IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-393

CARNIVAL CORPORATION,

Petitioner,

v.

DARCE CARLISLE,

Respondent.

CARNIVAL'S INITIAL BRIEF

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

UNITED STATES CONSTITUTION

TABLE OF AUTHORITIES (continued)

CASES (continued) **Page**

FEDERAL STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (continued)

OTHER AUTHORITIES (continued) **Page**

INTRODUCTION

In the decision we ask this Court to review, the Third District Court of Appeal reversed a summary judgment for our client, Carnival Corporation, and held, contrary to overwhelmingly settled federal maritime law, that a shipowner is vicariously liable for the negligence of a shipboard doctor in treating passengers. Even more surprising than the district court's radical departure from established maritime law was its assumption that it had authority to make that departure. Because the district court exceeded its authority by rejecting the applicable maritime law instead of applying it as it was required to do, and because even if it had the authority to change the law it was wrong to do so, we ask this Court to quash the decision of the Third District and reinstate the summary judgment for Carnival on vicarious liability.

STATEMENT OF THE CASE AND FACTS

Darce and Kristopher Carlisle, who lived in Ann Arbor, Michigan, took a cruise in March of 1997 with their 14-year-old daughter, Elizabeth, on Carnival's ship Ecstasy, departing from Miami, Florida (2R 197, 390, 393-94, 403).[1] A few days before the cruise they arrived in Davenport, Florida, near Orlando, where they planned to stay a few days with Darce's parents before going on to Miami (2R 403). The day before the cruise was to start, Elizabeth became quite ill, with vomiting, fever, lower abdominal pain and headache (2R405-06). This went on all day (2R 408). The Carlisles nevertheless decided to proceed with their plans, and drove to Miami on

[1] We will refer to the record on appeal by clerk's volume and page number. For example, 2R 197 refers to volume 2 of the record, page 197. References to the district court's decision, appended to this brief, are to decision page numbers and appendix page numbers.

Monday, March 31st, and boarded the ship (2R 406-07, 409). Elizabeth was feeling so ill they went straight to the infirmary, but the infirmary was not open yet, and they returned later (2R 429-30, 436-37). The ship's doctor, Mauro Neri, at that time diagnosed the problem as influenza, and prescribed medications for flu (2R 439).

Dr. Neri was a physician licensed to practice in England, with extensive training in surgery and experience in emergency medicine (2R 204, 252, 299-300). His credentials had been reviewed and approved for Carnival by the chairman of the emergency department at Mount Sinai Medical Center, Dr. Arthur Diskin (2R 223, 242). Dr. Neri's status, as the Carlisles were advised by both their cruise tickets and Carnival's brochure,[2] was that of an independent contractor (2R 343, 349; *see also* 2R 304). Although Carnival contractually agreed to indemnify Dr. Neri (2R 302), and controlled certain non-medical aspects of Dr. Neri's employment such as the style and rank of uniform he wore (2R 281, 431-32, 434), and the hours of operation of the

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[2] The ticket said:

> If the Vessel carries a physician, nurse. . . , it is done solely for the convenience of the guest and any such person in dealing with the guest is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or those under his order or assisting him with respect to treatment, advice or care of any kind given to any guest.
>
> The physician, nurse . . . are each independent contractors and shall be entitled to make a proper charge for any service performed with respect to a guest and the Carrier shall not be concerned in any way whatsoever in any such arrangement (2R 343).

Carnival's 1997 Cruise Vacation Brochure, in a section entitled "Things to Know Before You Go," stated: "MEDICAL SERVICES [:] The ships' infirmaries are equipped to treat minor non-emergency matters. A doctor is available to render services at a customary charge. Doctors are independent contractors" (2R 349).

infirmary (2R 303), it was undisputed that on Carnival ships all decisions with regard to the *medical treatment* of any person on board were left solely to the professional judgment of the ship's physician (3R 315).

Over the next few days Elizabeth saw the doctor two more times and he continued to believe that she had the flu (2R 447-50, 461-62). On Wednesday, April 2nd, Darce Carlisle sent a fax to their hometown pediatrician describing Elizabeth's symptoms, and later telephoned him (2R 456, 458) The pediatrician recommended that they leave the ship (2R 468). The Carlisles voluntarily left the ship in Cozumel on Wednesday, flew via Cancun to Miami, where they spent the night, and left for Detroit the next day, Thursday, on the first available flight (2R 472-73). When they arrived in Detroit they went straight to the hospital, arriving at 11:00 Thursday morning (2R 474). Although the doctors at the hospital began running various tests immediately, it took them two days, until Saturday afternoon, April 5th, to determine that Elizabeth had a ruptured appendix, and they operated right away (2R 477-80). Because of an abdominal infection, Elizabeth had to have another operation on April 23rd (2R 483-84, 618).

In March of 1998 Darce Carlisle, on her daughter's behalf, sued Carnival and Dr. Neri for negligence (1R2-9).[3] Carlisle sought to hold Carnival liable on theories of,

[3] Elizabeth Carlisle's precise injuries, listed in the Third Amended Complaint (2R 163-64), are not relevant to the legal question before this Court, but we do need to set one thing straight. Carlisle alleged in her original complaint that, among other things, because of Carnival's and Dr. Neri's negligence, Elizabeth had "lost the ability to conceive and bear children" (1R 4). In her three amended complaints Carlisle changed that allegation to "suffered . . . damage to the reproductive system" (1R 24, 108-09, 163). The district court mistakenly treated the original (later changed) allegation that Elizabeth was unable to conceive as an established fact, 864 So. 2d at 2 (A2) ("as a (continued...)

among other things, vicarious liability, negligent hiring and apparent agency (1R 162-64, 166-67). Carnival's motion for summary judgment on all of these theories was granted (2R 195-349, 382; SR1).[4] The summary judgment on vicarious liability was based on the established maritime rule that shipowners are not vicariously liable for the negligence of shipboard doctors in treating passengers, commonly called the *Barbetta* rule after the Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988). Carlisle appealed, and the Third District reversed the summary judgment on vicarious liability, expressly rejecting the *Barbetta* rule, and adopting instead the reasoning of a solitary federal district court case, *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959). *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 7 (Fla. 3d DCA 2003) (A6).[5] Carnival moved for rehearing, rehearing en banc and certification of a question of great public importance. The Third District certified the question "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger," and that brought us to this Court.

(...continued)
result of the rupture and subsequent infection, Elizabeth was rendered sterile"), but there was evidence to the contrary (deposition of Elizabeth Carlisle, 2R 623-25).

[4] We have filed along with this brief an agreed motion to supplement the record with the summary final judgment (SR1).

[5] As a result of its decision on vicarious liability, the district court did not reach any issues of apparent agency, and it expressly found no error in that portion of the summary judgment on the claim of negligent hiring. 864 So. 2d at 8 n.5 (A7 n.5).

SUMMARY OF ARGUMENT

An inextricable part of the district court's decision rejecting the *Barbetta* rule that shipowners are not vicariously liable for the negligence of their doctors in treating passengers is the court's assumption, or implicit holding, that in a case in which it was obligated to apply maritime law it had the authority to reject a settled maritime rule in favor of a lone contrary decision. This Court must first consider the authority of a Florida court to work such a change in federal maritime law.

That the *Barbetta* rule is settled maritime law is beyond question. In at least 27 decisions over more than a hundred years, federal courts have adhered to it, as against the one decision, *Nietes*, that – despite criticism and express rejection of it by other courts – the district court here adopted. The *Barbetta* rule being settled, and the Third District being bound, as it was, to apply maritime law in this case, it had no authority to reject *Barbetta* and follow *Nietes*. A state court may not, as the district court here has done, change a characteristic feature of maritime law, or interfere with the uniformity so essential to maritime law. Because the district court had no authority to do what it did, its decision should be quashed and the certified question answered in the negative.

Even if the district court had authority to reject the *Barbetta* rule, its decision should be quashed because *Barbetta* is correct. Vicarious liability turns on control, and, as many decisions explain, although a shipowner may control certain aspects of a doctor's employment, it cannot – because of the nature of the doctor-patient relationship and the shipowner's lack of expertise – have the control over the doctor's practice of medicine required for vicarious liability.

Finally, the issue is one of great public importance because imposing vicarious liability on shipowners will have significant impact on the cruise industry so vital to Florida, and, in turn, Florida's economy and citizens, and because the district court has radically changed maritime law.

ARGUMENT

I.

THE DISTRICT COURT WAS REQUIRED TO APPLY THE SETTLED FEDERAL MARITIME RULE OF *BARBETTA*, AND HAD NO AUTHORITY TO CHANGE IT

An inextricable part of the Third District's decision rejecting the *Barbetta* rule and adopting *Nietes* is the implicit holding that – despite its duty to *apply* existing maritime law – it had the authority to change that law. This was wrong, and this Court must examine that assumption before it can reach the substantive question of vicarious liability.[6]

A.

The *Barbetta* Rule Is Settled Maritime Law

It is well established that although plaintiffs may sue in state court for injury resulting from maritime torts, the substantive law to be applied is maritime law. *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So. 2d 488, 490 (Fla. 3d DCA 1986);

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[6] The issues presented for this Court's review – whether the district court had authority to change settled maritime law, and "[w]hether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger," are legal questions and therefore reviewed by this Court de novo, *see Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). The entry of a summary judgment on a pure question of law is reviewed de novo as well. *Clay Elec. Coop., Inc. v. Johnson*, No. SC01-1955, 2003 WL 22966277, at *2 (Fla. 2003).

Hallman v. Carnival Cruise Lines, Inc., 459 So. 2d 378, 379 (Fla. 3d DCA 1984); *Klosters Rederi A/S v. Cowden*, 447 So. 2d 1017, 1018 (Fla. 3d DCA 1984). More specifically, as the district court pointed out in its decision, "the negligence of a medical professional who causes injury to a person at sea constitutes a maritime tort and . . . causes of action founded on such negligence are to be governed by maritime law." *Rand v. Hatch*, 762 So. 2d 1001, 1003 (Fla. 3d DCA 2000). *See* 864 So. 2d at 3 (A2).

The rule of maritime law applicable here is that a shipowner is not vicariously liable for the negligence of a ship's physician in treating passengers. "If the doctor is negligent in treating a passenger . . . that negligence will not be imputed to the carrier." *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988). *See also Amdur v. Zim Israel Navigation Co., Ltd.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969) ("[i]t is the general rule that a physician or surgeon . . . is not a servant or agent of the shipowner and the latter is not liable for the negligence of the former in treating a passenger"). The *Barbetta* rule has been settled maritime law since 1887, followed by all courts but one since then. Yet the district court, embracing that one aberrant decision and scholars' criticism of the *Barbetta* rule, "reject[ed] the holding of the *Barbetta* line of cases," and "impos[ed] . . . vicarious liability," 864 So. 2d at 7 (A6), standing established maritime law on its head.

The *Barbetta* rule was in fact established long before *Barbetta*, as the Fifth Circuit explained, listing the many earlier cases:

> Does general maritime law impose liability, under the doctrine of respondeat superior, upon a carrier or ship owner for the negligence of a ship's doctor who treats the ship's passengers? Although neither the

> Supreme Court, this court nor any district court in this circuit has ruled on the question, we are not without guidance. An impressive number of courts from many jurisdictions have, for almost one hundred 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 employ 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. *E.g., The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918); *Di Bonaventure v. Home Lines, Inc.*, 536 F.Supp. 100, 103-04 (E.D. Penn. 1982); *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 A.M.C. 2674, 2677 (S.D. N.Y. 1981); *Amdur v. Zim Israel Navigation Co.*, 310 F.Supp. 1033, 1042 (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, 402 (D. Mass. 1923); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy*, 107 N.Y. 228, 13 N.E. 781 (1887). *See De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 666-67 n.2, 63 S.Ct. 814, 817-18 n.2, 87 L.Ed. 1065 (1943) (tracing the development of the basic rule in the state courts, and recognizing the influence which those state "judges of great learning, for courts of last resort of states having much to do with maritime pursuits," had on the rule's development in the federal courts); *see also* 1 M. Norris, The Law of Maritime Personal Injuries § 39 (3d ed. 1975).

848 F.2d at 1369. Courts before and after *Barbetta* have adhered to this rule, including another federal circuit court of appeal, many federal district courts (including six decisions from the Southern District of Florida), New York's highest court and a California intermediate appellate court. *Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300, 303 n.3 (S.D.N.Y. 1996), *affirmed*, 116 F.3d 465 (2d Cir. 1997); *Malmed v. Cunard Line Ltd.*, No. 91 CIV. 8164 (KMW), 1995 U.S. Dist. LEXIS 12256, at *2 (S.D.N.Y. Aug. 22, 1995)

(unpublished); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633, 1639 (S.D. Fla. 1993); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 491 (D.P.R. 1992); *Hilliard v. Kloster Cruise, Ltd.*, 1991 AMC 314, 316-17 (E.D. Va. 1990); *Nanz v. Costa Cruises, Inc.*, 1991 AMC 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crocier*e, *S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989); *Bowns v. Royal Viking Lines, Inc.*, 1977 AMC 2159 (S.D.N.Y. 1977); *Metzger v. Italian Line*, 1976 AMC 453 (S.D.N.Y.), *affirmed*, 535 F.2d 1242 (2d Cir. 1975); *Ludena v. The Santa Luisa*, 112 F. Supp. 401, 408 (S.D.N.Y. 1953); *Allan v. State S.S. Co.*, 30 N.E. 482, 485 (N.Y. 1892); *DeRoche v. Commodore Cruise Line, Ltd.*, 46 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1994).[7]

In 1959 a federal district court judge in California took exception to the rule, and, despite Ninth Circuit precedent to the contrary,[8] and relying not on ship cases but on hospital and corporation cases, made his own rule:

> It is our opinion that, where a ship's physician is in the regular

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[7] In *DeZon v. American President Lines*, 318 U.S. 660 (1943), the United States Supreme Court, holding that an employer was liable to *seamen* for negligence of a ship's physician, in a footnote observed that "[l]iability to a *passenger* injured by the negligence of a ship's doctor has been denied on this ground," *id.* at 666 n.2 (emphasis added), and discussed and quoted as "statements of judges of great learning" the early cases establishing the rule of non-liability. Though the court in *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959), said it thought the *DeZon* court did so "with implied criticism," *Nietes*, 188 F. Supp. at 220, we have carefully read *DeZon* and can find no such implication.

[8] *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918).

> employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable.

Nietes v. American President Lines, Ltd., 188 F. Supp. 219, 220 (N.D. Cal. 1959). Despite a lapse of 44 years, no court until the Third District followed *Nietes* to hold a shipowner vicariously liable. As Judge Marcus vividly put it in *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633 (S.D. Fla. 1993), "the overwhelming tide of case law on the question holds that a shipowner may not be held vicariously liable for the torts of the ship's doctor," and "[t]he lone beacon of dissent is *Nietes* . . . ." *Id.* at 1634, 1635. Apart from not being followed, *Nietes* has been criticized by several courts. *See DeRoche v. Commodore Cruise Line, Ltd.*, 46 Cal. Rptr. 2d at 472 ("*Nietes* . . . appears to stand alone . . . and has been criticized roundly for it"). *Accord Malmed v. Cunard Line, Ltd.*, 1995 U.S. Dist. LEXIS 12256, at 4 n.2. In *Amdur v. Zim Israel Navigation Co., Ltd.*, 310 F. Supp. at 1042, the court observed that the *Nietes* rationale, "while perhaps viable for the specific fact pattern in *Nietes*, is not sound as a general rule," *accord Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103 (E.D. Pa. 1982), and that "[t]o pretend, as the *Nietes* case does, that mere employment of a physician by a shipping company . . . creates control, is to create a species of liability without fault which is without precedent." *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. at 1043. The *Barbetta* court found *Nietes* to be

"internally contradictory" and misguided. 848 F.2d at 1370-71.[9] And so until now, courts, although asked by plaintiffs, as the district court was here, to discard the *Barbetta* rule and follow *Nietes*, have refused to do so. *Cummiskey v. Chandris, S.A.*, 895 F.2d at 108 ("we decline the invitation to break with maritime precedent"); *Mascolo v. Costa Crociere*, 726 F. Supp. at 1286 ("[u]nder the doctrine of *stare decisis* we will not and cannot abolish a century-old rule of law"); *DeRoche*, 46 Cal. Rptr. 2d at 472 ("[w]e see no reason to depart from the established law"); *Barbetta*, 848 F.2d at 1370 ("we decline to follow the *Nietes* court's lead").[10]

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[9] We address the criticism of *Nietes* in more detail in Part II.

[10] Recently, federal district judge James Lawrence King, relying on the Third District's decision here on vicarious liability, and also allowing that the cruise line could be liable under a theory of apparent agency, denied a motion to dismiss a complaint against Carnival for the alleged negligence of its doctor in treating a passenger. *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374-75 (S.D. Fla. 2004). It is strange indeed that a federal district court would reject the precedent of federal circuit courts and its own court to rely on a state court decision that completely departs from the established federal maritime law it was bound to follow. While it is true that, as Judge King observed, the Eleventh Circuit has not addressed this issue, *id*. at 1374 n.5, that did not stop the Southern District in six earlier decisions, from adhering – as it knew it must – to the *Barbetta* rule. *See Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633, 1639 (S.D. Fla. 1993); *Nanz v. Costa Cruises, Inc.*, 1991 AMC 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989). Moreover, Judge King's decision in *Huntley* is a complete about-face from his earlier decision in *Mascolo*, in which he said "[t]he reasoning behind the rule prohibiting the negligence of a ship doctor from being imputed to a ship owner is sound," *id*. at 1586, elaborated on the soundness of that reasoning, rejected the plaintiffs' arguments based on *Nietes* as "confus[ing] control over the doctor with control over the medical activity," *id.*, and ended his opinion this way:

> The mere fact that the controling principals [sic] of law here have been in existence for over a century is an indication that the rule is a sound

(continued...)

Even the court in *Fairley v. Royal Cruise Line*, relied on by the district court, held that it was bound by the *Barbetta* rule on vicarious liability. There the plaintiff had alleged apparent agency and joint venture theories arising out of the alleged malpractice of the ship's doctor, and the cruise line moved to dismiss. The court, acknowledging that "the majority rule precludes suing the shipowner based on the theory of respondeat superior," *id.*, 1993 AMC at 1639, denied the motion to dismiss because it was unable to say that "there [was] no conceivable set of facts under which the Plaintiff could prevail on . . . for example, an agency-by-estoppel theory." *Id.* The *Fairley* court knew it must follow the *Barbetta* rule, and simply held that the plaintiff *might* be able to pursue another avenue to recovery. *Nietes*, until now, has been all alone in imposing vicarious liability.[11]

(...continued)

> 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.

Id. We submit that to the extent *Huntley* is based on the Third District's decision here, which is wrong, *Huntley* is also wrong.

[11] A few scholars have sung *Nietes*' praises and criticized the *Barbetta* rule, and the district court relied on those scholars' works. "[W]e, like many of the commentators, find *Nietes*, to be the most persuasive precedent." 864 So. 2d at 5 (A4), *citing* Martin J. Norris, *The Law of Maritime Personal Injuries*, 4th Ed. § 3:10; Beth-Ann Erlic Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 Nova L. Rev. 575 (1992); Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 Tul. Mar. L. J. 381 (1990). But notwithstanding scholarly criticism, courts are bound by controlling decisions. *American Trucking Ass'ns, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir. 1982) ("we are not free to exercise the same license as scholars in disregarding still binding precedent"); *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212, 215 (5th Cir. 1980) ("[t]he Appellant . . . cites us to many scholarly criticisms . . . , but we are bound by the former decisions of this court"); *Rader v. Johnston*, 924 F. Supp. 1540, 1550 (D. Neb. 1996) ("[a]lthough the majority opinion in *Smith* has been harshly (continued...)

This rule of federal maritime law is, then, settled and fixed. That being the case, despite the district court's wish to overturn what it no doubt perceived to be a harsh rule, it was not free to do so. The rule may not be discarded, changed or reshaped by a Florida court, but must be applied as it is.

B.

A Florida Court Has No Authority to Interfere With the Uniformity of Maritime Law By Changing a Long-Settled Rule of Maritime Law

"[I]t is beyond the power of the State by . . . judicial decision to mold or modify the maritime law . . . ."[12]

The district court, although acknowledging that it was required to apply maritime law, 864 So. 2d at 3 (A2), did not do that, or, rather, ostensibly did that but was selective, and unfortunately chose a lone case and general principles over a huge majority of contrary decisions and the rule precisely on point.[13] The district court

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(...continued)
criticized by virtually every legal scholar and commentator addressing the decision . . . there is no question that the *Smith* decision is valid, binding precedent at this time"); *FDIC v. Dixon*, No. 84-5919, 1986 WL 16837, at *3 (6th Cir. Apr. 29, 1986) (unpublished) ("[d]espite thirty years and more of scholarly criticism of the rule announced in *Johnson*, we are, nevertheless, bound to follow the holding of that case if its rule of law is controlling of the issue before us"); *Pettco Enters., Inc. v. White*, 162 F.R.D. 151, 155 (M.D. Ala. 1995) (treatise by well-known scholar not binding).

[12] *Riley v. Agwilines, Inc.*, 73 N.E.2d 718, 719 (N.Y. 1947).

[13] Although acknowledging that it was bound to apply maritime law, 864 So. 2d at 3 (A2), the district court inconsistently and mistakenly assumed that because "[t]his issue has never been squarely addressed by this court or the Florida Supreme Court," it was free to "find *Nietes* to be the most persuasive precedent." *Id.* at 5 (A4). The assumption was wrong because the "issue" is settled maritime law, and therefore not to be "addressed" by a Florida court at all.

adopted the one and only maritime case that would hold shipowners liable for their doctors' negligence, and, in addition, instead of employing the very specific *Barbetta* rule, applied two very general precepts of maritime law: first, that "a carrier owes a duty to its passengers to exercise reasonable care under the circumstances," 864 So. 2d at 3 (A3), and, second, that "[m]aritime law embraces the principles of agency." *Id.* at 6 (A5). But the *Barbetta* rule is exactly on point, and "a court sitting in admiralty jurisdiction must apply federal maritime rules that directly address the issues at hand . . . . " *Greenly v. Mariner Mgmt. Group, Inc.*, 192 F.3d 23, 25-26 (1st Cir. 1999). *Accord TAG/ICIB Servs., Inc. v. Pan Am. Grain Co.*, 215 F.3d 172, 177 (1st Cir. 2000).[14]

By selecting as its polestar a solitary case followed only by commentators, and bolstering it with general principles found in maritime law instead of the very specific maritime rule it was bound to apply, the district court crafted a dramatic change in settled federal maritime law – something a state court simply may not do.

The United States Constitution provides that the federal judicial power "shall extend . . . to all Cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2, cl. 1. The "saving to suitors clause," originally part of the Judiciary Act of 1789, and now found in 28 U.S.C. § 1333(1), provides that

> the [federal] district courts shall have original jurisdiction exclusive of the courts of the States, of:

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[14] Specific rules always trump general ones in any event. *See Jones v. State*, 813 So. 2d 22, 25 (Fla. 2002) (specific statute controls over general statute); *Arison v. Cobb Partners, Ltd.*, 807 So. 2d 101, 105-06 (Fla. 3d DCA 2002) (specific provisions of an agreement supersede conflicting general provisions); *Smith v. State*, 738 So. 2d 433, 435 n.2 (Fla. 1st DCA 1999) (applying "the maxim that the specific controls over the general"); *J.M. v. Dep't of Children and Families*, 833 So. 2d 279, 282 (Fla. 5th DCA 2002) (specific rule should control over general rule).

> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled* (emphasis added).

This clause gives state courts "concurrent subject matter jurisdiction over most maritime matters." James Wm. Moore, *Moore's Federal Practice* § 124.46 (2004). *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986).

In exercising jurisdiction over a maritime claim a state court may "adopt such remedies, and . . . attach to them such incidents as it sees fit *so long as it does not attempt to make changes in the substantive maritime law.*" *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994) (emphasis added), *quoting Madruga v. Superior Court*, 346 U.S. 556, 561 (1954), *quoting Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924). *Accord Offshore Logistics*, 477 U.S. at 222-23. The proviso that a state court "not attempt to make changes in the substantive maritime law" is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law *or* interferes with the proper harmony and uniformity of that law in its international and interstate relations." *American Dredging*, 510 U.S. at 447 (emphasis added), *quoting Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). The district court's rejection of the *Barbetta* rule does both. The rule that a shipowner may not be held vicariously liable for its doctor's negligence is a "characteristic feature" of maritime law, dating back to at least 1887. *See* cases cited in *Barbetta*, 848 F. 2d at 1369. It is settled general maritime common law. *See Cummiskey v. Chandris, S.A.*, 719 F. Supp. 1183, 1190 (S.D.N.Y. 1989), *affirmed*, 895 F.2d 107 (2d Cir. 1990). The district court's decision works material prejudice to this

entrenched feature of maritime law.

In addition, the district court's decision interferes with the uniformity of maritime law. "The overriding concern of the maritime law is the federal interest in the need for a uniform development of the law governing the maritime industries." *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 648 (5th Cir. 1985), *citing Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982). This was explained long ago in *The Lottawanna*, 88 U.S. 558, 575 (1874):

> One thing . . . 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.

Accord American Dredging, 510 U.S. at 450-51. *See also Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981) (uniformity and simplicity is a basic principle of federal admiralty law); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-2 (2001) ("[a] first pervasive theme in the Supreme Court's federalism jurisprudence is the idea that the constitutional grant of federal authority over maritime matters requires the development of a uniform maritime law").

The need for uniformity in maritime law is obvious: ships cannot be subject to conflicting laws merely because of their physical location at a particular moment. A shipowner or ship's captain must know with certainty what rules apply to a vessel and what liabilities can arise regardless of where the ship happens to be.

Uniformity being the goal and purpose of maritime law, the authority of states

to alter that law must be – and is – limited. "If there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working." Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* § 1-17 (2d ed. 1975). *See Green v. Vermilion Corp.*, 144 F.3d 332, 341 (5th Cir. 1998) ("[t]hat uniformity is not to be sacrificed to accommodate state law is a fundamental premise of admiralty jurisdiction"); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 166 (1919) ("[o]bviously, 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").

A Florida court cannot simply discard the prevailing maritime rule on vicarious liability of shipowners for ships' doctors and make its own rule, out of step with the rest of the country. Maritime law must be uniform. [15]

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[15] In the "absence of constraining maritime law," the district court might have been permitted to go its own way, *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 250 (Fla. 3d DCA 1985), but that is certainly not the case here. There is a great deal of "constraining maritime law." When federal circuit courts are truly split on a federal question a state court may make a choice: "When the United States Supreme Court has not yet ruled on a federal-law issue and there is a split of authority among the various federal courts of appeals on that issue," a state court is "free to select the interpretation it considers most sound." *Dickinson v. Cosmos Broadcasting Co.*, 782 So. 2d 260, 267 (Ala. 2000). *Accord Modern Supply Co. v. Federal Sav. & Loan Ins. Corp.*, 748 P.2d 251, 254 (Wash. Ct. App. 1987); *423 South Salina St., Inc. v. City of Syracuse*, 503 N.E.2d 63, 70-71 (N.Y. 1986); *Stuart v. Farmers' Bank of Cuba City*, 117 N.W. 820, 823 (Wis. 1908). But one lower-court case does not a "split of authority" make. Here at least 27 decisions, including federal circuit court decisions, had adhered to the *Barbetta* rule, and (not counting the *Huntley* decision discussed above) one solitary federal district court decision rejected it – although it was bound to follow it by the will of its judicial superiors on the Ninth Circuit Court of Appeals. "For there to be a 'split of authority,' . . . the rule urged . . . must have been pronounced either by the highest court of a state or by a federal circuit court. (continued...)

Because the district court's decision, rejecting the universally applied *Barbetta* rule in favor of the never-before-followed *Nietes*, works material prejudice to the longstanding *Barbetta* rule, and interferes with uniformity of maritime law, the district court violated the prohibition against a state's changing substantive maritime law. *American Dredging*, 510 U.S. at 447. This it was without authority to do.[16]

II.

THE *BARBETTA* RULE IS CORRECT

If the Court agrees with us, as we believe it will, that neither the Third District nor this Court has the authority to change settled maritime law, then this Court's answer to the certified question is "no." If this Court determines that a Florida court can decide the issue, the answer should likewise be "no," because the *Barbetta* rule is correct.

There is a reason *Nietes* until now has stood completely alone, why only

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(...continued)
Neither state intermediate courts of appeals cases nor federal district court cases are sufficiently authoritative to constitute a 'split of authority' unless there are so many of them from one jurisdiction over such a long period that it can be reasonably inferred that the highest court of the state or the federal court of appeals acquiesces in the rule." *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 n.9 (W. Va. 1991).

[16] The federal mandate of uniformity in maritime cases melds into familiar principles of stare decisis, "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (citation and internal quotation marks omitted). "[T]he Court is bound to follow the law as it is found to be, although its application in isolated cases may work a hardship." *Beach v. Kirk*, 189 So. 263, 269 (Fla. 1938). *Accord Gentile Bros. Co. v. Florida Indus. Comm'n*, 10 So. 2d 568, 571 (1942) ("[i]t may be that such an interpretation will work a hardship . . . but individual cases should not be permitted to overthrow a long settled rule that the public has relied on and in a multitude of instances would be adversely affected if overthrown"). *See also State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("even though the court might believe that the law should be otherwise," it must follow established law).

commentators are enamored of it, and courts have continued to reject it in favor of the *Barbetta* line of cases. The *Nietes* court misunderstood the issue central to imposition of vicarious liability – control. "The theory of vicarious liability of a principal for the acts of its agent turns primarily on the ability of the principal to control the acts of the agent." *Fairley*, 1993 AMC at 1635. Consequently, control is at the heart of the two justifications for the *Barbetta* rule, (1) "the nature of the relationship between the passenger and the physician, and the carrier's lack of control over that relationship," and (2) a shipping company's lack of "expertise requisite to supervise a physician or surgeon carried on board a ship . . . . " *Barbetta*, 848 F.2d at 1369, *quoting Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. at 1042.

> The reason, of course, that both justifications for the general rule are tied to the concept of control is that respondeat superior liability is predicated upon the control inherent in a master-servant relationship. Because it would be inconsistent with the basic theory of respondeat superior liability to impose responsibility vicariously where the "master"--that is, the ship owner or carrier--lacks the ability to meaningfully control the relevant actions of its "servant"--that is, the ship's doctor-- . . . courts have refused to do so.

Id. (citation omitted).

Court after court has agreed that, although, as here, a shipowner may control many aspects of a doctor's employment, ultimately it cannot control the doctor's practice of medicine on its passengers. Judge Marcus acknowledged this in *Fairley*:

> [T]he degree of skill peculiar to the doctor may, insofar as vicarious liability is concerned, render his relationship to his employer a breed apart from the less technical master-servant relationships.
>
> . . . .

> The harshness of the [*Barbetta*] rule can only be justified by the notion that *meaningful* control is a prerequisite to vicarious liability and that -- under any conceivable set of facts, and *even if he is a regular crew-member* -- the carrier has no meaningful ability to control the ship's doctor.

Id., 1993 AMC at 1638, 1637 (emphasis added). The court in *Malmed v. Cunard Line Ltd.*, No. 91 CIV. 8164 (KMW), 1995 U.S. Dist. LEXIS 12256 (S.D.N.Y. Aug. 22, 1995) (unpublished), elaborated:

> Courts . . . have concluded that although a carrier may control certain aspects of a physician's employment -- such as hours, wages, and working conditions -- *the carrier does not control precisely that aspect of the physician's performance at issue in a malpractice or negligence action, that is, his or her practice of medicine*. Because ship owners are not themselves in the business of medicine -- they have no medical training or experience on which they can rely to instruct or supervise the physicians they employ -- they cannot fairly be said to control the doctor's medical practice.

Id. at *8 (emphasis added).

The court in *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033 (S.D.N.Y. 1969), put to rest the notion – proposed by the judge in *Nietes* – that a shipboard doctor can be supervised from the shore:

> It is pure sophistry to assert that a ship's master is capable of "supervising" the medical treatment rendered by a physician, or that some shore-based "company chief surgeon," by his very existence, is capable of supervising or controlling the actions of a ship's physician. A shore-bound chief surgeon . . . does not occupy a position of control over a ship's physician sufficiently immediate to warrant equation with the hospital-doctor standard. To pretend, as the *Nietes* case does, that mere employment of a physician by a shipping company . . . creates control, is to create a species of liability without fault which is without precedent."

Id. at 1042-43.

And, of course, the Fifth Circuit said it in *Barbetta*:

> We agree with those courts which have concluded that if the carrier's

> ability to control the doctor's treatment is a necessary prerequisite to imposing liability, liability cannot--as the *Nietes* court would have it--turn on whether the doctor is technically an employee or an independent contractor. Moreover, we also agree with those same courts that in reality, a carrier cannot exercise control over the ship's doctor as he practices medicine; if control is a prerequisite to respondeat superior liability, therefore, the general rule against holding the carrier or ship owner vicariously liable for the doctor's negligence must prevail.

Id. at 1371. *See also* Robert D. Peltz and Vincent J. Warger, *Medicine on the Seas*, 27 Tul. Mar. L.J. 425, 446 (Summer 2003) ("[t]he essence of the *Barbetta* court's holding is the recognition that whatever authority a master may have to control the general actions of a ship's doctor, he has neither the ability, expertise, nor the authority to supervise or second guess his medical decisions").

On this determinative issue, *Nietes'* reasoning is inconsistent and faulty, as the *Barbetta* court explained:

> The *Nietes* court claimed to have been led to [its] rule by its conclusion that concerns over a carrier's ability to control or supervise a professionally skilled physician are not a "realistic basis for the determination of liability in our modern, highly organized industrial society." *Nietes*, 188 F. Supp. at 220. As the *Nietes* court saw it, liability is proper despite the carrier's lack of control because "the employment of a doctor aboard ship is a beneficial substitute" for an otherwise more costly duty which the shipowner owes to its passengers--to provide such care and attention as is reasonable and practicable under the circumstances, even if that means changing course and putting in at the nearest port. *Id.* at 221. . . .
>
> First of all, we find the *Nietes* court's reasoning to be internally contradictory. The court claimed that the carrier's ability to control the doctor should not be considered in determining whether to impose vicarious liability; instead, as the court expressed it, a carrier must be liable for a ship doctor's negligent treatment because the carrier chose to discharge its duty to provide its passengers with reasonable medical care by bringing the doctor aboard the ship. The policy underlying the court's rule, therefore, sounds in strict liability. The rule the *Nietes* court actually adopted, however, imposes liability only when the carrier has some control over the doctor it brought on board: if the carrier pays the

> doctor's salary, can subject him to discipline, and can give him orders, the carrier is responsible for the doctor's negligence. Despite its words to the contrary, therefore, the *Nietes* court did understand that the control inherent in a master-servant relationship is the foundation upon which respondeat superior liability normally rests. Consequently, the difference between those courts that have refused to impose vicarious liability and the *Nietes* court is that the *Nietes* court apparently believed that the employment relationship between a carrier and a ship's doctor provides the necessary control. We disagree.
>
> *We think that the Nietes court has confused the employer's right to control its employees' general actions with its ability to control those specific actions which could subject the employer to liability.* In the case of a ship's doctor, as we explained above, numerous courts have found that the carrier or ship owner lacks both (1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients and (2) the power, even if it had the knowledge, to intrude into the physician-patient relationship. The *Nietes* court's only acknowledgement of this, the true difficulty with imposing liability based upon a theory of control, was its "presumption" that the ship's doctor is always linked, through modern means of communication, to a "chief surgeon" with the power to supervise and the discretion to direct the ship's doctor's hand. We think that with this presumption, the *Nietes* court unrealistically presumed away the problem; . . . .

Barbetta, 848 F.2d at 1370-71 (emphasis added).

Certainly Carnival controlled some aspects of Dr. Neri's employment and working environment, but as the cases above all agree, that did not – and could not – give Carnival control over his practice of medicine on passengers. The district court here, like the *Nietes* court, "confused the employer's right to control its employees' general actions with its ability to control those specific actions which could subject the employer to liability." *Barbetta*, 848 F. 2d at 1371.[17, 18]

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[17] The district court suggested that because a shipowner is liable for the negligence of its doctor in treating crew members, it should be similarly liable when it comes to passengers. "[T]he 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." 864 So. 2d at 7 (A6), and "[t]hus, (continued...)

Because a shipowner cannot have the control over a shipboard doctor required for vicarious liability, the *Barbetta* rule is correct, and the district court was wrong to reject it.

III.

THIS ISSUE IS ONE OF GREAT PUBLIC IMPORTANCE

(...continued)
in the case of a seaman, a ship owner is liable for the negligence of the ship's doctor regardless of the degree to which the doctor's medical activities, or the doctor-patient relationship, can be controlled by the ship owner." *Id.* But control is not a factor in liability to crew members, which has historically been based on the special nature of the relationship between shipowner and crew members and which is guaranteed regardless of fault, as the court in *Barbetta* explained:

> [The] difference in treatment between passengers on the one hand and seamen on the other is justified by the statutorily recognized special relationship which exists between a seaman and his employer. As the Supreme Court explained:
>
> > When the seaman becomes committed to the service of the ship, the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. *This duty does not depend upon fault.*

Barbetta, 848 F.2d at 1369 n.1, *quoting DeZon v. American President Lines*, 318 U.S. 660, 667 (1943). This comparison, therefore, cannot provide justification for imposing vicarious liability in the case of passengers.

[18] A concern of the district court was its perception that it was difficult to sue – specifically, obtain jurisdiction over – a doctor personally. But as two of the cases cited in the district court's decision indicate, Florida courts have found personal jurisdiction against ships' physicians in similar cases. *See* 864 So. 2d 8 n.4 (A6 n.4), *citing Rana v. Flynn*, 823 So. 2d 302, 303 (Fla. 3d DCA 2002); *Rossa v. Sills*, 493 So. 2d 1137, 1138 (Fla. 4th DCA 1986). *See also Pota v. Holtz*, 852 So. 2d 379, 381-82 (Fla. 3d DCA 2003).

The district court's decision, contrary to the prevailing law relied on by the cruise industry for over a hundred years, suddenly imposes vicarious liability on shipowners for the negligence of their doctors in treating passengers. This increased liability will have significant impact on the cruise industry, and, in turn, Florida's economy and its citizens. In August of 2003 the Orlando Sentinel reported, from a study by Business Research and Economic Advisors, that:

> [t]he cruise industry spent $4.5 billion in Florida last year [2002], . . . more than any other state. . . .
>
> . . . .
>
> Florida is home to 10 cruise lines and has four of the most active cruise ports worldwide.
>
> Florida accounted for two-thirds of all U.S. passenger embarkations in 2002 . . . .
>
> . . . .
>
> 37 percent of the direct spending done by cruise firms occurs in Florida. California ranked second with 10 percent.
>
> [C]ruises directly and indirectly -- by stimulating hiring in other industries -- support 126,559 jobs in Florida with payroll of $4.3 billion.

Tim Stieghorst, *Florida Receives Biggest Wave of Cruise Spending*, Orlando Sentinel, Aug. 29, 2003, at C3. The majority of cruise lines are based in Florida, and all of those lines require passenger litigation to be filed in Florida. Of the 6,500,000 cruise passengers in the United States in 2002, 4,413,000 embarked from Florida ports.[19] Thus the district court's decision is important not only to the cruise industry and Florida's economy, but to the millions of passengers who take cruises each year

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[19] *The Cruise Industry 2002 Economic Summary*, *available at* http://www.iccl.org/resources/economicstudies.cfm.

from Florida or who are subject to a Florida litigation forum selection clause. Because of the decision's potential impact on the cruise industry, Florida's economy and millions of passengers, it is of great public importance.

In addition, the decision is a radical departure from settled, universally-applied maritime law, and will result in uncertainty and unpredictability. If the decision is left to stand, Florida will have one rule and the rest of the country another. Because of the uncertainty this could cause in the shipping industry, the decision is of great public importance.

CONCLUSION

For all of these reasons, and under the authorities cited, we ask this Court to quash the decision of the district court and reinstate the summary judgment for Carnival on vicarious liability.

Respectfully submitted,

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We certify that on May _____, 2004 we mailed copies of Carnival's Initial Brief to David H. Pollack, Esq., The Law Office of David H. Pollack, LLC (counsel for respondent), The Ingraham Building, 25 S.E. 2nd Avenue, Suite 1020, Miami, FL 33131; and Charles R. Lipcon, Esq., Law Offices of Charles R. Lipcon (counsel for respondent), Two South Biscayne Boulevard, Suite 2480, 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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