Supreme Court No. S209836
2nd Civil No. B235409
Los Angeles County Superior Court No. VC058225

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CATHERINE FLORES

Plaintiff and Appellant,

vs.

PRESBYTERIAN INTERCOMMUNITY HOSPITAL

Defendant and Respondent.

After a Decision by The Court Of Appeal, Second Appellate District,
Case No. B235409

REPLY TO ANSWER TO PETITION FOR REVIEW

FONDA & FRASER, LLP
*Peter M. Fonda, State Bar No. 057023
Kristen J. Heim, State Bar No. 132657
1925 Century Park East, Suite 1360
Los Angeles, California 90067-2701
Telephone: (310) 553-3320
Facsimile: (310) 553-4232
pfonda@fondafraserlaw.com

Attorneys for Defendant, Respondent, and Petitioner
PRESBYTERIAN INTERCOMMUNITY HOSPITAL

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INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The Answer to Petition for Review filed by Plaintiff and Respondent, Katherine Flores (hereinafter "Flores"), unwittingly underscores the importance of granting the Petition for Review. The Answer graphically reveals a misunderstanding of the Legislative intent

behind California's Medical Injury Compensation Reform Act ("MICRA"). If allowed to stand the decision by Division Three of the Second Appellate District in Flores will resurrect a long dormant and ill-reasoned appellate decision now almost forty (40) years old. It also lends added support to an unfortunate decisional split in the law interpreting medical negligence actions causing havoc in the trial courts across the state and destroying a well-developed body of law regarding the scope of MICRA.

This court should not be deceived by Flores' attempt to re-cast the appellate court's opinion as "very limited" to the specific allegations of the Complaint.

LEGAL DISCUSSION

(1) Flores' Answer Acknowledges an Existing Conflict in the Law Regarding What Constitutes Professional Negligence for the Purposes of Application of MICRA.

While the Answer asserts that the review of the decision in *Flores* "will not serve to secure uniformity of decision" and therefore fails to qualify for review pursuant to California Rule of Court 8.500(b)(1) ("when necessary to secure uniformity of decision"), Flores has repeatedly acknowledged that there is an existing conflict between the two lines of appellate decisions following *Gopaul vs. Herrick Memorial Hospital* (1974) 38 Cal.App.3d 1002 and *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50. (See, for example, "Flores would admit that

there is a conflict and the decisions rendered in *Gopaul* and *Murillo*" as to what constitutes professional negligence [see Ans. Pet. Rev. at 12-13]; "Flores would admit that a conflict and lack of uniformity exists between *Gopaul* and it progeny on one side and *Murillo* on the other with respect to the definition 'professional negligence' in the rendition of professional services."], Ans. Pet. Rev. at 18.)

Simply stated, Flores cannot, with a straight-face assert (as she does) "There is no conflict between Flores and *Murillo* and its progeny to be resolved." (Ans. Pet. Rev. at 17.)

(2) Flores' Attempts to Re-Cast the Thrust of the Appellate Decision by Inventing a False Distinction Between Claims Based on Negligent Services and Those Based on Negligent Maintenance of Equipment Used in Providing Those Services.

Flores misrepresents that California Code of Civil Procedure §340.5 is strictly limited in its application to only those cases involving "professional negligence in the rendition of professional services," interpreting "professional services" as something less than "services [that] are within the scope of services for which the [healthcare provider] is licensed," (C.C.P. §340.5).

Surely it is beyond debate that the law in California has long recognized that properly maintaining equipment, used to provide medical care to in-patients in a hospital, is an inherent part of providing medical

care. Nonetheless, under Flores' false distinction, negligent calibration of an x-ray machine or the failure to maintain surgical equipment properly sterilized would not be "professional negligence" because it would only constitute a failure to maintain equipment or premises and not "professional skill" or "medical skill" (Ans. Pet. Rev. 15). Not only does that distinction make no sense, but it would insert language into C.C.P. §340.5 which would totally destroy its applicability to much of those services rendered by a hospital in its capacity as a licensed healthcare provider.

A hospital bed is as much a part of the equipment used to treat a patient as an x-ray machine or surgical instruments. The distinction between "professional services" and maintaining hospital equipment, as suggested by *Flores*, would emasculate the provisions of MICRA and, specifically, the application of C.C.P. §340.5.

However assuming *arguendo* that plaintiff's theory holds water, this distinction or dichotomy is a further reason the Court should grant review. If it is Flores' theory that there exists a distinction in the application of C.C.P. §340.5, and therefore MICRA, between "professional services" and the faulty maintenance of medical equipment by a healthcare provider, that itself is an important unresolved issue that this Court should address. Therefore, rather than suggesting a reason to avoid review, Flores' theory as espoused in her Answer is an **additional** reason why review is necessary.

If Flores' theory is correct and if the Opinion of Division Three of the Second District Court of Appeal is correct in its application of the law, there has been imposed a new, far-reaching reading of MICRA that excludes from its scope much of what a hospital does in affording care to patients. Under Flores' reasoning allegations of harm from a broken heart monitor, improper sterilized equipment, or hospital beds which are not properly maintained, are outside the scope of MICRA even though those pieces of equipment are utilized in the rendition of patient care and are integral to the delivery of patient care. Under Flores' newly articulated theory, hospitals and healthcare providers (not to mention their insurance carriers), do not and cannot know where the line is drawn between what is covered under MICRA and what is excluded. That result is the exact danger that MICRA was intended to avoid – uncertainty and risk as to hospitals' liability in the course of treating patients by providing a safe environment in which the care and treatment of patients by other healthcare providers may be carried out, with resultant increases in healthcare insurance rates[1].

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[1] "The Legislature's objective was to reduce the number of 'long tail' claims attributable to the tolling provisions formally available in malpractice actions." (*Photias vs. Doerfler* (1996) 45 Cal.App.4th 1014, 1019-1020. "Commentators had observed that the delayed discovery rule and the resulting 'long tail' claims made it difficult to set premiums at an appropriate level. [Citations.] Presumably, the legislative goal in amending §340.5 was to give insurers greater certainty about their liability for any given period of coverage, so that premiums could be

(3) Review Should be Granted to Settle the Important Question of Law of What Constitutes "Professional Negligence" in the Rendition of Healthcare Services by a Hospital.

If the *Flores* decision is allowed to stand the body of law developed in the last nearly four decades would be leading to a destruction of the understanding of the bench, bar, and public of the application of MICRA. Flores would have this court believe that C.C.P. §340.5 and, therefore, MICRA, applies strictly to professional "services", limiting that word to exclude the efforts of a hospital to provide a safe environment in which the care and diagnosis of patients may be carried out. *Flores* would create uncertainty in the understanding of the bench, bar, and healthcare providers of what constitutes "professional negligence", defined in C.C.P. §340.5(2) to be a "negligent act or omission to act by a healthcare provider in the rendering of professional services."

Petitioner believes that the correct answer to the issue posed in this Petition is that if the alleged negligence arises out of a healthcare provider's diagnosis, treatment, or provision of care to a patient, including the acts or omissions integral to those for which the healthcare provider is licensed, MICRA applies. Whether that is, or is not, the standard is the essential

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set to cover costs." (*Young vs. Haines* (1986) 41 Cal.3d 883, 900; see *David M. vs. Beverly Hospital* (2005) 131 Cal.App.4th 1272, 1277.)

question that needs to be resolved. That issue is squarely presented in this case – a claim by a patient of an injury allegedly suffered during the course of her treatment and care while in a hospital.

Flores has acknowledged that she was a patient under the defendant's care (see Opinion at 2, fn.2). She has alleged that she was injured in the course of that care by the condition of a piece of equipment – the hospital bed – being used in the course of her care. Flores claims that, as decided by the appellate court, had she claimed her injuries were due to negligent **latching** of the bed rail, her claim would have been time-barred by Code of Civil Procedure §340.5. She contends, however, that instead the hospital failed to exercise ordinary care to maintain the bed rails in a safe condition and that its failure to properly maintain the bed rails allowing them to collapse, constituted ordinary negligence subject to that longer two-year statute of limitations. (See Ans. Pet. Rev. 16-17.) Flores asserts that the bench, bar, healthcare providers, and the general public, should be satisfied with this wavy indistinct line between what constitutes ordinary as opposed to professional negligence. Petitioner asserts Flores' position only underscores the need for review by this court.

Petitioner urges that the line between professional negligence in the rendering of care to patients, subject to the provisions of MICRA, and those situations which fall outside the scope of MICRA, is an important and

indeed a compelling issue. Flores acknowledges that it is an issue on which there is conflict and confusion. Review, accordingly, should be granted.

(4) A Recent Appellate Opinion Supports Petitioner's Interpretation of the Scope of C.C.P. §340.5.

In January of 2013, Division Four of the Second Appellate District rendered its decision in *So vs. Shin* (2013) Cal.App.4th 652)[2]. Briefly, in *So*, plaintiff, following a miscarriage, underwent a dilation and curettage procedure, and alleged she was administered inadequate anesthesia and woke during the procedure. She sued her anesthesiologist, the anesthesiologist group, and the hospital where the surgery was performed. The claim against the hospital was premised upon *respondeat superior*. The trial court sustained demurrers to the causes of action for assault and battery and intentional infliction of emotional distress and later granted a motion for judgment on the pleadings as to the negligence claim. (*Id.* at 657-661.)

Insofar as that opinion is relevant to the issues in *Flores*, Division Four of the Second District Court of Appeal acknowledged that the "Courts have broadly interpreted in the rendering of 'professional services'" as that term is used in C.C.P. §340.5. (*Id.* at 663.)

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[2] On April 17, 2013, the California Supreme Court issued an Order denying the request for depublication of the opinion in *So*, in which a Petition for a Re-Hearing in the appellate court was denied on January 28, 2013.

In *So*, the court cited, with approval, the decisions in *Murillo, supra*, and *Canister vs. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388. In *Canister*, the plaintiff, police officer, was injured when an ambulance in which he was transporting an arrestee hit a curb. In discussing the application of the MICRA statutes to the facts in *Canister*, the Second District observed "Although the act of operating an ambulance may be performed by someone having no special knowledge, skill or care as a member of the medical profession, this does not mean the employees here in question were not acting as healthcare providers in transporting the patient to a medical facility." (*Id.* at 664, citing *Canister*, *supra*, at 404.) In *So*, the court referred to *Bellamy vs. Appellate Department* (1996) 50 Cal.App.4th 797 with approval and concluded that as a hospital is a healthcare provider, providing in-patient care is within the scope of services for which a hospital is licensed (referring to Health & Safety Code §1250), (So at 668.) The *So* court held that since the alleged negligence was in failing to "safeguard[e] incapacitated patients" the claim was "clearly within the scope of services for which the hospital is licensed, [and] its alleged failure to do so necessarily states a claim for professional negligence." (*So* at 668.)

That reasoning applies with equal force here. The claim against petitioner was one for professional negligence, subject to C.C.P. §340.5

CONCLUSION

The Answer to the Petition for Review strengthens Petitioner's argument that review should be granted to address an important question of law and to resolve a split of authority. The Answer by Flores which attempts to re-cast the appellate opinion as one of narrow scope and application is simply wrong. The *Flores* decision severely limits the application of MICRA in the provision of healthcare services to patients by hospitals (and other healthcare providers) and rests squarely upon a nearly forty-year-old decision interpreting pre-MICRA statutory language. Flores injects confusion and uncertainty in the application of the law. The Answer to the Petition for Review by Flores further supports the importance of review by this court.

DATED: May 16, 2013

FONDA & FRASER, LLP

PETER M. FONDA
KRISTEN J. HEIM
Attorneys for Defendant and Respondent
PRESBYTERIAN INTERCOMMUNITY
HOSPITAL

Certificate of Counsel as to Word Count
(Cal. Rules of Court, rule 8.504(d)(1)_

The text of this Petition for Review consist of 1,893 words as counted by Microsoft Word and prepared in 14 point Times New Roman font to generate the Petition.

I declare under the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of May, 2013 at Los Angeles, California.

PETER M. FONDA
Attorney for Defendant and Respondent
Presbyterian Intercommunity Hospital

PROOF OF SERVICE BY MAIL

Re: Catherine Flores VS Presbyterian Intercommunity Hospital

Case No. 209836

I, SHARLEEN INOUYE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1925 Century Park East, Suite 1360, Los Angeles, California 90067. I served a true copy of the attached

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on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Los Angeles, California 90067, on May 16, 2013.

SEE ATTACHED LIST

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 16, 2013 at Los Angeles, California.

SHARLEEN INOUYE

SERVICE LIST

Edward W. Lloyd, Esq. — Attys for Plaintiff and Appellant
LAW OFFICES OF EDWARD W. LLOYD
2900 Adams Street, Suite C130
Riverside, California 92504
T: (951) 656-1203
F: (951) 656-3103

Clerk of the Superior Court
for the Hon. Yvonne T. Sanchez
Southeast District - LASC
Dept. "C"
12720 Norwalk Boulevard
Norwalk, California 90650

California Court of Appeal
Second District, Division Two
300 S. Spring St.
Los Angeles California 90013

Supreme Court of California
Office of The Clerk - First Floor
350 McAllister Street
San Francisco, California 94102