IN THE SUPREME COURT OF FLORIDA

RACHELLE M. STELLAS and
FRANK STELLAS, her husband,

Petitioners,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.

CASE NO. 88,250

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF AMICI CURIAE, THE FLORIDA HOSPITAL ASSOCIATION, THE ASSOCIATION OF VOLUNTARY HOSPITALS OF FLORIDA, INC., THE FLORIDA STATUTORY TEACHING HOSPITAL COUNCIL, AND THE FLORIDA LEAGUE OF HOSPITALS

GEORGE N. MEROS, JR.
Florida Bar No. 263321
RUMBERGER, KIRK & CALDWELL, P.A.
106 East College Avenue, Suite 700
Post Office Box 10507
Tallahassee, Florida 32302
Telephone (904) 222-6550
Facsimile (904) 222-8783

Attorney for The Florida Hospital Association,
The Association of Voluntary Hospitals of Florida, Inc.,
The Florida Statutory Teaching Hospital Council, and
The Florida League of Hospitals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

STATEMENT OF THE CASE AND FACTS

The Hospitals adopt and incorporate the factual statements of Respondent, Alamo Rent-A-Car, Inc., and Amicus Curiae, Florida Defense Lawyers Association.

This brief is filed on behalf of The Florida Hospital Association (FHA), The Association of Voluntary Hospitals of Florida, Inc. (AVHF), The Florida League of Hospitals (League), and The Florida Statutory Teaching Hospital Council (Council). All have been granted amici curiae status by stipulation of the parties in accordance with Fla.R.App.P. 9.370.

The FHA is comprised of approximately 250 hospitals, varying in size from 32 beds to over 1,000 beds. Its members are representative of the various forms of ownership currently existing in the hospital field. The AVHF represents public hospitals and the private, not-for-profit hospitals throughout the state. AVHF's 85 hospitals provide more than 85% of all charity health care in the State of Florida. The League is a trade association representing approximately 70 investor-owned hospitals in Florida. The Council consists of 6 hospitals meeting the statutory criteria established in Section 408.07(49), Florida Statutes (1995). It includes hospitals affiliated with an accredited medical school that exhibit activity in the area of medical education, as reflected by at least 7 different resident physician specialties and the presence of 100 or more resident physicians. The Council currently consists of Jackson Memorial Hospital, Mount Sinai Medical Center, Orlando Regional Health Care Systems, Shands

Hospital, Tampa General Hospital, and University Medical Center. The mission of these hospitals includes delivery of high quality health care to Florida citizens, including providing care to indigent patients; providing medical care to persons with highly complex and severe illnesses; training medical professionals; and performing medical research.

The FHA, AVHF, the League, and the Council have traditionally undertaken to assist their members in delivering quality health care services in an efficient and cost-effective manner. A fair tort system, and particularly an equitable allocation of responsibility for tortious conduct, is of critical importance in their efforts to provide both quality and cost-effective health care. Any retreat to a system where a litigant would be forced to pay more than its fair share of a loss would jeopardize the ability of these hospitals to accomplish their mission. These Amici, therefore, have a keen interest in convincing this Court to abide by its decision in Fabre v. Marin and enforce the legislative declaration that one's liability should equate with one's fault. Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993), receded from on other grounds, Wells v. TMRMC, 659 So. 2d 249 (Fla. 1995).

SUMMARY OF THE ARGUMENT

This Court should reject Petitioners' request to abandon the recent decision in Fabre v. Marin. Such precipitous action would be unprecedented and unwise. The Florida Legislature has twice confirmed that Fabre properly interpreted Section 768.81, Florida Statutes. Similarly, this Court has no factual basis on which to hold Fabre unconstitutional. Petitioners have not even raised a due process challenge to Section 768.81. Equally important, a procedural due process claim is dependent upon a factual record demonstrating an unconstitutional process -- facts that do not exist in this record.

Contrary to the unsupported accusations of the Academy, Fabre is fair, and it works in actual application. Fabre has not created delay in settlements or increased the number of pending cases. The records of the State Court Administrator reveal that since Fabre, cases have settled at approximately the same rate as before Fabre, and cases are disposed of within the same time range as before Fabre.

If this Court were to abandon Fabre, it would also abandon its principled adherence to Stare Decisis. The judiciary must guard against sudden changes in course that serve to lessen confidence in the judiciary and disturb settled expectations. This is especially true where, as here, the Legislature has confirmed the wisdom of Fabre, and there are no facts to demonstrate that it has been applied unfairly or unconstitutionally.

A. FABRE SHOULD NOT BE ABANDONED, SINCE THERE IS NOTHING TO SUGGEST THAT THIS COURT MISINTERPRETED THE LEGISLATIVE INTENT UNDERLYING SECTION 768.81

Fabre does not represent an extension of the common law or creation of a new common law principal. To the contrary, the only issue in Fabre was the legislative intent underlying Section 768.81. Accordingly, Fabre should not be overruled unless there are unmistakable indications that it misinterpreted the legislative will, or the facts demonstrate that the statute (as construed) is unconstitutional beyond a reasonable doubt. State v. Kinner, 398 so. 2d 1360 (Fla. 1981); Hadley v. Dep't of Administration, 411 so. 2d 184, 187 (Fla. 1982); Amisub v. Department of HRS, 577 So. 2d 648 (Fla. 1st DCA 1991) (courts must honor legislative intent and the policy behind an enactment).

Petitioners make no attempt to prove that Fabre misinterpreted Section 768.81. In fact, just the opposite is true. In both the 1994 and 1995 legislative sessions, the Academy strenuously urged the Legislature to pass a law that would have repealed Fabre and amended Section 768.81. The Legislature rejected these proposals reaffirming that Fabre represents true legislative intent. Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of House Bills at 311, HB 1425; Fla. Legis., Final Legislative Bill Information, 1995 Regular Session, History of Senate Bills at 75.SB 644.

Notably, the legislation interpreted in Fabre was created at the express invitation of this Court in Walt Disney World Co. v. Wood, 515 So. 2d 198 (Fla. 1987). In that case Disney suffered the

palpable unfairness of having to pay 86% of a plaintiff's loss when the jury found it to be only 1% liable - a result thrust upon Disney by the doctrine of joint and several liability. Recognizing the unfairness of that result, the Court invited the Legislature to reconsider the doctrine in subsequent legislation. 515 So. 2d at 202. The Legislature accepted the invitation and enacted amendments to Section 768.81. Now, as a result of these amendments and the Fabre decision, the inequity so obvious in Disney has been replaced by a scheme where a tortfeasor must pay only its fair share of a non-economic loss. That result is not only consistent with legislative intent, it is the very basis of the amendments to 768.81.

Lastly, just as the Florida Legislature has reaffirmed the validity of the Fabre decision, the various states that share a similar statutory scheme continue to equate liability with fault. See DaFonte v. Up Right, Inc., 828 P.2d 140 (Cal. 1992); Brown v. Keill, 580 P.2d 867 (Kan. 1978); Barlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. Ct. App.); Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987) (interpreting Louisiana law); Johnson v. Niagra Mach. & Tool Works, 666 F.2d 1223 (Cir. 1981) (interpreting Minnesota law); Connar v. West Shore Eauiwment, 227 N.W.2d 660 (Wis. 1975); Paul v. N. L. Indus., Inc., 624 P.2d 68 (Okla. 1980).

In summary, the Fabre decision interpreted legislative amendments that were made at the invitation of this Court to remedy unfairness in Florida's tort system. Fabre interpreted those

amendments to mean that a tortfeasor should be required to pay only its fair share of a loss. The Florida Legislature has twice reaffirmed that intent. This record provides no basis to conclude to the contrary.

B. PETITIONERS HAVE NOT PROVEN, AND THE FACTS DO NOT DEMONSTRATE, **THAT** 768.81 IS UNCONSTITUTIONAL

In an obvious attempt to seize upon the concerns of two Justices concerning the procedural ramifications of the Fabre decision[1], the Academy asserts that Section 768.81 is unconstitutional. The assertion is wrong for multiple reasons. First, the record does not appear to reflect that Petitioners properly raised or litigated the constitutionality of 768.81 in the trial court or district court of appeal. Stellas v. Alamo Rent-A-Car, 673 So. 2d 940 (Fla. 3d DCA 1996) . Accordingly, this Court should not entertain an allegation of unconstitutionality raised for the first time on appeal. Penn v. Florida Defense Fin. & Acct'g. Serv. Cert. Auth., 623 So. 2d 459 (Fla. 1993).

Second, while Petitioners and the Academy suggest that Section 768.81 violates procedural due process, there are no facts to demonstrate that the statute has deprived these litigants of procedural due process in actual application. A claim of deprivation of procedural due process can be decided only on the basis of substantial facts of record:

[1]Wells v. TMRMC, 659 So. 2d 249, 255 (Fla. 1995) (Wells, J., concurring).

> As we have noted in the past, '[t]he extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved.' . . . The United States Supreme Court observed similarly in stating that '[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' . . . There is, therefore, no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met. We must instead consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand.

Hadley v. Department of Admin., 411 So. 2d 184, 187 (Fla. 1982) (citations omitted). This Court cannot decide important constitutional issues in a factual vacuum, no matter how fervent Petitioners' or the Academy's disagreement with the legislative intent of Section 768.81. Accordingly, even if the constitutionality of 768.81 were properly at issue (and it is not), this Court should decline to address that issue in the absence of factual support.

In the face of overwhelming Florida precedent holding that a court should not declare a statute unconstitutional in the absence of a solid factual record, the Academy cites a single decision out of Montana to the effect that a statute similar to 768.81 violates "substantive due process." That case is of no help to Petitioners. In an en banc decision filed almost simultaneously with this Montana decision, the Eleventh Circuit Court of Appeals harmonized U.S. Supreme Court decisions and held that a claim of arbitrary or capricious legislation or governmental conduct does not give rise to a substantive due process claim. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). Substantive due process is limited to claims involving "fundamental rights," namely, those rights specifically

enumerated in the Bill of Rights, or those within the penumbra of the Bill of Rights. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) ; accord, State v. Powell, 497 So. 2d 1188, 1193 (Fla. 1987); Jacobi v. Fenster-Stock, 21 Fla. L. Weekly D 1905 (Fla. 3d DCA Aug. 21, 1996). In actuality, the Montana decision is based upon the justices' disagreement with the legislative policy underlying the statute. Florida decisions emphasize, however, that it is not within the court's province to strike a statute because of judicial disagreement with legislative policy. Baker v. State, 636 So. 2d 1342 (Fla. 1994); Tatzel v. State, 356 So. 2d 787 (Fla. 1976). It is a "fundamental principle" that a court has the duty to resolve all doubts concerning the validity of a statute in favor of its constitutionality, and to strike a statute only if it is unconstitutional "beyond any reasonable doubt." State v. Kinner, 398 So. 2d at 1363; State v. Aiuppa, 298 So. 2d 391, 396 (Fla. 1974). The Court recently reaffirmed these principles:

> "The Legislature has the final word on declarations on public policy . . . ", and courts should not overturn the legislature's presumptively correct factual and policy findings unless the findings are clearly erroneous.

University of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993).

This case bears no resemblance to Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). There, the facts of record and numerous judicial decisions demonstrated that Florida's medical mediation statute, in practical application, deprived litigants of their right to due process for wholly arbitrary reasons unrelated to the merits of the cause. Because the necessary facts were both patent on the face of

judicial decisions and the record in that case, the Court had ample factual support for its finding of unconstitutionality. Id at 235-237. Here, to the contrary, there are no judicial decisions or any facts to show that 768.81 has deprived any litigant of procedural due process, or has violated any fundamental right specifically guaranteed by the Bill of Rights. Because this Court has repeatedly refused to issue advisory opinions on the constitutionality of statutes, this Court should reject the Academy's invitation to declare 768.81 unconstitutional in the absence of a factual record supporting that holding.

C. FABRE IS FAIR, AND IT WORKS

Section 768.81 is not only constitutional, it is also fair, and it works in actual practice. The intent behind 768.81 is as simple as it is equitable -- in most instances, a tortfeasor should be responsible only for its fair share of a loss. This Court made the point eloquently in Fabre:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the co-defendant to pay more than his fair share of the loss.

623 So. 2d at 1187, citing from Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978).

Indeed, were this Court to abandon Fabre, the state would return to the days of Walt Disnev v. Wood, where those who purchase insurance or have other resources would be forced to pay all or an unfair share of a loss. A return to Walt Disnev v. Wood would increase the cost of medical care, which might cause higher and unaffordable health insurance premiums. The Legislature has explicitly refused to turn back the clock. This Court should do so as well.

Fabre is not only fair, it works in real life. The Academy declares to this Court, without any factual support, that "cases don't settle," and "cases never end," due to Fabre. (Academy br. at p. 13.) The Court's own statistics refute these allegations. Statistics compiled and published by the State Court Administrator's Office reflect that since August, 1993 (when Fabre was decided), the number of civil cases that settled prior to trial has risen, refuting the claim that "cases never settle."[2] The statistics also show that civil jury cases have concluded at virtually the same rate as before the Fabre decision, refuting the notion that "cases never go away." See App. I and II.

Statistics also reflect that Fabre has prevented both small and large defendants alike from paying millions of dollars more than their fair share of liability. Included as Appendix III and IV are a verdict form and jury verdict reports reflecting various

[2]Of course, it would be statistically inappropriate to rely on the percentage of cases settled every year, since the number of cases filed in a given year has no relation to the cases settled in that year (that is, many cases that settled in 1995 were actually filed in 1990, 1991, 1992, etc).

lawsuits in which a jury has apportioned fault against a non-party tortfeasor.[3] These documents demonstrate that in this small sampling of cases, the Fabre decision prevented co-defendants from paying over $2.4 million in damages properly attributable to other wrongdoers, If this Court were to abandon Fabre, those millions of dollars would be borne by deep pocket defendants (including hospitals), or those individuals or small businesses responsible enough to purchase liability insurance. If Fabre is reversed, hospitals who are minimally at fault would be forced (as deep pockets) to pay entire claims, thus resulting in less dollars available for patient care, medical education, and medical research. That result might be desirable to a plaintiff or his attorney, but it is not fair, and it is not the legislative policy of this state.

Finally, Fabre should not be abandoned merely because it did not definitively address every possible factual scenario concerning a fair apportionment of damages. Neither this Court nor the Legislature is omniscient; neither can predict the course of human events. Fabre anticipated that future cases would have to fill in the interstices of legislative policy underlying Section 768.81. Fabre, 623 So. 2d at 1186, n.3. And since Fabre, this Court and others have done just that, providing specific rules governing application of 768.81, including procedural protections for

[3]Appendix III is 'Verdict of the Jury" in Zhang v. General Motors Corporation! No. 89-268-CIV-FTM-20D (M.D. Fla. filed Nov. 13, 1992). Appendix IV is Fla. Jury Verdict Rep. Oct. 1993, Nov. 1993, April 1994, Jan. 1995, Feb. 1995, June 1995, and July 1995.

litigants. Wells v. TMRMC, 659 So. 2d 249 (Fla. 1995); Nash v. Wells Fargo Guard Services, Inc., 21 Fla. L. Weekly S292 (Fla. July 3, 1996); WR Grace v. Dougherty, 636 So. 2d 746 (Fla. 2d DCA 1994). This prudent case-by-case adjudication will ensure that 768.81 will be applied equitably to all citizens.

D. STARE DECISIS COMPELS THIS COURT'S ADHERENCE TO THE FABRE DECISION

> I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity. That presumption is supported by much more than the desire to foster an appearance of certainty and impartiality in the administration of justice, or the interest in facilitating the labors of judges. The presumption is an essential thread in the mantle of protection that the law affords the individual. Citizens must have confidence that the rules on which they rely in ordering their affairs - particularly when they are prepared to take issue with those in power in doing so - are rules of law and not merely the opinions of a small group of men who temporarily occupy high office. It is the unpopular or beleaguered individual - not the man in power - who has the greatest stake in the integrity of the law.

Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, 101 S. Ct. 1032, 1036-1037 (1981). (Stevens, J., concurring.)

This Court should stand by its decision in Fabre v. Marin. To do otherwise would undermine Stare Decisis, doctrine of fundamental importance to Florida Law. Perez v. State, 620 So. 2d 1256, 1258 (Fla. 1993) (Overton, J., concurring); Keith v. News & Sun Sentinel, Co., 667 So. 2d 167 (Fla. 1995) (Anstead, J.); State v. Gray, 654 So. 2d 552 (Fla. 1995) (Harding, J.); Amendment to

Florida Rule of Judicial Administration 2.070 - Court Reporting, 661 so. 2d 806 (Fla. **1995)** (Harding, J. **and** Grimes, J. dissenting).

Indeed, Stare Decisis commands adherence to recent decisions even if some Justices believe that a decision was wrongly decided. This is particularly so where a reversal of course would have an impact on settled expectations, or run the risk of undermining public confidence in the stability of basic rules of law. Perez v. State, 620 So. 2d at 1259; Planned Parenthood of S.E. Pa. v. Casey, 112 s. ct. 2791 (1992) .

Both of these factors argue strongly against abandonment of Fabre v. Marin. Since the 1988 passage of amendments to Section 768.81, and most particularly since this Court's decision in **Fabre,** Florida citizens have come to rely upon the principle that, in most instances, a tortfeasor will be required to pay only its fair **share** of a given loss. Individuals have purchased health insurance and hospitals **have** purchased liability insurance and have priced their services with the certain knowledge that they will not be forced to **pay** for the damages caused by others. Health and liability insurance companies and the community as a whole have, in turn, based their business and personal judgments on the same fundamental assumptions. Were this Court to reverse course and overrule Fabre, individuals, businesses, and hospitals alike would immediately be underinsured, and insurance companies would **have no** choice but to raise the cost of insurance because of substantially increased risks. Those additional costs will have a ripple effect throughout the community.

It is just as certain that such a precipitous judicial 'reversal would undermine public confidence in the stability of our rules of law. To overrule Fabre, this Court would have to hold either that it had misinterpreted the legislative intent behind Section 768.81 (in the face of two legislative reaffirmations of Fabre) or find the statute unconstitutional (without any factual record to support that conclusion). Either ruling defies common sense and violates settled principles of law. Indeed, one would be hard pressed to explain such a ruling to an individual who would be forced to pay higher insurance premiums due to increased risk, or to an individual who is sued after Fabre has been overruled and would be required to pay more than his fair share of a loss. In both instances the confidence of these individuals, and the community at large, would be undermined by such an abrupt departure from recent precedent.

This Court should adhere to the numerous decisions reaffirming the importance of Stare Decisis in Florida and reject the invitation to overrule Fabre v. Marin.

E. SECTION 768.81 AND BASIC NOTIONS OF FAIRNESS REQUIRE APPORTIONMENT OF FAULT AMONG ALL WRONGDOERS

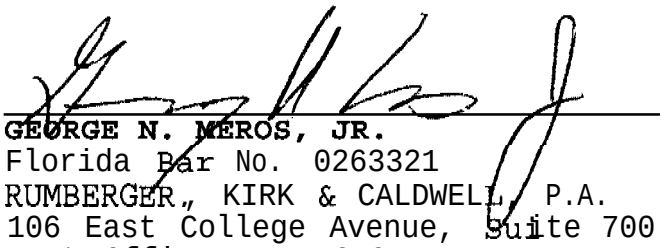
To avoid repetition, these Amici adopt and incorporate the arguments of Alamo and Amicus the Florida Defense Lawyers Association on the issue whether Fabre requires apportionment of fault among negligent and intentional wrongdoers alike.

One additional note. Section 768.81 means what it says -- a person should be responsible for only his fair share of a loss, regardless of the degree of culpability of a another wrongdoer. That is fair, and it is precisely what the Legislature intended.

CONCLUSION

These Amici respectfully request that this Court adhere to the strong legislative policy that one should be responsible only for his fair share of a loss. The Court should decline the invitation to reverse Fabre and rewrite Section 768.81.

Respectfully submitted,



GEORGE N. MEROS, JR.
Florida Bar No. 0263321
RUMBERGER, KIRK & CALDWELL, P.A.
106 East College Avenue, Suite 700
Post Office Box 10507
Tallahassee, Florida 32302
Telephone (904) 222-6550
Facsimile (904) 222-8783

Attorney for The Florida Hospital Association, The Association of Voluntary Hospitals of Florida, Inc., The Florida Statutory Teaching Hospital Council, and The Florida League of Hospitals

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by the United States Mail Service to:

G. Bart Billbrough
Walton Lantaff Schroeder & Carson
One Biscayne Tower, 25th Floor
2 South Biscayne Boulevard
Miami, Florida 33131

Scott Jay Feder
Scott L. Poisson
Feder & Fine, P.A.
3100 First Union Financial Ctr.
200 South Biscayne Boulevard
Miami, Florida 33131

Asa Groves
Darton II PH II
9130 South Dadeland Boulevard
Miami, Florida 33156

Kerry C. McGuinn, Jr.
Rywant, Alvarez, Jones & Russo
109 North Brush Street
Tampa, Florida 33601

Joel S. Perwin
Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin
25 West Flagler Street
Miami, Florida 33130

Jack W. Shaw
Brown, Obringer, Shaw, Beardsley & DeCandio, P.A.
225 Water Street
Jacksonville, Florida 32202

this 13th day of September, 1996.

GEORGE N. MEROS, JR.