IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-393

CARNIVAL CORPORATION,

Petitioner,

v.

DARCE CARLISLE,

Respondent.

CARNIVAL'S REPLY BRIEF

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

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ARGUMENT

A.

The District Court Had No Authority to Reject the Settled Maritime Rule of *Barbetta*

Carlisle argues that Carnival waived its right to raise the issue of the district court's authority to reject the rule of *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), because Carnival raised it for the first time in its motion for rehearing. AB at 11-12.[1] Carnival did not raise the issue earlier for the simple reason that the rule was so clear, the authority so overwhelming, and other courts' adherence to it so uniform (except for the lone district court in *Nietes v. American President Lines, Inc.*, 188 F. Supp. 219 (N.D. Cal. 1959)), that it never occurred to Carnival, though it was certainly implicit in Carnival's arguments, that the district court **B** bound as it was to apply maritime law **B** would reject this settled maritime rule, or that Carnival needed to explain to the court that it had no authority to reject it.

In any event, courts often "exercise [their] discretion to hear . . . newly presented argument" on rehearing, *Perez v. State*, 717 So. 2d 605, 606 (Fla. 3d DCA 1998), for various reasons applicable here. *See Jaworski v. State*, 804 So.

[1] We refer to Carlisle's answer brief as "AB" and our initial brief as "IB."

2d 415, 419 (Fla. 4th DCA 2001) (although "generally issues not raised in a party's brief(s) are deemed waived and may not be considered for the first time in a motion for rehearing . . . we are obligated to entertain any basis to affirm the judgment . . . , even one the appellee has failed to argue"); *State v. Gaines*, 731 So. 2d 7, 8-9 (Fla. 4th DCA 1999) (addressing statute raised for the first time in motions for rehearing because confusion might be engendered), *affirmed* (on ground raised on rehearing), 770 So. 2d 1221 (Fla. 2000); *Regan v. ITT Indus. Credit Co.*, 469 So. 2d 1387, 1390 (Fla. 1st DCA 1984) (addressing belated argument where decision offended fundamental principles governing the administration of justice), *approved*, 487 So. 2d 1047 (Fla. 1986).

On the merits, Carlisle argues that *'[i]n the absence of constraining maritime law* . . . a district court of appeals is free to interpret maritime law as it sees fit" (AB at 12) (emphasis added). But as we pointed out in our initial brief, there is a great deal of constraining maritime law. IB at 21 n.15. At the time of the district court's decision, 27 decisions had followed the *Barbetta* rule and none had followed *Nietes*, written by a district judge in California who decided to ignore Ninth Circuit decisions he was bound to follow. Carlisle discusses *Barbetta* and *Nietes* as though there were no other cases, saying that "[i]n this case, the district court was confronted with *two diametrically opposite decisions*" and that the

district court extensively considered "*both decisions*" (AB at 12) (emphasis added). Carlisle cannot, by simply ignoring them, make 27 decisions and a hundred-year-old rule of law just go away.

To support her surprising statement that the law is not settled, and to obscure the fact that the district court's decision was based on one decision by one out-of-step judge, Carlisle declares that "two federal district courts have expressly rejected Barbetta and a third has criticized the legal foundation upon which it was decided," referring to *Niete*s; *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372 (S.D. Fla. 2004); and *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633 (S.D. Fla. 1993) (AB at 13). First, at the time the district court decided this case, *Nietes* was the *only* case of its kind, the "lone beacon of dissent," as Judge Marcus put it in *Fairley*. 1993 AMC at 1635. Second, as we thoroughly discussed in our initial brief, reliance on *Huntley* is precarious indeed, breaking, as it does **B** in relying on the district court's decision here **B** with federal circuit court and southern district precedent, and representing a complete change of position by its author, who earlier had rejected *Nietes* and praised the *Barbetta* rule as "a sound one." See IB at 13-14 n.10. Further, this Court must examine the correctness of the district court's decision based on the law that existed at the time. The after-the-fact *Huntley* decision **B** wrongly adopting the district court's erroneous decision

B should not figure into this Court's consideration at all.

That brings us to *Fairley*, which is of far more help to Carnival than to Carlisle, because in *Fairley* the court acknowledged that on the issue of vicarious liability it must follow *Barbetta*: "the majority rule precludes suing the shipowner based on the theory of respondeat superior." *Id.*, 1993 AMC at 1639. See discussion of *Fairley*, IB at 14-15.

Carlisle's statement that "there was no controlling precedent on the issue before the district court at the time it rejected Barbetta" (AB at 18; see also AB at 21) is nothing short of delusional. If there was no controlling precedent, why had 27 cases followed the *Barbetta* rule over more than a hundred years? If there was no controlling precedent, why was Judge Marcus constrained in *Fairley* to follow the *Barbetta* rule? If there was no controlling precedent, why, if, as Carlisle claims, *Nietes* was so right and *Barbetta* so wrong, had no court followed *Nietes* in the 44 years since it was decided? The answer is there was a whole host of controlling precedent, and as the United States Supreme Court cases in our initial brief explain, the district court was not free to reject this long-settled rule and interfere with the uniformity of maritime law. IB at 16-22.[2, 3]

[2] Not having much else to rely on, Carlisle makes much of what it refers to as "extensive criticism" of *Barbetta* by scholars. AB at 7. *Barbetta* was decided 16

B.

The *Barbetta* Rule Is Correct

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years ago. The two articles and one treatise section cited by Carlisle, AB at 16-17, and also cited by the district court, 864 So. 2d at 5, are hardly "extensive." As we said in our initial brief, scholars' views are well and good, but courts must follow controlling cases. IB at 15 n.11. Carlisle does not mention the criticism of *Nietes* by several *courts* refusing to follow it. See IB at 12-13.

[3] Carlisle also says that "while this Court is not free to summarily discard principles of *stare decisis* . . . it is not obligated to blindly follow precedent . . . . " (AB at 18). But the district court was bound to apply the settled maritime law, *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So. 2d 488, 490 (Fla. 3d DCA 1986); *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), and not authorized to change it. IB at 8, 16-22. The United States Supreme Court and federal circuit maritime cases Carlisle relies on (AB at 18-21) are of no help to her **B** those courts *are* free to deviate from maritime precedent if they wish. The United States Supreme Court is, of course, the ultimate authority on maritime law.

Carlisle claims that *Barbetta* is based on "flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers" (AB at 22), specifically, that "passengers are free to contract with the ship's doctor for any medical services they may require" (AB at 23), and that "the ship's physician is provided for the convenience of the ship's passengers" (AB at 26). But a closer look at *Barbetta* and other cases following the rule shows that although they may recite or quote the "convenience of passengers" and "free[dom] to contract" language, they are, except for a few very early cases, grounded on the issue of the shipowners' ultimate control over the doctor and the doctor-patient relationship. This is the primary and most prominent rationale for adherence to the rule. *See Barbetta*, 848 F.2d at 1369 (two justifications for the rule, both relating to control: (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"); *Malmed v. Cunard Line Ltd.*, No. 91 CIV. 8164 (KMW), 1995 U.S. Dist. LEXIS 12256, at *7 (S.D.N.Y. Aug. 22, 1995) (unpublished) ("[c]ourts 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"); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished) ("[n]umerous courts have found that the carrier or shipowner 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"); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 491 (D.P.R. 1992) (quoting *Barbetta* expertise and control language); *Hilliard v. Kloster Cruise, Ltd.*, 1991 AMC 314, 317 (E.D. Va. 1990) (citing *Barbetta* justifications **B** lack of control and expertise); *Nanz v. Costa Cruises, Inc.*, 1991 AMC 48, 49-50 (S.D. Fla. 1990); ("each court addressing the issue . . . ha[s] focused on two issues: the element of control existing such that the master/servant doctrine does or does not apply; and the relationship between the passenger and the medical personnel and the level of control, if any, the shipowner/operator has over that relationship"), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989) (citing *Barbetta* justifications **B** lack of control and expertise); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Pa. 1982) (ship's doctor is an independent medical expert; "[w]here . . . control is

lacking, there can be no vicarious liability"); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969) (shipping company does not possess expertise requisite to supervise physician and does not occupy a position of control over a ship's physician).[4, 5]

Judge Marcus, in *Fairley*, recognized the control justification for the rule:

> 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*

[4] The cases we have not listed here (see IB at 9-11) follow the rule without discussing rationale.

[5] Of the four early cases discussing passengers' freedom to consult the doctor or not, only *Churchill v. United Fruit Co.*, 294 F. 400, 401-02 (D. Mass. 1923), did not also rely on some aspect of control. *See O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891) ("the master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger"); *The Great Northern*, 251 F. 826, 831 (9th Cir. 1918) (same); *Allan v. State S.S. Co.*, 30 N.E. 482, 485 (N.Y. 1892) (no officer of the ship is competent to supervise the physician in his treatment of passengers; the responsible person is the physician, independent of all superior authority).

> *regular crew-member* -- the carrier has no meaningful ability to control the ship's doctor.

Id., 1993 AMC at 1637 (emphasis added).

Whether or not one agrees that a cruise ship's doctor is there for the convenience of passengers, or that passengers are free to decline the services of a ship's doctor, the fact remains **B** and this is key, because it is the basis of vicarious liability **B** that a shipowner has neither the control over the doctor-patient relationship nor the expertise to be held vicariously liable for its doctor in treating passengers. It is courts' recognition of this principle that has sustained the *Barbetta* rule all these years.

Carlisle's next argument is that "[t]o 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 . . . ." AB at 27-28. But shipowners *do* assume responsibility. They cannot hire just *any* doctors, they must hire competent, duly qualified doctors, or they *will* be liable. "If the carrier breaches [this] duty, it is responsible for its own negligence." *Barbetta*, 848 F.2d at 1369.[6, 7]

[6] Here, the trial court also entered summary judgment for Carnival on Carlisle's claim of negligent hiring, and the district court affirmed that ruling. 864 So. 2d at 8 n.5.

Even if this Court does not agree, even if it, like the district court, believes that the maritime law should be changed and that *Nietes* is right, it is not for this Court, as it was not for the district court, to change this law and, by doing so, interfere with the uniformity so essential to maritime law. See IB at 16-22.

C.

There Is No Genuine Issue of Material Fact on Apparent Agency, But If This Court Believes There Could Be, It Should Remand So the District Court Can Decide the Issue

In addition to the summary judgment on vicarious liability, the trial court granted summary judgment for Carnival on Carlisle's theory of apparent agency. Because the district court reversed on the vicarious liability ground, it did not reach this issue. 864 So. 2d at 8 n.5. Carlisle argues that this Court can approve

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[7] Carlisle also says that because Carnival is liable to crew members it should be liable to passengers, but the comparison of passengers to crew members is unhelpful, because shipowners' liability to crew members is based on the special nature of the relationship between shipowner and crew members, and is guaranteed regardless of fault. See IB at 27-28 n. 17. And although Carlisle suggests that a plaintiff has no remedy against a ship's doctor, courts have found personal jurisdiction against ships' physicians in similar cases. See IB at 28.

the district court's decision because "there was a genuine issue of material fact as to whether Carnival could be held liable for Dr. Neri's conduct on a theory of apparent agency." AB at 30.

Apparent agency is created when (1) the alleged principal makes some sort of manifestation causing a third party to believe that the alleged agent has authority to act for the benefit of the principal, (2) the belief is reasonable and (3) the claimant reasonably acts on the belief to his detriment. *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *2 (S.D. Fla. Feb. 3, 1995) (unpublished), *citing Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1111 (5th Cir. 1985). Restatement (Second) of Agency ' 267[8] provides:

> *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 (emphasis added).

Apparent agency, then, is predicated on the *principal's* manifestation of agency, applying only when it is "the principal, rather than the agent, who represents or holds out to third parties that the agency exists." *Warren*, 1995 WL

[8] *Cited with approval in Irving v. Doctors Hospital of Lake Worth, Inc.*, 415 So. 2d 55, 57-58 (Fla. 4th DCA 1982).

688421, at *2 (citation and internal quotation marks omitted).

Carlisle says there is a genuine issue of material fact because at the time Dr. Neri treated Carlisle he was wearing a Carnival Cruise Lines nametag, he was wearing an officer's uniform, Carlisle paid him using the "Sail and Sign" card, and Dr. Neri never told them he *wasn't* an employee of the ship. AB at 33-34.

But before Carlisle ever set foot on the ship and saw Dr. Neri in his officer's uniform with his nametag, or used her "Sail and Sign" card, she was on notice, by virtue of her ticket, that the ship's doctors were independent contractors, not employees:

> 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) (emphasis added).[9]

[9] In addition, Carnival's 1997 Cruise Vacation Brochure, in a section entitled "Things to Know Before You Go," states: "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) (emphasis added).

The district court, relying on *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985), and *Fairley v. Royal Cruise Line*, held that this provision could not limit Carnival's liability:

> As for the exculpatory language contained in the passenger ticket, 46 App. U.S.C.A. ' 183c invalidates certain purported disclaimers of liability:
>
> > It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement *any provision or limitation* (1) *purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability*, or from liability beyond any stipulated amount, for such loss or injury . . . All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be *against public policy and shall be null and void and of no effect*.
>
> *See Carlisle v. Ulysses Line, Ltd.*, 475 So. 2d 248 (Fla. 3d DCA 1985) (exculpatory clause attempting to relieve cruise line from liability for negligence of its servants would be unlawful under 46 U.S.C. ' 183c). *See also Fairley*, 1993 AMC at 1641, n. 7 (citing 46 App. U.S.C.A. ' 183c for the proposition that cruise line's disclaimer of liability for physician's negligence did not, as a matter of law, preclude apparent authority claim). To the extent the cruise ticket seeks to limit Carnival's liability for the negligence of its agent, it is invalid.

Carlisle v. Carnival, 864 So. 2d 1, 7-8 (Fla. 3d DCA 2003) (footnote omitted).

But we submit that application of this statute assumes the doctor is a "servant,"

and thus begs the question. To the extent "servant" means one under the employer's control, the doctor, for the reasons we've given above, cannot be considered a servant, and the statute cannot apply to prevent Carnival from relying on the disclaimer in Carlisle's ticket.

Whether the servants were indeed servants was not the issue in *Carlisle v. Ulysses Line,* and in *Fairley*, denying a motion to dismiss, the court raised the issue in a footnote, but did not resolve it:

> Even considering the language of [the paragraph in the plaintiff's passenger contract providing that the physician on board was an independent contractor], given the procedural posture under Rule 12(b)(6) and the record before the court, we are convinced neither that Plaintiff has failed to state a claim upon which relief may be granted, nor that it would be impossible for Plaintiff ultimately to prevail [on its apparent agency and joint venture theories].
>
> [Footnote:] Further, although neither party cited the provision or any caselaw thereunder, we note *in passing* that 46 U.S.C. app. ' 183c prohibits owners of vessels transporting passengers from disclaiming liability "in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants."

Id. at 1641 and n. 7 (emphasis added).

The court in *Warren v. Ajax Navigation Corp.* held that in view of the "clear" and "established law" that a shipowner is not liable for its doctor's negligence, the plaintiffs' belief that the doctor was the ship's agent was "unreasonable." 1995 WL 688421, at *3. To similar effect is *Barbetta*:

> Because we conclude that the law does not impose respondeat superior liability upon a carrier or ship owner for the negligence of its doctor, we do not reach the question of whether, if the law did impose liability, the contractual provision on which the district court focused validly removed it. *See* 46 U.S.C.App. ' 183c (prohibiting vessels transporting passengers from disclaiming liability for the negligence of its servants which causes death or bodily injury)[.] . . . We note only that because there was no liability to disclaim, the contractual provision is not a disclaimer; it is, instead, merely an accurate restatement of the principles of general maritime law which we have reviewed above.

Id. at 1372 n. 2. Carnival, as principal, did not hold Dr. Neri out as its agent. Summary judgment on the issue of apparent agency was correct.

Once this Court accepts jurisdiction it may, of course, "consider the entire cause on the merits." *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984); *Bould v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977). But since the district court did not reach the issue of apparent agency, we respectfully submit that this Court should remand, as it has often done, so that the district court may address it. *See, e.g., Ford v. State*, 825 So. 2d 358, 362 (Fla. 2002) (remanding to district court to review issue not reached); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 915 (Fla. 1995) (same); *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 643 (Fla. 1988) (same); *Waddell v. Schwarz*, 405 So. 2d 978, 980 (Fla. 1981) (same).

Even if this Court concludes that Carnival may be liable on an apparent

agency theory, we trust it will address the district court's decision on vicarious liability, a decision so important that the district court certified it to this Court as one of great public importance, and a decision that, if left to stand, will cause great harm and uncertainty.

D.

The Question Is One of Great Public Importance

As we said in our initial brief, this is a case of great public importance because of the effect that increased liability will have on the cruise industry, and, in turn, Florida's economy and its citizens, and because it is a radical departure from settled, universally applied maritime law that will result in uncertainty and unpredictability. IB at 28-30. Carlisle's suggestion that the case is not important because "the number of persons whose lives will actually be effected [sic] is fairly limited," and "the risk of accidents, attack and disease onboard a cruise ship is relatively small," AB at 35-36, is, of course, based on past statistics. No one can predict the future. Liability, once imposed, could *potentially* extend to many passengers. In addition, *any* increase in liability will have ramifications on the industry.

As for Carlisle's argument that no constitutional or fundamental right is affected, under the United States Constitution and the cases interpreting it, see

IB at 16-22, a state court has no authority to change maritime law, and the question of the district court's authority to do so is a question of great public importance.

CONCLUSION

For all of these reasons, and for the reasons given in our initial brief, 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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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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