastic changes have occurred in the maritime industry" since the adoption of seamen as words of admiralty"). [9/]

[9/] Between 1970-1995, passenger cruises became the fastest-growing segment of the entire travel and tourism industry in the United States–outpacing hotels, restaurants and theme parks. Dickinson and Vladimir, Selling the Sea: An Inside Look

Carnival argues that Barbetta is nevertheless still sound because cruise lines are unable to control the medical decision making of a ship's doctor. See Barbetta, 848 F.2d at 1370. However, as the district court observed, "the Barbetta line of cases rests on even shakier fictions" than the notion that the ship owner does not control the doctor's treatment of passengers. Carlisle v. Carnival Corp., 864 So2d 1,4 (Fla. 3DCA 2003)(A4); Nietes, 181 F.Supp. at 220. Chief among them is the Barbetta court's finding that passengers are free to contract with the ship's doctor for any medical services they may require. While a passenger is *technically* free to decline onboard medical treatment, if he is at sea and in medical distress, he *realistically* does not have any "meaningful" alternative other than to seek medical care onboard the vessel. See. Carlisle, 864 So.2d at 4 (A4); see also Huntley, 307 F. Supp 2d at 1372 ("a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor"); Fairley, at 1993 AMC at 1639 ("if a passenger is ill, and port is distant, the ship's doctor is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies.")

At the Cruise Industry, at 37; Ross A. Klein, Cruise Ship Blues: The Underside of the Cruise Industry, New Society Publishers, (2002) at 2. In addition, the composition of cruise line passengers has also changed. Passengers are no longer "older empty-nesters, with relatively simple tastes," but "everyman." Dickinson and Vladimir, Selling the Sea: An Inside Look At the Cruise Industry, at 62. Consequently, "the ship's product delivery . . . of necessity is more diverse and complex." Id.

Indeed, the notion that ill passengers such as Carlisle are free to accept or decline shipboard medical services is as disingenuous as the claim that ship's doctors are "independent contractors" rather than agents of the cruise line. Ship's doctors are no different from any other ship's officers. They are subject to ship's discipline under general maritime law, as well as the lawful commands of the captain. See Norris, The Law of Maritime Personal Injuries 4th ed. § 3:10 (1990). When they are sick or injured, they are entitled to all of the remedies available to other crewmembers under the Jones Act and maritime law, including maintenance and cure and the warranty of seaworthiness. Id.

Moreover, as the district court pointed out, cruise lines do exercise an element of control over the doctor-patient relationship.[10/] In Carlisle's case, Carnival controlled a number of aspects of Dr. Neri's medical practice, such as the selection of medical personnel, the hours of operation of the infirmary, and the procedures for the operation of the ship's hospital. Carlisle, 864 So2d. at 5 (A5). Furthermore, with the advent of modern technology, cruise line shoreside medical personnel have the ability to monitor and communicate with the ship's physician while he is on board the vessel in a way that they did not back when the "Barbetta rule" was first pronounced. Nietes, 188

[10/] The district court correctly noted that because Maritime law embraces principles of agency, it was required to look to the right to control, rather than actual control, to determine whether an individual was acting as an agent for a principal. See Cactus Pipe & Supply Co., Inc. v. M/V Montrmartre, 756 F. 2d 1103, 111 (5th Cir. 1985).

F.Supp. at 220; see also Klein at 78 (noting that advent of "telemedical" satellite hook-ups from ship to shore onboard cruise ships). The notion that ship's physicians are wholly "independent" from the cruise line by simply labeling them independent contractors on fine print in a passenger ticket is pure fiction.[11/]

Barbetta also rests on the false assumption that the ship's physician is provided for the convenience of the ship's passengers, rather than as an economical alternative to fulfilling its duty of reasonable care to its passengers. Under maritime law, a cruise line has a duty to provide reasonable medical care to passengers under the circumstances. See Fairley, 1993 AMC at 1639. While fulfillment of this duty does not legally require cruise lines to provide an infirmary or shipboard medical staff to passengers, *realistically* they have no other alternative unless they wish to divert their

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[11/] The district court is not alone in its rejection of the legal fiction of doctors being considered independent contractors for purposes of liability for legal malpractice. As Judge Altenbrand recently observed in a case involving land based medical malpractice:

> Two recent cases, which are admittedly distinguishable from today's case, seem to favor a theory of nondelegable duty over that of apparent agency in the context of medical negligence. This trend suggests that hospitals should be vicariously liable as a general rule for activities within the hospital where the patient cannot and does not realistically have the ability to shop on the open market for another provider. Given modern marketing approaches in which hospitals aggressively advertise the quality and safety of the services provided within their hospitals, it is quite arguable that hospitals should have a nondelegable duty to provide adequate radiology departments, pathology laboratories, emergency rooms, and other professional services necessary to the ordinary and usual functioning of the hospital.

Roessler v. Novak, 858 So.2d 1158, 1165, (Fla. 2nd DCA 2003). (citations ommitted)(emphasis added).

vessels every time a passenger becomes ill and requires medical treatment -- something no modern day cruise line could possibly do if it wished to stay in business. As the district court noted:

> The fallacy of the notion that the acutely ill passenger at sea has sifted through a series of options and ultimately chosen to use the ship's doctor underscores the fiction of the familiar incantation that the physician is on board merely for the "convenience of the passenger." In reality, as has been recognized, the ends of the cruise line are, at the very least, equally served by being able to fulfill its duty to ill or injured passengers without necessarily being required to disrupt the voyage or incur great expense to evacuate the patient every time a medical situation arises.

864 So.2d at 4-5 (A4-5); accord, Huntley, 307 F. Supp 2d at 1372 ("[w]here the cruise line has made an economic decision–that it is the most cost-effective for the cruise line and most attractive to prospective passengers for it to employ a shipboard doctor with a well-equipped shipboard infirmary in order to discharge its duty to provide reasonable medical attention under the circumstances–it is not unreasonable to require the cruise line to bear the costs of such decision"); Fairley, 1993 AMC at 1639. Indeed, as the district court recognized, because the employment of a doctor aboard a ship is a beneficial substitute for the shipowner's otherwise more costly duty to sick passengers, there is a legitimate reason to impose liability on a cruise line for the negligence of its doctors. See Carlisle, 864 So2d at 5 (A5); Fairley, 1997 AMC at 1639 ("where the cruise line has reaped the benefits of carrying a doctor

aboard its vessels, there may be circumstances where it should be required to bear its consequences.")

In addition, cruise lines also benefit from providing passengers with a shipboard physician, "since the presence of a qualified physician on board, with a well-equipped and well-staffed infirmary, is an enticement to purchase the ticket." Fairley, at 1993 AMC 1639; Carlisle, 864 So.2d 1(A1).[12/] Indeed, while cruise lines are not *technically* required to provide quality medical care to passengers, in today's competitive cruise line industry, they need to do so if they wish to remain in business:

> While the presence of an onboard physician is not required by law, the practical realities of the competitive cruise industry, and reasonably anticipated risks of taking a small city of people to sea for days at a time, all but dictate a doctor's presence.

Carlisle, 864 So.2d at 5 (A5); see also Dickinson and Andy Vladimir, Selling the Sea: An Inside Look at the Cruise Industry, at 78 ("Legally there are no American or international requirements concerning the level of cruise-ship medicine. However, since lines are in the hospitality business, it makes eminent sense to provide necessary and adequate medical care.")(emphasis added). To the extent that cruise lines benefit economically from providing medical services to passengers, there is no reason why they should not be required to assume responsibility for their human costs of those services. See Fairley, 1993 AMC at 1639.

[12/] Indeed, the Carlisles specifically stated that having a doctor onboard the ship was an important factor for them in deciding to go on their cruise. See (2R. 531).

Furthermore, adopting Barbetta would have the anomalous effect of shielding cruise lines from liability for the malpractice of shipboard physicians committed on passengers, while continuing to hold them vicariously liable for negligence committed on crewmembers. See Compagno, Malpractice on the Love Boat: Barbetta v S/S Bermuda Star, 14 Tul. Mar. L.J. at 390-391. This result seems particularly absurd where, as here, the vessel owner agrees to indemnify the doctor for all malpractice claims, regardless of who brings them. See DeZon v. Am. President Lines, Ltd., 318 U.S. 660, 87 L.Ed. 1065, 63 S.Ct. 814 (1943). There is simply no logical justification for allowing a crewmember to recover damages from a shipowner for the malpractice of its physician while leaving a passenger injured by that same physician without any legal recourse. Id.[13/]

Finally, the biggest problem with Barbetta is that in many cases, such as this one, it leaves an injured plaintiff of any viable legal remedy. Although passengers such as Carlisle *theoretically* have an action against cruise line doctors who commit medical malpractice, *realistically* that action is only as good as their ability to serve

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[13/] Carnival argues that holding cruise lines vicariously liable for the medical negligence of shipboard doctors committed on crewmembers is justified because the vessel owner is required to provide crewmembers with a doctor onboard the vessel under the Jones Act and general maritime law. However, where, as here, the cruise line chooses to provide those same services to passengers as a means of satisfying its duty under general maritime law to provide reasonable medical care to its passengers, this is a distinction without any real difference. See Carlisle, 864 So2d at 6 (A6); Fairley, 1993 AMC at 1639.

those physicians with process and exercise jurisdiction over them. Many ship's doctors live abroad and are constantly traveling onboard vessels. See Dickinson and Vladimir, Sailing the Sea: An Inside Look at the Cruise Industry at 78.[14/] As a result, it is often a practical impossibility to serve them with process within the time required by the Rules of Civil Procedure. Additionally, there is no guarantee that if the doctor is served that a passenger will be able to exercise personal jurisdiction over him, or that they will be able to satisfy any judgment ultimately obtained against them.

Whatever logical basis the Barbetta rule may at one time have had, there is no question that like the last clear chance rule and the doctrine of divided damages, it has outlived its usefulness. Given the modern realities of passenger travel onboard cruise ships, the district court was entirely correct to reverse the summary judgment in favor of Carnival.

C. There was a genuine issue of material fact as to whether Dr. Neri held himself out as Carnival's agent at the time he treated Elizabeth.

Because the district court concluded as a matter of law that Carnival was vicariously liable for the medical malpractice of Dr. Neri, it did not address the issue of apparent agency. However, the district court's decision to reverse the summary judgment in favor of Carnival was also correct on that basis because there was a

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[14/] Dr. Neri lived in England prior to and after working for Carnival. (2R. 668).

genuine issue of material fact as to whether Carnival could be held liable for Dr. Neri's conduct on a theory of apparent agency.

Where a ship holds a doctor out to be its agent, under circumstances suggesting that the doctor was treating the plaintiff on behalf of the carrier, and the plaintiff relies on those representations to his detriment, the vessel may be liable for the malpractice of the ship's doctor on a theory of apparent agency. See Fairley v. Royal Cruise Line Limited, 1993 AMC 1633 (S.D. Fla. 1993). The Court in Fairley reached this conclusion despite the Fifth Circuit's decision in Barbetta v. S/S/ Bermuda Star, 848 F.2d 1364 (5th Cir. 1988), which held that a shipowner could not be held vicariously liable for the torts of the ship's doctor. The Court also specifically rejected the cruise line's argument that the doctor was an independent contractor, and not an agent of the vessel, based on the language in the passenger ticket. "Contrary to Defendant's argument in its Supplemental Memorandum, p. 20 of Plaintiff's passenger contract, attached to the Amended Complaint, will not dispose of the issue of whether the ship doctor was an independent contractor . . ." Id. at 1640.

The result in Fairley is consistent with the Restatement of Agency, as well as the majority of jurisdictions which have recently recognized a cause of action against a physician for medical malpractice even though the physician is an independent contractor based on the doctrine of apparent agency. See Delvalle v. Sanchez, 170 F.Supp.2d 1254 (S.D. Fla. 2001)(summary judgment on issue of apparent agency

improper where plaque on hospital wall listed gynecologist as working at hospital and where patients who were treated by doctor toured hospital facilities and went to that hospital to deliver their babies); Kafri v. Greenwich Hosp. Ass'n, 2000 WL 306620 (D. Conn. 2000)(denying summary judgment on apparent agency theory where patient paid radiology group, radiology group was located in hospital, and screening equipment used by radiology group was owned by hospital); Bynum v. Magno, 125 F.Supp.2d 1249 (D. Hawaii 2000)(where all forms presented to patient bore hospital's name, patient was unfamiliar with doctors and had no reason to believe they were not employees of hospital, summary judgment on apparent agency issue was improper); Jennison v. Providence St. Vincent Medical Ctr., 25 P.3d 358 (Or. Dist. Ct. App. 2001)(unless a patient has actual knowledge of a physician's actual status as an independent contractor, the patient can recover against the hospital for the physician's negligence if it is objectively reasonable for the patient to believe that the physician is an employee of the hospital); Pamperin v. Trinity Mem. Hosp., 423 N.W.2d 848 (Wis. 1988)(applying apparent agency doctrine where radiologist misread x-ray); Harding v. Martini, 726 N.E.2d 84 (Ill.Dist.Ct.App. 2000)(father's reliance on hospital's conduct was sufficient to create factual issue on child's claim for apparent agency in medical malpractice case); Simmons v. Tuomey Regional Medical Ctr., 533 S.E.2d 312 (2000)(trial court erred in entering summary judgment for hospital on medical malpractice claim despite disclaimer in consent given to patients that doctors were

independent contractors; genuine issue of material fact existed as to whether doctors were apparent agents of hospital); Guadagnoli v. Seaview Radiology, 712 N.Y.S.2d 812 (N.Y.Dist.Ct.App. 2000)(denying summary judgment on agency by estoppel theory where hospital held itself to public as offering and rendering radiological services and where patient believed hospital was responsible for her treatment); Kashishian v. Al-Bitar, 535 N.W.2d 105 (Wis.Dist.Ct.App. 1995)(reversing summary judgment in favor of hospital on apparent agency where patient did not enter hospital seeking treatment from specific physician and there was no evidence that patient was aware that physician was not an employee of hospital); Jackson v. Power, 743 P.2d 1376 (Alaska 1987)(hospital could be liable for malpractice of independent contractor under an apparent agency theory of vicarious liability); Hill v. St. Clare's Hosp., 499 N.Y.S. 2d 904 (1986)(same; Restatement (Second) of Agency § 267 ("One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.")

The record in this case clearly establishes a genuine issue of material fact with regard to the question of apparent agency. At the time Dr. Neri treated Carlisle, he was wearing a Carnival Cruise Lines name tag. (2R. 428). He also was wearing what appeared to Carlisle to be an officer's uniform. (2R. 429, 531). Carlisle paid the

doctor using her "Sail and Sign" card, which was provided to her by Carnival prior to the beginning of the voyage. (2R. 246). Doctor Neri never told the Carlisles that he was not an employee of the ship. In fact, Carnival's own witness conceded that the ship's doctor is considered an officer of the ship. (2R. 691).[15/]

There was also sufficient evidence with regard to the issue of the Carlisle's reliance on the ship's conduct with regard to Dr. Neri appearing to be its employee. At the time the Carlisles went on the cruise, they knew that there was a doctor onboard the ship. (2R. 528). The existence of a doctor affected their decision to cruise. (2R. 531). Indeed, had Carnival not provided medical facilities onboard the Ecstasy, the Carlisles testified they would not have taken the cruise. (2R. 531). On a motion for summary judgment, the moving party bears the burden of establishing the absence of any material issues of fact. See Delandro v. America's Mortg. Servicing, Inc., 674 So.2d 184 (3rd DCA 1996). Any doubts as to the existence of factual issues must be resolved in favor of the non-movant. Id. at 186. Given the significant evidence set forth by

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[15/] Carnival's claim that Dr. Neri was merely an independent contractor, and not an employee, is further belied by the extensive control it exercised over him while he worked onboard the Ecstasy. Carnival set and controlled Dr. Neri's working hours. (2R.433, 586). It also selected the nursing staff he worked with and provided him with medical equipment. (2R. 649). Carnival's contract with Dr. Neri required Carnival to indemnify him for $1 million in the event he is sued for medical malpractice related to his work onboard the ship. (2R. 680). It also required Dr. Neri to permit all claims "to be dealt with by [Carnival] or any insurance association with which [Carnival is insured]." (2R. 712).

Carlisle on the issue of Dr. Neri's relationship to the ship, the district court's order reversing summary judgment in favor of Carnival should be affirmed.

II THIS ISSUE IS NOT OF SUFFICIENT PUBLIC IMPORTANCE TO WARRANT THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.

All of this, of course, assumes that this case presents a question of sufficient public importance to justify this Court's exercise of its discretionary jurisdiction to review the district court's decision. With all due respect to the district court's certification order, we submit that it does not.

Cases of exceptional importance are normally limited to those which may affect large numbers of persons and interpret fundamental legal or constitutional rights. In the Interest of D.J.S., 563 So.2d 655 (Fla. 1st DCA 1990). The outcome of this Court's decision effects three groups of people: shipowners, shipboard medical personnel, and passengers who are injured as a result of the medical negligence of shipboard medical personnel. While the decision in this case is certainly of great significance to those individuals, the number of persons whose lives will actually be effected by it is fairly limited. Only 1 in 20,000 Carnival passengers suffers a medical crisis serious enough to require evacuation. Dickinson and Vladimir, Selling the Sea: An Inside Look at the Cruise Industry, at 77. Furthermore, despite the number of passengers who cruise annually, the risk of accidents, attack and disease onboard a cruise ship is relatively small. Klein, Cruise Ship Blues: The Underside of the Cruise Industry, at 81.

Carnival cites to newspaper articles and studies indicating that the cruise industry spent $4.5 billion in Florida last year and accounts for two-thirds of all U.S. passenger embarkations. However, these figures merely demonstrate that passenger cruising is big business – a point Carlisle readily concedes. They do *not*, however, demonstrate that medical malpractice committed on passengers by ship's physicians is a widespread problem, let alone one of "great public importance." Furthermore, the fact that Florida derives a substantial economic benefit is irrelevant to an issue of *federal maritime law.*

Finally, there is no fundamental or constitutional right implicated by the district court's decision on this issue. How could there be, when other federal district courts applying maritime law have held shipowners vicariously liable for the medical negligence of their doctors in other cases? See Fairley, 1993 AMC at 1633; Nietes, 188 F.Supp. at 219; Huntley, 307 F. Supp 2d at 1372. Ultimately, this case presents nothing more than a conflict among various courts over an issue of maritime law. While it certainly is an issue significant to the parties and to those in the cruise line industry, it does not rise to the level of a question of "great public importance" that warrants this Court's exercise of its discretionary jurisdiction. Accordingly, this Court should decline to exercise its jurisdiction and dismiss Carnival's petition.

CONCLUSION

For the foregoing reasons, this Court should decline to exercise its jurisdiction and dismiss Carnival's petition, or alternatively, affirm the district court's order reversing summary judgment in favor of Carnival.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this ___ day of June, 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, FL 33131; **John Campbell, Esq.**, Campbell & Malafy, 2655 Le Jeune Road, Suite 201, Coral Gables, FL 33134; **Robert Peltz, Esq**., McIntosh, Sawran, Peltz & Cartaya, P.A., 19 W. Flagler Street, Suite 520, Miami, FL 33130; **Charles Lipcon, Esq.**, Lipcon, Margulies & Alsina, P.A., 2 S. Biscayne Blvd., Suite 2400, Miami, FL 33131.

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CERTIFICATE OF COMPLIANCE

We Certify That this Brief Complies with the Font Requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. We Have Used 14-point Times New Roman Type.

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