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/Appellant,

vs.

PRESBYTERIAN INTERCOMMUNITY HOSPITAL,

Defendant/Respondent

After a Decision by the Court of Appeal, Second Appellate District
Case No. B235409

ANSWER BRIEF ON THE MERITS

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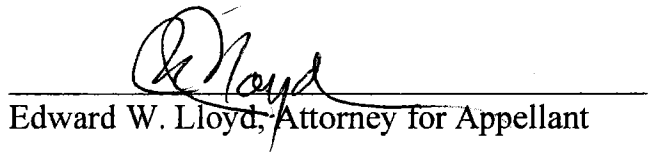
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this Certificate.

(Cal. Rules of Court, Rule 8.208(d)(3)

Dated: January 21, 2014



Edward W. Lloyd, Attorney for Appellant

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ISSUES PRESENTED

As stated by PIH in its Opening Brief on the Merits, the issue presented by this case is:

> "Whether a lawsuit against a hospital (health care provider) based upon allegations that an in-patient sustained injuries when a bed rail collapsed, causing her to fall to the floor, is governed by California Code of Civil Procedure sec. 340.5 (hereinafter

"C.C.P."), the statute of limitations for actions arising out of professional negligence, or by C.C.P. sec. 335.1, the statute of limitations applicable, generally, to personal injury actions."

As this Court will soon glean, however, this statement of the "issue presented" is far too limited. Instead, the issue actually presented is "what is the definition of 'professional negligence' for universal application to MICRA?"

Code of Civil Procedure sec. 340.5 provides a one year statute of limitations for professional negligence committed by a health care provider in the rendition of professional services. The issue here is "what constitutes 'professional negligence?" Subsection (2) of sec. 340.5 defines "professional negligence" as follows:

> "'Professional negligence' means a negligent act or omission to act by a health care provider **in the rendering of professional services**, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (emphasis added)

MICRA, however, is more than a statute of limitations embodied in Code of Civil Procedure sec. 340.5. MICRA is instead a constellation of

statutes and amendments all passed by the Legislature at the urging of a former Governor in an attempt to remediate a perceived medical malpractice insurance crisis. In an attempt to do so, the Legislature added to or amended the California Business and Professions Code, Civil Code, Code of Civil Procedure, and Insurance Code not once but multiple times, in a comprehensive and interrelated scheme to accomplish its stated purpose.

In turn, the majority of all such amendments and additions apply only to health care providers or their insurers **in the rendition of professional services**. For example, Civil Code sec. 3333.1 provides collateral source benefits to a health care provider defendant when liable for negligent acts or omissions in the rendering of professional services; Civil Code sec. 3333.2 provides a $250,000 cap on non-economic damages to a health care provider when liable for negligent acts in the rendering of professional services; and Code of Civil Procedure sec. 364 requires a plaintiff to file a notice of intent prior to filing an action when alleging negligence in the rendering of professional services. Each then goes on to define "professional negligence" in the exact same terms as does Code of Civil Procedure sec. 340.5.

Insurance Code sec. 108.5 was amended to define "medical malpractice insurance" to mean insurance coverage against the legal liability of the insured as a result of negligence "in rendering professional services". The Business

and Professions Code was likewise amended to add reporting and disciplinary measures for negligent acts in the "rendering of professional services". Throughout, the Legislature used the same definition of "rendering of professional services" as it did for purposes of the statute of limitations contained in sec. 340.5.

MICRA in its totality was and is a scheme of legislation designed and intended to ease a perceived medical malpractice insurance crisis. As this Court observed in its holding in the case of Calatayud v. State of California (1998) 18 Cal. 4th 1057, at 1065, "We do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness'."

As a result, this Court is in actuality not being asked to define "professional negligence" for purposes of Code of Civil Procedure sec. 340.5 but for all of MICRA to insure that the whole may be harmonized and rendered effective. Flores opines that as the Legislature intentionally chose the same definition of "professional negligence" for its multiple MICRA sections, so must this Court. Chaos, not harmony results if multiple and differing definitions are applied to multiple provisions of MICRA.

The issue presented is thus broadened. What is before this Court is not the definition of "professional negligence" for purposes of Code of Civil

Procedure sec. 340.5, but instead, for MICRA and all its provisions.

INTRODUCTION

Flores perceives the issue before this Court as one of statutory interpretation. The statute of limitations involved applies only to a health care provider in the rendition of professional services. Similarly, virtually all of MICRA applies only to health care providers for acts committed in the rendering of professional services. Flores suggests that resolution of the case before this Court is dependent upon a finding by this Court of the breadth of the term "in rendering professional services." This Court is asked to interpret a statute.

Over the course of our jurisprudence, rules have developed for interpreting statutes. Our courts are directed to recognize and follow these rules of interpretation whenever the language utilized by the Legislature is ambiguous or otherwise subject to interpretation. In her presentation to the Appellate Court Flores recognized these rules and, applying them to her case, argued successfully for an interpretation that "professional negligence" was not the cause of her injuries, i.e. a fall from bed occasioned by a defective or broken bedrail latch. PIH, on the other hand, totally failed to even consider the rules of statutory interpretation in its presentation to the Appellate Court.

Once again in its OBOM, PIH ignores rules of statutory interpretation and construction. Ironically, PIH does recognize that legislative intent is a primary factor in interpretation. PIH recites in its Brief what the Legislative intent was, i.e. "The Legislature enacted MICRA in response to medical malpractice insurance 'crisis'." [OPOM: 8] Recognition of the legislative intent, however, is only the initial step in such an analysis. Once legislative intent is recognized, an interpretation must then follow which gives effect to that legislative intent. PIH totally fails to explain to this Court how adding to the burden of the already hard-pressed medical malpractice carriers (by including in their coverage claims formerly recognized as non-professional claims) will alleviate a medical malpractice insurance crisis perceived to exist in 1975.

In this Answer Brief on the Merits, Flores will focus on rules of statutory interpretation and construction. Paramount thereto is this Court's observation that "We do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness'." (Calatayud v. State of California, supra, at 1065) This Court also noted that it "...must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's

purpose and policy." (Escobedo v. Estate of Snider (1997) 14 Cal. 4th 1214, at 1223)

In its Brief, PIH urges an expansive definition of "rendering of professional services" and thus "professional negligence" as being co-extensive with everything that happens in a hospital, from a surgical blunder to a slip and fall on a wet floor caused by a janitor's ordinary negligence. Flores will demonstrate in her Brief that in light of the overall scheme of MICRA as adopted by the Legislature in 1975, such a definition would render that overall scheme unworkable. Were such a definition applied, MICRA would become a shambles. To the contrary, the entire MICRA scheme as adopted works efficiently within the bounds of the limited definition urged by Flores.

In this OBOM, Flores will demonstrate the chaos that would have resulted were the definition urged by PIH adopted: Such a definition, were it adopted:

1. Would have converted every general liability insurance carrier providing general liability coverage to a health care professional into a medical malpractice carrier;

2. Would have bestowed upon every such former general liability carrier both the benefits and burdens that the Legislature intended only

for medical malpractice carriers;

3. Would have required both health care providers and their insurers to report to the Medical Quality Assurance Control Board claims for what would formerly have been recognized as non-professional premises liability and general negligence claims;

4. Would have subjected physicians and other health care providers to disciplinary action for not only negligent medical incidents but also for acts of premises defects and general negligence; and

5. Would subject anew MICRA in its entirety to attacks on its Constitutionality as denying equal protection between health-care patients and non-health-care patients, there no longer being a rational reason for the discrimination, i.e. to lower medical malpractice insurance rates.

Flores opines that the position taken by PIH is disingenuous at best. PIH asks this Court to adopt a definition of "professional negligence" as being co-extensive with any negligence occurring within the confines of a hospital. It argues that a fall from bed precipitated by a defective bed rail latch is "professional negligence". The definition sought by PIH would likewise hold that a slip and fall precipitated by a janitor's negligence in leaving water on a floor and a fall occasioned by a loose handrail on a stairway would also

constitute professional and not ordinary negligence. In effect, every negligent occurrence in a hospital causing injury would, under its definition, be professional in nature.

Why then does virtually every hospital and other health care professional carry general liability insurance? Were the definition that PIH seeks applied, general negligence on the part of a hospital would cease to exist, subsumed instead into "professional negligence". Yet, in reality, every such responsible institution carries a policy of general liability insurance. As defined by PIH, the general liability carrier offering policies to hospitals and other health care providers would be out of business. Why, then, does PIH have a general liability policy of insurance?

This has been the state of affairs since 1975. Doctors and hospitals have purchased and insurers have sold general liability coverage since that date and continue to do so. By doing so they recognize that not everything that happens in a hospital is professional negligence. Health care providers know that the law as it presently stands does not render all acts within a hospital "professional" in nature. They act accordingly in continuing to purchase general liability insurance coverage. They now ask this Court to "judicially legislate" because they want a different law, a law even more favorable to them.

Before proceeding into legal argument, Flores here seeks to correct a misconception contained in PIH's Opening Brief on the Merits. In its introduction, it criticizes the Appellate Court for adopting the reasoning of an appellate court decision (GoPaul v. Herrick Memorial Hospital (1974) 38 Cal. App. 3d 1002) "...rendered forty years earlier, which had never been followed since its rendition and in which the appellate court interpreted a totally different statute of limitations which was applicable to medical malpractice actions." [OBOM: 2]

Flores asserts that this is an unfair criticism of the Opinion of the Court of Appeal. The Appellate Court hearing this matter did not adopt the reasoning of GoPaul v. Herrick Memorial Hospital, supra. In conducting its review, it reviewed numerous cases, including GoPaul and the case of Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, which latter case was relied upon by PIH there and presently. Rather than rely on GoPaul, the Appellate Court noted that " the instant fact situation is easily distinguished from the five California cases discussed above, arising out of patient falls from beds or gurneys. All those cases involve injury to a patient resulting from the failure to properly secure or supervise the patient while on a hospital bed or gurney..." [Opinion: 13] The Appellate Court noted that Flores did not allege the hospital was negligent in failing to elevate the bed rails or in failing to

supervise her, but instead, that she was injured by an equipment defect.

The Appellate Court did not rely on GoPaul, supra. Instead, it relied on the cases cited to it by PIH, i.e. Bellamy v. Appellate Dept. (1996) 50 Cal. App. 4th 797 and Murillo, supra for the proposition therein stated that "not every tortious injury inflicted upon one's client or patient or fiduciary beneficiary amounts to [professional] malpractice." [Opinion: 15] The Appellate Court noted that the Murillo opinion agreed with the proposition that "No reasonable person would suggest that 'professional malpractice' was the cause of injury to a patient from a collapsing chair in a doctor's office." In our case we have an injury from a collapsing bed rail.

As a final introductory note Flores observes that the facts of this case are not disputed nor is the standard of review. As such, Flores will not expend the valuable time of this Court in reiterating either. Instead, Flores will proceed straight to legal argument.

LEGAL ARGUMENT

I. INTRODUCTION TO LEGAL ARGUMENT:

Code of Civil Procedure sec. 340.5(2) defines professional negligence as follows:

> "'Professional negligence' means a negligent act or omission

> to act by a health care provider **in the rendering of professional services**, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (emphasis added)

All parties agree that the injuries sued upon in this action were caused by an act or omission of a health care provider, i.e. a hospital. The sole issues to decide are 1) whether or not a fall occasioned by a broken bedrail latch which collapsed constitutes "professional negligence" and 2) whether that negligence occurred during the rendition of services.

PIH argues that the words "in rendering of professional services" is co-extensive with everything that occurs within a hospital. Under the definition urged by PIH, premises defects and the negligent performance of janitorial duties would constitute professional negligence. Flores on the other hand argues for a more limited definition to only those services traditionally performed by a skilled, professional health care provider, more akin to "medical incidents" and not premises defects. PIH argues that the maintenance of a defective bedrail is "professional negligence" while Flores argues that such constitutes general negligence only. No specialized medical

skills are required to maintain a bedrail in good, operating condition. One does not go to medical school, nursing school or train as a physician's assistant to maintain a bedrail. One goes to trade school or on the job training as a mechanic/maintenance worker.

II. ALL RULES OF STATUTORY CONSTRUCTION MANDATE A FINDING THAT ORDINARY RATHER THAN PROFESSIONAL NEGLIGENCE IS THE ALLEGED CAUSE OF FLORES' INJURIES:

This case presents a matter of statutory interpretation/construction. In its Opening Brief on the Merits, PIH argues that "The Legislative Intent Behind MICRA Is That Lawsuits For Personal Injury By Patients In Hospitals Are Subject To the Provisions of MICRA..." [OBOM: 7-8] This is dead wrong. The legislative intent of MICRA was and is to reduce medical malpractice insurance premiums and nothing more. (American Bank & Trust Company v. Community Hospital (1984) 36 Cal. 3d 359, at 372) Not only does PIH erroneously state the legislative purpose of MICRA, it comes to this "conclusion" without examining or applying a single rule of statutory interpretation. Although it recognizes legislative intent as a primary factor for consideration, it has failed in its entirety to demonstrate to this Court how the result it seeks assists in fulfilling the legislative intent, i.e. lowering medical

malpractice insurance rates. Most critically, PIH fails to even hint as to how dumping thousands of claims formerly recognized and insured as general negligence claims onto the shoulders of the medical malpractice carrier can possibly assist in lowering medical malpractice insurance premiums.

In the sections which follow, Flores will discuss all relevant rules of statutory interpretation. Each points to a finding that a premises defect such as a broken bedrail latch does not constitute "professional negligence".

A. The Interpretation Urged by PIH Would Remove from MICRA the Word "Professional" Used not Once but Twice by the Legislature in Violation of Rules of Interpretation:

In attempting to ascertain legislative intent, effect must be given, whenever possible, to the statute as a whole and to its every word and clause. An interpretation that renders a particular term or terms of a statute as mere surplusage is to be rejected. (City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, at 55; Dyna-Med, Inc. v. Fair Employment & Housing Commission (1987) 43 Cal. 3d 1379, at 1387) Here, the statute in question (and over 20 others all part of MICRA) uses the word "professional" not once but twice. The statute reads:

> "'**Professional negligence**' means a negligent act or omission to act by a health care provider **in the rendering of**

professional services...." (emphasis added)

Not once but twice did the Legislature include the word "professional" in the statute.

PIH argues to this Court that the word "professional" is pure surplusage and need not be considered. At page 16 of its OBOM, PIH argues that "Professional Negligence" as defined in Code of Civil Procedure sec. 340.5 means "...Negligence During The Rendering Of Services For Which The Health Care Provider Is Licensed". Glaringly, PIH leaves the second "professional" out of the meaning it argues applies under MICRA. The Legislature, however, did not leave out the second "professional" when it enacted MICRA.

Rules of statutory construction tell us that had the Legislature intended MICRA to apply to all services rendered by a hospital and not just to professional services, the Legislature would have worded the statute just as PIH asks this Court to interpret it, i.e. sans the words "professional". The Legislature did not word it as PIH asks it be interpreted but instead included the word "professional" twice.

PIH thus asks this Court to interpret Code of Civil Procedure sec. 340.5 in a manner that renders a particular term of the statute, i.e. "professional" as mere surplusage. As noted by this Court in City of San Jose v. Superior Court,

supra, such an interpretation is to be rejected.

The statute reads "'Professional negligence' means a negligent act or omission to act by a health care provider **in the rendering of professional services**...", not "'Professional negligence' means a negligent act or omission to act by a health care provider **in the rendering of services**...".

B. The Legislative Intent of MICRA Is Defeated, Not Accomplished, by Defining All Claims for Injury Against a Health Care Provider as "Professional Negligence":

1. The Legislative Intent to Contain the Skyrocketing Medical Malpractice Insurance Costs:

The purposes of MICRA, of which Code of Civil Procedure sec. 340.5 is but one small part, were to contain the problems of "skyrocketing malpractice premium costs...resulting in a potential breakdown of the health delivery system...." (American Bank & Trust Company v. Community Hospital (1984) 36 Cal. 3d 359, at 372) This Court observed that:

> "The reason the Legislature limited the application of ...MICRA in general - to the medical malpractice field was, of course, because it was responding to an insurance 'crisis' that had arisen in a particular area. The problem which was the immediate impetus to the enactment of MICRA arose when the insurance

companies which issue virtually all of the **medical malpractice insurance** policies in California determined the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past...." (American Bank & Trust Company v. Community Hospital, supra, at 371-372) (emphasis added)

These stated purposes of MICRA, recited by the Legislature in its preamble to MICRA and observed by this Court in American Bank & Trust Company v. Community Hospital, supra, are consistent only with a construction of MICRA that **limits** "professional negligence" to the application of professional judgment and skill. They do not support any construction that would **extend** the application of MICRA and its limitations to any kind of negligence by a health care provider that results in injury to a patient.

Prior to the passage of MICRA, general negligence claims such as hospital slip and falls and premises liability were not the burden of the medical malpractice carrier but instead of the general liability carrier. Interestingly enough, they still are the burden of the general negligence carrier and not the medical malpractice carrier. Flores has asked this Court to take Judicial Notice of the NorCal Mutual Insurance Company insurance policies for both

physicians and hospitals. [RJN: Exh. 2] Those policies themselves distinguish between professional negligence and general negligence-premises liability limiting the former to incidents arising out of medical incidents. Even today after the passage of MICRA such claims based upon premises liability and slip and falls, etc. are covered by general liability coverage and not medical malpractice coverage.

The definition of "professional negligence" urged by PIH, however, would potentially turn every claim arising within a hospital into a claim for professional negligence adding to the burden of the medical malpractice carriers. As defined by PIH, the medical malpractice carrier would be forced to defend and indemnify the slip and fall claim. One does not reduce medical malpractice claims by expanding the definition of what constitutes medical malpractice claims thereby adding new classes of claims, i.e. premises defect, general negligence to the risks covered. One does not reduce medical malpractice insurance premiums by adding to the pool of covered claims a whole new class of claims to be considered in underwriting medical malpractice coverage. It adds to those rates if a slip and fall in a hospital corridor becomes professional negligence and the burden of coverage is shifted from the general liability carrier to the medical malpractice carrier.

2. The Legislative Intent to Reduce the Number of Medical

Malpractice Lawsuits:

In Perry v. Shaw (2001) 88 Cal. App. 4th 658, at 665-666, the Appellate Court held that the purpose of the MICRA provisions relating to the statute of limitations was to reduce the number of medical malpractice actions filed. The Court there observed that to accomplish this goal, i.e. to reduce the number of medical malpractice actions filed, "The Legislature specifically reduced the limitations period of such actions from four to three years." (Perry v. Shaw, supra, at 665-666)

Thus, another intent of the Legislature was to reduce the number of medical malpractice cases filed. But what does PIH say to that Legislative intent? PIH says that we should reclassify all those cases we used to consider as premises liability cases or product defect cases and make them medical malpractice cases. Were PIH's definition of "professional services" adopted the Legislature's stated purposes of reducing the number of medical malpractice cases filed is resoundingly defeated. Into the mix of botched surgeries and mis-diagnoses to be litigated as medical malpractice actions go the slip and falls, the food poisonings at the cafeteria, the falling chandeliers striking patients on the head, the collapsing chairs in a doctors office, and the broken bedrail cases.

The Legislature sought to reduce the number of medical malpractice

claims. PIH seeks to drastically increase the number of medical malpractice claims presented, covered and litigated. This is not the result intended when the Legislature enacted MICRA. It is the antithesis of that result.

C. The Broad Definition of "Professional Negligence" Sought by PIH Would Have Led to Chaos and Havoc Within MICRA Had It Been Intended and Applied by the Legislature to Its Legislative Plan:

In interpreting or construing a statute, this Court observed "We do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness'." (Calatayud v. State of California, supra, at 1065) A statute should be construed in the context of the entire statutory system of which it is a part in order to achieve harmony among the parts. (Nickelsberg v. Workers Compensation Appeals Board (1991) 54 Cal. 3d 288, at 299) This Court also noted that it "...must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (Escobedo v. Estate of Snider (1997) 14 Cal. 4th 1214, at 1223)

In the subsections which immediately follow, Flores will demonstrate that had the Legislature intended as PIH suggests, i.e. to include every

negligent act or omission within a hospital as "professional negligence", MICRA would have been an unworkable failure.

MICRA was an enactment of the Legislature in 1975 passed as Assembly Bill 1. As previously noted, it comprised a constellation of amendments and additions to the Civil Code, Code of Civil Procedure, Business and Professions Code, and Insurance Code. To evaluate the overall scheme of Legislation in light of the contrasting definitions posed, it is important for the Court to examine the Bill as originally enacted. As such, Flores has presented a copy of A.B. 1 to the Court along with its request for the Court to judicially notice same. [RJN: Exh. 1]

This Court is advised that numerous of the laws passed were temporary measures or have since been amended, repealed or re-numbered. The purpose of Flores in discussing them as originally enacted is to demonstrate that it was not the intent of the Legislature to include within its ambit of "professional negligence" all acts occurring within a hospital. While each of these measures was in effect, the interpretation sought by PIH would have wreaked havoc on the overall scheme of legislation known as MICRA.

1. Insurance Code Sec. 108.5's Definition of Medical Malpractice Insurance:

Part of the MICRA scheme was the addition of Insurance Code sec.

108.5. This was a temporary measure that was repealed the following year. That addition read as follows:

> "'Medical malpractice insurance' means insurance coverage against the legal liability of the insured, and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice **in rendering professional services** by any person who holds a certificate or license issued pursuant to Chapter 5..." [RJN: Exh. 1; A-50] (emphasis added)

Had the Legislature intended a definition of "in rendering professional services" as urged by PIH, medical malpractice insurance would thus be extended to cover Flores' fall from her bed as a result of a broken bedrail latch. It would also cover a slip and fall on a wet floor, a fall from a defective stair, and debris flying from a gardener's mower striking a patient in the eye. Any existing carrier providing general liability coverage would have to re-qualify as a medical malpractice carrier. It is obvious that the Legislature did not intend such a ludicrous result. Any existing policies of general liability insurance would be worthless as covering nothing, everything having been subsumed into the medical malpractice policy.

Further, medical malpractice rates would have soared. The medical

malpractice carriers would now be forced to assume all prior general negligence claims and both defend and indemnify all such claims. Such an interpretation leads to a ludicrous result for which the Legislature of this State should not be blamed.

2. Insurance Code Sec. 11895's Restrictions on Issuance of Medical Malpractice Insurance:

MICRA added Insurance Code sec. 11895. That section called for the formation of a temporary Joint Underwriting Association which was to be the "exclusive agency through which medical malpractice insurance may be written on a primary basis." [RJN: Exh. 1; A-70; Insurance Code sec. 11895(a & b)]. Thus, any "general liability" carrier who wrote what would, under PIH's definition, be classified as medical malpractice insurance was and is in violation of law unless they were members of the Joint Underwriting Association. This result, which would be compelled by PIH's definition, is also ludicrous.

3. Insurance Code Sec. 11587:

MICRA added sec. 11587 to the Insurance Code. [RJN: Exh. 1; A-68] It provides that any health care licensee who alleges to be aggrieved by any medical malpractice insurance rate may demand an explanation from that carrier. If the licensee determines the explanation inadequate, the licensee may

file a petition for hearing with the Insurance Commissioner, who must conduct a public hearing within 15 days. The Commissioner may order the carrier to reduce the rate or cancel the policy.

Under the definition urged by PIH, as incorporated into Insurance Code 108.5, every general liability carrier thereby converted into a medical malpractice carrier would be thus burdened by this section. Any health care provider "aggrieved" by a general liability policy rate (now a medical malpractice carrier by reason of Ins. Code 108.5) could protest such rate accordingly. Flores believes the Legislature did not intend this result.

4. Insurance Code Sec. 11588:

This section was added to the Insurance Code by MICRA. [RJN: Exh. 1; A-69] It provided that no professional liability carrier issuing a policy to a health care provider could refuse to issue or renew a policy at rates which are not excessive. Once again, the Legislature sought to lower medical malpractice insurance rates, not those of the general liability carriers. Had the definition sought by PIH been applied, however, general liability carriers for health care providers would have been converted into medical malpractice carriers and burdened with this law. The Legislature did not so intend.

5. Insurance Code Sec. 4040:

Insurance Code sec. 4040 was added by MICRA to provide enhanced

rights to a medical malpractice insurer in the borrowing of money to defray expenses, to provide surplus funds, etc. [RJN: Exh. 1; A-68] By reason of Insurance Code 108.5, were PIH's definition applied, formerly general liability carriers would have been eligible for such benefits.

6. Reporting Requirements:

MICRA added sections 800, 801, and 802, to the Insurance Code. [RJN: Exh. 1; A-50] These sections require the Board of Medical Quality Assurance to maintain a file for each licensee within which are to be maintained all records of any judgment or settlement requiring an insurer to pay in excess of $3,000 caused by a licensee's negligence or omission in practice and requires each insurer and health care provider to report each such claim. Failure to so report is declared a public offense punishable by a fine not less than $5,000 nor more than $50,000.

Were PIH's definition of "in rendering professional services" adopted, arguably every personal injury claim emanating from a hospital or against a health care provider becomes reportable. Pursuant to Insurance Code 108.5, every carrier providing general liability coverage to a hospital becomes a medical malpractice carrier with a duty to report each incident, including those formerly thought to be acts or omissions of general negligence.

PIH seeks to classify as "professional negligence" each and every

negligent injury producing act occurring within the confines of a hospital. In so doing, it would render each and every negligent injury producing act within its confines reportable to the Board of Medical Quality Assurance. Such a system would inundate the BMQA with needless and irrelevant information having nothing to do with the quality of medical practice.

Perhaps PIH can explain to this Court why it did not report Flores' claim to the Board of Medical Quality Assurance. The only explanation foreseen is that it acts in reality far differently from how it argues herein.

7. Medical Statistics:

MICRA added sec. 2124.5, et seq. to the Business and Professions Code. [RJN: Exh. 1; A-58] It created a Bureau of Medical Statistics under the BMQA to provide the BMQA with medical data. Pursuant to sec. 2124.7, every insurer is required to furnish the bureau with the name of every health care provider in this state whose malpractice liability insurance has been terminated.

As noted above, per Insurance Code 108.5 all general liability carriers would become med mal carriers under PIH's definition and thus would be required to report every termination of a general liability policy. Surely, this was not envisioned by the Legislature.

8. Discipline of Health Care Providers:

MICRA amended sec. 2361 to the Business and Professions Code requiring the Division of Medical Quality to take affirmative action against any licensee who is guilty of unprofessional conduct. [RJN: Exh. 1; A-58] As PIH seeks to classify as "professional conduct" anything that happens in the confines of the hospital, PIH would thereby suggest that any negligence within a hospital constitutes unprofessional conduct for which discipline lies.

As sought to be defined by PIH, the Division of Medical Quality would have been required to take affirmative action against PIH for allowing Flores to occupy a broken bed. As sought to be defined by PIH, the Division would likewise be required to affirmatively act every time a patient tripped and fell in a health care providers' facility on wet or slippery floor.

D. The Interpretation of "Professional Negligence" Urged by PIH, if Adopted, Renders MICRA Unconstitutional or at a Minimum Subject to Further Constitutional Challenge:

This Court has previously stated that a statute is to be construed in such a manner so as to promote rather than defeat the statutory purpose and policy. (Escobedo v. Estate of Snider, supra, at 1223) Accordingly, a statute should not be construed in such a manner as to render it unconstitutional. (Dyna Med, Inc. v. Fair Employment & Housing Commissio, supra, at 1387) Flores opines that to adopt a broad interpretation of "professional negligence" as urged by

PIH would subject the entirety of MICRA to renewed Constitutional challenge.

The issue of the Constitutionality of MICRA was examined by this Court in the important case of American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, supra. There, plaintiff challenged the Constitutionality of Code of Civil Procedure sec. 667.7 which provided for periodic payment of future damage awards in medical malpractice litigation. In part, plaintiff challenged the measure on the basis that it violated equal protection because it provided a special benefit to one class of tortfeasors, i.e. medical care providers which was not provided to other tortfeasors and likewise treated medical care victims disparately from non-medical care victims.

This Court determined that Constitutional principles were not violated because there was a rationale and legitimate basis for the Legislature's decision to attempt to reduce medical malpractice insurance rates. The Court observed that "Sec. 667.7 is one of a number of provisions of MICRA which was intended, in part, to reduce the cost of medical malpractice insurance." (American Bank and Trust Company v. Community Hospital of Los Gatos-Saratog, supra, at 372) Thus, "...since there was a rational and legitimate basis for the Legislature's decision to attempt to reduce insurance costs in the medical malpractice area since the provisions of section 667.7 are

rationally related to that objective, the Legislature did not violate equal protection principles in limiting section 667.7's application to medical malpractice actions." (American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, supra, at 373)

Also of import is the Court's further observation that "First, the legislative history of MICRA does not suggest that the Legislature intended to hold down the overall costs of medical care but instead demonstrates-as we have explained-that the Legislature hoped to reduce the cost of medical practice insurance, so that doctors would obtain insurance for all medical procedures...." American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, supra. at 373)

This Court there determined that the Legislature intended to reduce the costs of medical malpractice insurance. It found sec. 667.7 rationally related to that purpose and thus Constitutional. It found that the Legislature did not intend to reduce overall medical costs, but only those of medical malpractice premiums. It thus did not intend to reduce premiums for general liability coverage but only for medical malpractice insurance premiums and herein lies the Constitutional challenge presented by the expansive definition sought by PIH.

Such a definition sought by PIH does not serve to reduce medical

malpractice insurance premiums. It would serve only to potentially reduce premiums for general liability coverage and to potentially raise premiums for medical malpractice insurance by including into the covered risks all things formerly found to constitute general negligence.

Thus, it is the general negligence premium only and not the medical malpractice premium that might be lowered. At the same time, the medical malpractice rate may well be increased. Such a result does nothing to accomplish the legislative purpose of lowering medical malpractice rates. Lacking a legitimate and rational basis for the legislative measure, disparate treatment now becomes unconstitutional. Legal challenges to the Constitutionality of such a result could be expected.

E. Neither This Court nor Any Court May Judicially Alter a Statute:

In construing a statute, the function of a court is simply to ascertain and declare what is in terms or substance contained in the statute, not to insert what has been omitted, or to omit what has been inserted. (Code of Civil Procedure sec. 1858)

PIH asks this Court to omit the word "professional" from the phrase "in rendering professional services" such that the statute of limitations of Code of Civil Procedure sec. 340.5 and in effect all of MICRA includes instead the

entirety of activities "in rendering services", professional in nature or not. Flores opines that were it to do so, this Court would be "judicially altering" MICRA and therefore "judicially legislating."

F. In Interpreting the Words "Rendering of Professional Services", the Court Is to Apply the Usual, Ordinary Import of the Words:

In the case of Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, this Court was called upon to examine the term "professional negligence" for purposes of the "gatekeeper statute", i.e. Code of Civil Procedure sec. 425.13 which required that in a medical malpractice action, no claim could be pled for punitive damages absent leave having first been granted by the court. Recognizing the issue as one of statutory interpretation, this Court advised that "...a court looks first to the words of the statute themselves, giving to the language its usual, ordinary import." (Central Pathology Service Medical Clinic, Inc. v. Superior Court, supra, at 186-187)

Such should be the case here when interpreting the phrase "rendering of professional services." Flores suggests that applying the usual, ordinary import of the word "professional" leads to a conclusion that its relates to a job that requires special education, training or skill. When a doctor performs surgery, he or she exercises a task that requires specialized education training

and skill. When a hospital is asked to maintain a bed, no such specialized education, training or skill is brought to task.

In the case of American Bank and Trust Company v. Community Hospital of los Gatos-Saratoga, supra, this Court was called upon to examine the Constitutionality of various MICRA provisions. The Court examined allegations that the damage cap of Civil Code sec. 3333.2 treated victims of the rendition of medical professional services disparately from the victims of other tortfeasors. Throughout that opinion, however, this Court did not describe the actions to which sec. 3333.2 applied as actions involving negligent acts or omissions in the rendering of professional services, but instead as "medical malpractice actions". Flores would observe that the Court used the term "medical malpractice" as a synonym for the Legislature's term "negligent acts or omissions in the rendering of professional services" when used in the medical context of MICRA.

When the usual and ordinary import of the word "medical malpractice" is examined, it does not conjure up visions of a janitor or maintenance worker maintaining a bed. Botched surgery, yes, but maintaining a bedrail latch, no. When the Legislature placed the limiting term "professional" before the word "services", it qualified those services covered by MICRA to those services involving a job requiring a particularized degree of medical skill. Construing

the term in its ordinary language, "medical malpractice" does not occur in a machine shop or maintenance shed.

It is crucial that the usual and ordinary meaning be applied. Statutes of limitations serve to curtail the vested property rights of members of the public. Such a statute should not be subject to technical and unusual interpretation which will mislead victims of torts.

III. PROPERLY INTERPRETING THE LAW, MICRA IS LIMITED TO CASES INVOLVING MEDICAL TREATMENT FALLING BELOW THE PROFESSIONAL STANDARD OF CARE. MICRA DOES NOT APPLY TO A PREMISES DEFECT WHICH NEITHER INVOLVES MEDICAL TREATMENT NOR THE PROFESSIONAL STANDARD OF CARE:

A. The Courts of this State Have Limited the Application of MICRA to Cases Involving Medical Treatment Falling Below the Professional Standard of Care. Professional Negligence Is Limited to the Failure to Exercise the Skill, Prudence, and Diligence Commonly Exercised by Practitioners of that Profession:

PIH has argued in its OBOM that "'Professional Negligence' as Defined in C.C.P. sec. 340.5 "...Has Properly Been Construed to Mean

Negligence During the Rendering of Services for which the Health Care Provider Is Licensed...." [OBOM: 16] From this position, PIH argues that any negligent act occurring within a hospital is "professional negligence" including a patient injured by a defective piece of equipment within the hospital. [OBOM: 16] In other words, PIH argues that professional negligence is co-extensive with any and all negligent acts within the confines of the walls of the hospital. California law is not in accord with this position.

The entire time this case has traversed the appellate process, this author has attempted to formulate a proper definition of "professional negligence" which encompasses the limiting characteristics the Legislature by its use of the word "professional" intended. Not being a wordsmith, this was a difficult task. A proper definition came to mind, however, during a recent review by this author of the Opinion rendered by this Court in the case of Barris v. County of Los Angeles (1999) 20 Cal. 4th 101. That case involved a suit by the mother of a young patient who was "dumped" by defendant hospital in violation of the federal Emergency Medical Treatment and Active Labor Act. A verdict of $1,350,000.00 was rendered for non-economic damages and the issue presented was whether or not the "medical dumping" alleged constituted "professional negligence" for purposes of the $250,000.00 cap imposed on general damages by Civil Code sec. 3333.2.

In its opinion, this Court formulated a definition more specific than that found in the MICRA statutes. The Court there held that "The damage cap applied, since the EMTALA claim was based on professional negligence, i.e., **medical treatment falling below the professional standard of care.**" (Barris v. County of Los Angeles, supra, at 113) (emphasis added) The Court held that to prove her EMTALA claim plaintiff had to prove that the hospital did not, with its available staff, provide to a patient known to be suffering from an emergency medical condition with medical treatment necessary to assure, within reasonable medical probability, that no deterioration of her condition would occur.

Thus, the Court found that "professional negligence" defined by the Court as "medical treatment falling below the professional standard of care" was the cause of injury and thus the damage award was subject to the MICRA cap. In the case at bar, the cause of Flores' injury was a defective bedrail latch, totally isolated from any medical care. In the case at bar, the cause of Flores' injury was a negligent act falling below the ordinary standard of care established by Civil Code sec. 1717, not a standard of care to which a professional would be held. Flores opines that this definition, previously formulated by this Court is the appropriate definition.

Of great import to this issue is the Opinion of this Court in American

Bank & Trust Company v. Community Hospital, supra. As previously discussed, this case involved Constitutional challenges to MICRA and in part the provision for periodic payment of future damages provided in MICRA's addition of Code of Civil Procedure sec. 667.7.

This Court observed that the Legislature in enacting MICRA expressly limited section 667.7 and MICRA in general to the medical malpractice field. The Court stated that "The reason the Legislature limited the application of section 667.7 - and, indeed, MICRA in general - to the medical malpractice field was, or course, because it was responding to an insurance 'crisis' that had arisen in a particular area." American Bank & Trust Company v. Community Hospital, supra, at 371) That area, of course, was the medical malpractice insurance area, i.e. the skyrocketing costs of medical malpractice insurance. It was not responding to any perceived crisis in the availability or affordability of general liability insurance. As the Legislature was not responding to any perceived crisis involving general liability insurance rates, it of necessity had no reason to include general liability claims within the purview of MICRA.

This Court thus has already determined in American Bank & Trust Company v. Community Hospital, supra, at 371 that MICRA is limited to the medical malpractice field. The action presently before this Court is not within the medical malpractice field. It lies smack dab in the middle of the field of

premises liability based upon ordinary negligence. Interpreting Code of Civil Procedure sec. 340.5 in the ordinary language as is required, negligent maintenance of a bed is not medical malpractice.

This Court also determined in that case that the purpose of MICRA was not to lower the overall costs of medical care but only to lower the cost of medical malpractice insurance. It stated that:

> "First, the legislative history of MICRA does not suggest that the Legislature intended to hold down the overall costs of medical care but instead demonstrates - as we have explained - that the Legislature hoped to reduce the cost of medical malpractice insurance, so that doctors would obtain insurance for all medical procedures...." (American Bank & Trust Company v. Community Hospital, supra, at 373)

Once again, this Court recognized the application of MICRA as intended to reduce medical malpractice insurance so that doctors would obtain insurance for **medical procedures** - not general liability policies so that they could maintain their premises or conduct non-medical procedures, i.e. maintaining its premises. This Court thus recognized the dichotomy between medical procedures to which MICRA applied and which were covered by medical malpractice insurance and non-medical procedures to which MICRA

did not apply and which were instead covered by general liability insurance. Maintenance of a bed is not a medical procedure, is not covered by medical malpractice insurance, and was never intended by the Legislature to be covered under MICRA.

This Court has expressly acknowledged that in adopting legislation, the Legislature is presumed to have had knowledge of existing judicial decisions and to have enacted and amended statutes in the light of such decisions which have a direct bearing upon them. (McDill v. Martin (1975) 14 Cal. 3d 831, at 837-838) "It is assumed that the Legislature has in mind existing law when it passes a statute." (McDill v. Martin, supra, at 837) According to this Court in the case of Cole v. Rush (1955) 45 Cal. 2d 345, at 355 "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes it in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." This Court thus instructs, and in fact commands that in 1975 when the Legislature amended Code of Civil Procedure section 340.5 it was assumed to have firmly in mind existing law as to what constituted professional negligence and what did not, i.e. Gopaul v. Herrick Memorial Hospital of Anaheim (1974) 38 Cal. App. 3d 1002 and Neel v. Magana, Olney, Levy, Cathcart & Gelfund (1971) 6 Cal. 3d 176, et al, discussed below. Further, fully aware of existing law, i.e.

Gopaul, Neel (as discussed following), the failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes it in other respects is indicative of an intent to leave the law as it stands in the aspects not amended.

Fully aware of the Gopaul and Neel decisions and the rules of common law established by each (discussed below), the Legislature amended the tolling cap from four years to three, but failed to provide a definition of "professional negligence" or "professional services" contrary to how it was defined in Gopaul/Neel. The Legislature is thus presumed to have adopted the positions of Gopaul/Neel.

For this reason, the common law pre-dating the 1975 amendment to Code of Civil Procedure sec. 340.5 as accomplished by MICRA is higher authority than anything subsequent as to the intentions of the Legislature. The Legislature presumptively knew what the law of Gopaul/Neel was and yet intentionally did not disturb it when it amended sec. 340.5 and enacted MICRA. In doing so, it adopted the principles of law set forth in both Neel and Gopaul.

At the time of the 1975 amendment to Code of Civil Procedure section 340.5, the law on what constituted "professional services" was firmly entrenched by the case of Neel v. Magana, Olney, Levy, Cathcart & Gelfund,

supra. This important case was prosecuted as a legal malpractice action and was defended on the basis that the applicable two year statute of limitations had expired, barring the proceeding. In reversing defendant's summary judgment upheld by the Appellate Court, this Court adopted a common law rule of delayed discovery into legal malpractice actions, as it already had with respect to other professionals, holding that a plaintiff's cause of action does not accrue until the plaintiff discovers the last element necessary to constitute the cause of action. Of utmost importance to the matters before this Court is the rationale of the Court for extending the statute as to "professional negligence" and its definition thereof.

This Court duly noted that in ordinary tort and contract actions, the statute of limitations began to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action or the identity of the wrongdoer does not toll the statute of limitations. The Court, however, found that in the case of professional malpractice, postponement of the period of limitations until discovery is justified by the special relationship between the professional and his or her client.

In support of its conclusion, the Court observed that the special obligation of the professional was exemplified by his or her duty not merely to perform his or her work with ordinary care but to use the skill, prudence,

and diligence commonly exercised by practitioners of that profession. (Neel v. Magana, Olney, Levy, Cathcart & Gelfund, supra, at 188.) As a corollary to this enhanced duty, the Court noted the inability of a layman to detect its mis-application. As an example in the medical malpractice as well as legal field, the Court observed that "He cannot be expected to know the relative medical merits of alternative anesthetics nor the various exceptions to the hearsay rule." (Neel v. Magana, Olney, Levy, Cathcart & Gelfund, supra, at 188.) Finally, the Court emphasized the fact that the dealings between the practitioner and client/patient framed a fiduciary duty which embraces an obligation to make full disclosures.

The Court in Neel v. Magana, Olney, Levy, Cathcart & Gelfund, supra, thus set forth the reasons and policy behind providing a tolling until such time as the client/patient became aware of the cause of action. In doing so, it set forth those indicia of a professional relationship driving the policy: a professional was duty bound to exercise not ordinary care but the skill, prudence, and diligence commonly exercised by practitioners of that profession; the misdeeds of a professional were often difficult for a lay victim to comprehend; and the acts occurred in the course of a fiduciary relationship wherein full disclosure was mandated by that very relationship.

This Court recognized the dichotomy between ordinary and professional

negligence and this was the state of the law when MICRA was enacted and Code of Civil Procedure section 340.5 was amended in 1975. Most importantly, in enacting MICRA and amending sec. 340.5 the Legislature was charged with knowledge of this common law rule at that time and its failure to include language of disapproval in the MICRA statutes evidences its intent to follow and not alter existing common law. In Neel the Court recognized that it is not *any* negligence by a health care provider or attorney that gives rise to the special rules for extending the statute of limitations or for limiting and conditioning the recovery of damages, but only negligence in the application of "professional skill, prudence and diligence".

No particular professional skill, prudence or diligence is required to properly latch a bed rail or maintain that latch. Nor is any particular skill, prudence or diligence required to mop a floor. Although a layman cannot recognize misfeasance in prescribing a particular medication or in the diagnosis of lymphoma, he or she can certainly recognize ordinary negligence in providing a patient with a broken bed just as he or she can in a hospital's failure to post warning signs stating "Caution/Wet Floor/ Piso Mojado" when a hospital janitor is mopping a floor. The case at bar does not assert professional negligence. It alleges ordinary negligence.

In Gopaul v. Herrick Memorial Hospital of Anaheim, supra, the

plaintiff fell off a gurney while unstrapped and unattended, after having x-rays taken at a hospital. The hospital conceded on appellate review that the fall was proximately caused by negligence of a technician and that the hospital was vicariously liable unless suit was barred by the statute of limitations. Hospital argued that suit was barred because it was brought beyond the one-year statute of limitations of Code of Civil Procedure sec. 340, the then statute of limitations for personal injuries.

Plaintiff, to the contrary, argued that the case fell within the common law modification of that rule, i.e. that it was an action for professional negligence subject to the then common law rule that in an action for professional negligence, the action was tolled until the plaintiff discovered or reasonably should have discovered the tortious nature of the injury. Plaintiff asserted the common law tolling doctrine for professional negligence established by our Supreme Court in Neel.

As with Neel, the Appellate Court determined that professional malpractice must occur in the performance of professional or fiduciary duties. "It will be seen that 'professional malpractice' was not involved in the defendant hospital's tortious conduct and that the reasons for the extended statute of limitations for such malpractice are wholly inapplicable here. The need to strap plaintiff to a gurney while she was ill and unattended would have

been obvious to all. The situation required no professional skill, prudence and diligence. It simply called for the exercise of ordinary care." (Gopaul v. Herrick Memorial Hospital of Anaheim, supra, at 1007.)

In the case at bar, the proper maintenance of a bedrail required no professional skill, prudence and diligence other than ordinary care. No depositions of expert bedrail maintenance technicians need be taken to establish community standards for bedrail maintenance. At the time MICRA was enacted and Code of Civil Procedure sec. 340.5 was amended, Neel and Gopaul represented the common law rule of law on the subject. When it enacted MICRA and amended Code of Civil Procedure sec. 340.5 the Legislature did not change this common law rule. It was, however, charged with knowledge of it and its failure to modify the rule solidified its intent not to change the rule of law as it existed.

The case of Murillo v. Good Samaritan Hospital of Anaheim, supra, and its followers relied upon by PIH herein, post-date MICRA and totally fails to take into account the body of common law preceding MICRA and the amendment to section 340.5 that restricts "professional negligence" to a breach of the duty to provide professional skill, prudence and diligence and it ignored the inference that the Legislature intended the same term to have the same meaning in MICRA, absent an indication in the statutory language or its

history to the contrary. The Murillo Court, as does PIH in its OPOM, expressly noted that Gopaul was decided under the law existing before enactment of Code of Civil Procedure section 340.5. Under the law established by this Court in McDill v. Martin, supra, however, Neel and Gopaul were the existing and controlling law defining "professional negligence" when MICRA was enacted and when sec. 430.5 was amended which entrenches them as the benchmark of what the Legislature intended when it enacted MICRA. When Murillo and its followers deviated from the definition established by Gopaul and Neel and adopted by the Legislature, they committed error in failing to follow mandates as to the construction of statutes.

In the case of Unruh-Haxton v. Regents of the University of California (2008) 162 Cal. App. 4th 343, patients who had received fertility treatment at a clinic owned by the Regents filed actions against the Regents and alleged intentional torts (fraud, conversion, etc) for the theft of eggs deposited with the clinic. The issue presented was whether the MICRA statute of limitations, i.e. Code of Civil Procedure sec. 340.5 applied.

The Court there held that MICRA and particularly sec. 340.5 did not apply to those causes of action for intentional tort. The Court held that "The legislators deliberately used the limiting term 'professional negligence'." (Unruh-Haxton v. Regents of the University of California, supra, at 356) The

phrase "professional negligence" was thus defined as a limiting phrase which did not encompass intentional conduct, i.e. limiting it to negligent conduct.

Just as the phrase is a limiting phrase limiting MICRA to negligent conduct, it is a limiting phrase limiting MICRA to professional conduct, i.e. in the performance of medical procedures and not floor mopping or bed maintaining operations.

The Court observed that "It would be inconsistent with the letter and spirit of the statutory scheme to hold allegations of intentional fraud, emotional distress, and stealing are really just another form of professional negligence." (Unruh-Haxton v. Regents of the University of California, supra, at 356) It would be equally inconsistent with the letter and spirit of the statutory scheme to hold floor mopping and defective bedrail latches as just another form of professional negligence.

Most recently, the California Court of Appeal for the Fourth District considered the issue in Johnson v. Chiu (2011) 199 Cal. App. 4th 775. There, a plaintiff brought a complaint against Dr. Chiu for medical malpractice and negligent maintenance of a laser machine that malfunctioned during a skin treatment.

Summary adjudication was granted as to the medical malpractice cause of action in that un-controverted evidence showed that Dr. Chiu complied, at

all times, with the applicable standard of care in the use of the laser machine. The trial court, on a motion in limine at the time of trial, then ruled that no cause of action for negligent maintenance could be stated because the cause of action for medical malpractice had been summarily adjudicated.

The Appellate Court reversed holding a cause of action for negligent maintenance of the laser machine survived the summary adjudication of the medical malpractice claim and was separate from it. The Court ruled that plaintiff should have been allowed to proceed on her ordinary negligence cause of action in which she alleged that Dr. Chiu was responsible for the repair and maintenance of the laser machine and knew or should have known that if not properly repaired and maintained, the laser could cause damages to the user of the product.

Such is the case at bar. Ms. Flores alleged a cause of action for the provision to her of defective equipment. This cause of action is separate from any medical negligence and is not controlled by MICRA.

Perhaps the most telling argument of all emanates from the very cases relied upon by PIH in "support" of its position. PIH's position is that there is no dichotomy between ordinary negligence and professional negligence when it occurs in a hospital - every negligent act or omission in a hospital is "professional negligence" according to PIH.

In Gopaul v. Herrick Memorial Hospital, supra, the Court began its analysis by noting that not every act of negligence by a professional is an act of "professional negligence." It reasoned that:

> "No reasonable person would suggest that 'professional malpractice' was the cause of injury to a patient from a collapsing chair in a doctor's office, or to a client from his negligent driving en route to the court house, or to a hospital patient from a chandelier falling onto his bed." (Gopaul v. Herrick Memorail Hospital, supra, at 1006)

Remarkably, although PIH urges Murillo v. Good Samaritan Hospital of Anaheim, supra, as support for its proposition that all which occurs within a hospital is "professional negligence", the Murillo Court agreed with the proposition that "no reasonable person would suggest that 'professional negligence' was the cause of injury to a patient from a collapsing chair in a doctor's office." (Murillo v. Good Samaritan Hospital of Anaheim, supra, at 56)

When Murillo agreed with the proposition that no reasonable person could argue that an injury to a patient from a collapsing chair in a doctor's office was the result of "professional negligence" how can PIH now argue that Murillo stands for the proposition that an injury to Flores occasioned by a

collapsing bedrail in a hospital is "professional negligence"?

PIH also cites the case of Bellamy v. Appellate Departments (1996) 50 Cal. App. 4th 797 in support of its position. As did Murillo, however, the Bellamy Court agreed with the Gopaul holding that not everything that occurs in a hospital is professional negligence. The Bellamy Court also agreed with the Gopaul holding that "...no reasonable person could argue that an injury to a patient from a collapsing chair in a doctor's office was the result of 'professional negligence'."

The primary cases cited by PIH recognize the dichotomy between professional and ordinary negligence. They each recognize that not everything that occurs in a hospital is professional negligence. Each agrees that a patient injured by a collapsing chair in a doctor's office is not the result of professional negligence but instead, ordinary negligence. Yet PIH urges that everything that occurs in a hospital is professional negligence and that somehow, although a patient inured by a collapsing chair in a doctor's office constitutes ordinary negligence, an injury to Flores occasioned by a collapsing bedrail in a hospital is professional negligence.

B. The Cases Relied upon by PIH Are Factually Distinguishable and Unreliable:

As the dominant "authority" upon which it relies, PIH cites this Court

to the cases of Murillo v. Good Samaritan Hospital of Anaheim, supra and Bellamy v. Appellate Department, supra. These cases, however, and their allegiance which blindly followed, are both factually distinguishable and unreliable, all as explained in the subsections which follow:

1. As Post-MICRA Cases, Neither Murillo, Bellamy, nor Their Progeny Established the Common Law upon which the Legislature Relied in Enacting MICRA:

Previously, Flores cited the Court to the case of McDill v. Martin, supra. That Supreme Court case solidified the doctrine of legislative intent that when the legislature enacts a statute, it is presumed to have known the common law of the land and, unless it expressly deviates from it in the law to be enacted, is presumed to have instead incorporated existed common law therein. With respect to "professional negligence", the definitions rendered in Gopaul v. Herrick Memorial Hospital of Anaheim , supra, and Neel v. Magana, Olney, Levy, Cathcart & Gelfund, supra were in existence at the time MICRA was enacted and the Legislature is presumed to have acted with full knowledge of their holdings as to what constituted "professional negligence".

It is Neel and Gopaul that therefore set the standard upon which the Legislature acted, not the cases of Murillo, Bellamy, and their progeny which followed. The definition of "professional negligence" as set forth in Gopaul

was known to the Legislature when it enacted MICRA. In not deviating therefrom in MICRA, it instead incorporated the definitions of Gopaul.

2. The Cases Cited by PIH Totally Ignored Rules for Statutory Construction/Interpretation:

We are faced with an issue of statutory construction, i.e. the meaning of the term "professional negligence." When faced with an issue of statutory construction, we are required to apply the rules of statutory construction. (Central Pathology Services Medical Clinic, Inc. V. Superior Court, supra, at 186-187)

An examination of Murillo, Bellamy, and their progeny cited by PIH reveals that not one such case applied any rule of statutory construction in rendering its decision. As a result, each such case is suspect. As a result, each such case is unreliable.

3. The Murillo Decision Is Purely Dictum:

As noted by the Court of Appeal's decision in this case, the holding in the case of Murillo is pure dicta and cannot be relied upon. [OPOM: Attachment; pg. 16]

This observation was rendered by the Court decision in Bellamy v. Appellate Department, supra, another of the cases relied upon by PIH. The Court in Bellamy observed, and properly so, that the professional negligence

found in Murillo was the failure of the hospital staff to raise the bedrails which resulted by reason of their failure to properly assess her medical condition as requiring same. (Bellamy v. Appellate Department, supra, at 806) Finding this as the professionally negligent act in rendering services, the Bellamy Court sided with Murillo. The Bellamy Court was keen to point out, however, that the holding in Murillo "...does not necessarily lead to the conclusion that any negligent act or omission by a hospital causing a patient injury is professional negligence." (Bellamy v. Appellate Department, supra, at 806)

In fact, the Bellamy Court expressly found anything beyond what was stated above in Murillo as pure dicta. Any conclusion reached in Murillo to the effect that a negligently maintained condition on hospital premises which causes injury to a patient falls within the genre of "professional negligence" was stated by the Bellamy Court to be pure dicta. (Bellamy v. Appellate Department, supra, at 806)

Murillo found that the hospital was professionally negligent in failing to medically assess the condition of its patient to determine if bedrails were needed. The Bellamy Court observed this and this alone as the foundation of the decision, with which it agreed. The Bellamy Court found as well that anything beyond this was unnecessary to the decision and was thus pure dicta. Statements in Murillo to the effect that any negligent act or omission by a

hospital causing injury to a patient is "professional negligence" are nothing more than dicta. Bellamy v. Appellate Department, supra, at 806-807) The Appellate Court in this case (Flores) likewise made that observation, i.e. that the statements in Murillo were dicta. [Opinion: 16]

PIH's case is built on dicta. PIH's case is built on statements made in Murillo extraneous to the decision, which statements are criticized by Bellamy, the other case relied upon by PIH.

4. The Facts of Murillo, Bellamy, and Their Progeny Are Distinguishable from the Facts Presented by Flores in the Instant Action:

The facts presented in the Murillo case are substantially different such that even were a Murillo test applied to the case at bar, professional negligence would not be found and Flores would prevail. Murillo involved the fall of a patient from a hospital gurney when the bedrails had not been raised. In Murillo, the defendant hospital "...argued that the alleged negligent act-failure to raise the bedrails-was ordinary negligence rather than professional negligence." (Murillo v. Good Samaritan Hospital, supra, at 53.) (It is also interesting to note that the positions taken by the health care industry vary according to their economic interest at the time. In Murillo, the hospital argued the position here taken by Flores.)

Disagreeing, the Appellate Court noted the following when it framed the issues presented to it.

> "In the present case, the question whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving the hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence." (Murillo v. Good Samaritan Hospital, supra, at 56.)

The Murillo Court expressly noted that the hospital had a professional duty to assess and recognize the medical condition of the patient. This involved the exercise of medical skill, prudence and diligence. No layperson could assess a patient to properly decide the need or lack of need for bedrails. This was in fact a medical decision. The Murillo Court also noted that after arriving at a medical assessment of the patient, the hospital had a duty to take medically appropriate steps to insure the patient's safety.

The negligence in Murillo, then, was that the hospital failed to properly medically assess the condition of the patient to determine the need for bedrails. According to the Murillo Court, the hospital had a medical duty to assess the patient. If it failed to do so it was professionally negligent for failing to fulfill

its medical duty to assess her. If it assessed the patient and determined no need for bedrails, then it negligently assessed her which constitutes professional negligence in medically assessing a patient.

To the contrary, in the case at bar, Flores was apparently properly medically assessed and it was determined to put the bedrails up on her bed. This is evident because the bedrails were raised. There was neither professional negligence in failing to assess her condition or in erroneously assessing her condition. She was assessed and she was properly assessed, determining that she medically needed bedrails. This assessment process constitutes the rendition of professional services, but it was not a negligent assessment, not a negligent rendition of professional services which caused her injury.

Hours after the assessment was accomplished in a proper medical fashion, the bedrails collapsed on Flores while she was attempting to get out of bed and while holding onto the bedrails to steady herself. This was ordinary negligence, not professional negligence. Just as if a bannister had collapsed on her, the collapse of the bedrails was ordinary negligence.

PIH also relies on the case of Bellamy v. Superior Court, supra, in support of its definition. The patient was left unrestrained and lying on an X-ray table during the course of an X-ray examination without the protection of

rails or straps. The Court in Bellamy v. Superior Court, supra, discussing Murillo, specifically commented that "whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving the hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence." (Bellamy v. Superior Court, supra, at 802.)

The Court in Bellamy offered the following explanation for its finding of professional negligence in the case before it:

> "Section 340.5 defines professional negligence as 'a negligent act or omission...in the rendering of professional services'." Under the facts alleged, the hospital was rendering professional services to Bellamy in taking X-rays and she would not have been injured by falling off the X-ray table but for receiving those services. Consequently, under the broad reading of the statute any negligence in allowing her to fall off the X-ray table arose 'in the rendering of professional services'." (Bellamy v. Appellate Department, supra, at 805-806)

Of course, in the case at bar, Flores was in no such position. She was not receiving medical services. She was attempting to exit her bed and steady

herself using the bedrails as a support when they collapsed.

Each of these cases presented by PIH involves negligence in assessing the condition of a patient. The patients were either medically assessed negligently or the hospital negligently failed to assess them at all. This involved a professional, medical decision or the failure to make a medical decision. This decision required the professional skill, prudence and diligence of a medically trained person exercising the specialized skill of a similarly employed person in the medical community.

Flores' case presents at a time after the professional medical assessment was made. Flores does not accuse PIH of negligence in deciding she needed bedrails. The medical decision was made to employ bedrails in her care and Flores does not allege that this medical decision was negligently rendered. Once the decision was made, however, the boundary was crossed from professional negligence to ordinary negligence. No lack of medical skill proximately resulted in the bedrails collapsing. They collapsed because of ordinary negligence, i.e. equipment defect.

IV. FLORES WAS NOT INJURED AS A RESULT OF THE RENDITION OF ANY SERVICES, PROFESSIONAL OR ORDINARY:

The Court will please recall earlier citations to law. Flores explained

that the term "professional negligence" was a limiting term. (Unruh-Haxton v. Regents, supra, at 356) MICRA was limited to actions involving negligence as compared to intentional torts and arguably those involving professional and not ordinary negligence. A further limiting term was included in the definition provided by the Legislature, i.e. in the rendering of "services".

All cases relied upon by PIH involved failures by a hospital to properly assess a patient's need for bedrails or failures to properly supervise a patient while on a gurney either preparatory to or in the course of a medical procedure. In each case, services were being provided to a patient and those services were negligently performed, i.e. sans bedrails.

In the case at bar, Flores was not injured as a result of the rendition of any services, be they professional or otherwise. All medical procedures had been completed for the day. Medical assessment services to determine if she needed bedrails had already been rendered and the decision was to employ bedrails. She was put into a bed and left to rest for the night. She fell while attempting to exit her bed and while using the bedrails for support. When those rails collapsed, she fell to the floor. The bed was inspected after her fall and removed from service.

Flores was not injured by negligently provided or omitted services. She was injured as a result of an equipment defect.

An additional qualifier was added by the Court in the case of Central Pathology Services Medical Clinic v. Superior Court, supra, at 191. The Court there held that "...an act ion for damages arises out of the professional negligence of a health care provider if the injury for which damages are sought is directly related to the professional services provided by the health care provider." (Central Pathology Services Medical Clinic v. Superior Court, supra, at 191.)

Flores's injuries were instead directly related to equipment defect. Her injuries were not the direct result of the rendition of services. Only indirectly were her injuries related to services. Only as a result of her hospital stay was she placed within the zone of danger of the equipment defect.

V. CONCLUSION:

PIH is critical of the Appellate Court's treatment of this matter, arguing that it relied on an appellate court decision (Gopaul) rendered forty years earlier which has not been followed since and which interpreted a totally different statute of limitations in effect pre-MICRA. It argues the post-MICRA cases it cites are the proper authority. This is error on several counts.

1. Gopaul, Neel, and other pre-MICRA cases, not post-MICRA cases, set the benchmark for the definition of "professional negligence".

When the Legislature enacted MICRA in 1975, it is assumed that it had in mind existing law, i.e. the law of Gopaul and Neel when it enacted MICRA and, having not changed the definitions of "professional negligence" set by those cases, instead adopted them. (McDill v. Martin, supra, at 837-838) The Legislature does not enact laws in a vacuum. It enacts them in the context of existing common law and unless it statutorily alters existing common law, it adopts it. In enacting MICRA, the Legislature is presumed to have adopted existing common law as established by Gopaul and Neel.

2. Gopaul has been followed. Specifically, the Appellate Court in Johnson v. Chiu, supra, followed the rationale of Gopaul in finding a patient's injury occasioned by a negligent maintenance of a laser skin care machine ordinary and not professional negligence. The result in Gopaul has been supported by the myriad cases of the California Supreme Court cited herein.

PIH relies predominately on the cases of Murillo v. Good Samaritan Hospital of Anaheim, supra and Bellamy v. Appellate Departments, supra for its opinion that all negligence which occurs within the confines of a hospital is "professional negligence." Yet, both Murillo and Bellamy expressly agreed that no reasonable man could argue that a patient injured from a fall from a

collapsing chair in a doctor's office was injured as a result of "professional negligence."

Both Murillo and Bellamy found "professional negligence" to exist because in each case, the hospital had failed to properly assess the condition of the patient to determine if the patient's condition required the use of bedrails. "Professional negligence" was found in each case because the hospital breached its medical duty to properly assess the patient's condition to determine if bedrails were required. This is the same result as if the hospital had negligently assessed the patient's condition to determine if he or she required an appendectomy. Each involved a medical assessment negligently provided.

Both Murillo and Bellamy involved the negligent provision of a service. That service was the assessment of their conditions to determine if bedrails were required followed by medical care. No services, medical or otherwise were being provided to Flores.

Neither Murillo nor Bellamy nor PIH pays one iota of consideration to the rules of statutory construction. Yet, each attempted to provide and does provide a definition for the term "professional negligence." This would not appear to be an act of forgetfulness on the part of PIH. When every rule of statutory construction supports your adversary's case and degrades your own,

it might be best to ignore them and go off on a tangent, i.e. dicta from Murillo. Rules of interpretation mandate that:

1. A statute be interpreted to give effect to the legislative intent. Here, that intent is to lower malpractice insurance rates. But PIH's definition would only raise those rates;

2. The intent of Code of Civil Procedure sec. 340.5 was to reduce the number of medical malpractice lawsuits. PIH argues that into that vast cauldron of medical malpractice suits we add premises liability, premises defect, and all things generally negligent having nothing to do with medical procedures or the exercise of professional skill, judgment and diligence. Were it adopted, PIH's definition would greatly add to the number of what it would term "medical malpractice" suits;

3. Words of a statute must be interpreted in light of their ordinary meaning and import. PIH would interpret "professional negligence" in a purely legalistic manner ignoring the ordinary meaning of the words. "Professional negligence" and "medical malpractice" would be interpreted to include a slip and fall, a collapsing chair in an office, a defective stair, and a tainted chicken-salad sandwich served-up in the hospital cafeteria. How could any patient unskilled in law

possibly comprehend that his or her cause of action for slipping in a puddle of water was controlled by sec. 340.5?

4. PIH seeks a definition that could bring chaos to MICRA if adopted across the board. Doctors must be disciplined when a patient slips and falls; insurers must report it; and the Medical Quality Assurance Board must investigate it.

PIH argues that every negligent act occurring in a hospital constitutes professional negligence. Yet, presumably PIH buys, and the insurers sell, general liability-premises liability policies to PIH and every other responsible hospital and doctor.

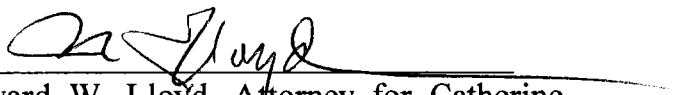
PIH bases its position on the Murillo case. Flores would probably agree that the Murillo Court got it right, at least partly. The hospital in Murillo was under a duty to medically assess its patient and determine if her condition required the use of bedrails. The hospital botched that medical assessment it made, which negligence could well be determined to be professional. That, however, was all that was needed to decide the case. Anything else was and is pure dicta. Any statement it made to the effect that any negligent act or omission by a hospital is professional negligence is pure dicta. PIH bases its position on dicta. The Appellate Court deciding this case (Flores) recognized this fact, i.e. that Murillo was dicta. The Appellate Court in Bellamy cited by

PIH recognized the fact, i.e. that Murillo was dicta.

Doctors do not go to medical school to learn how to maintain hospital beds. Lawyers do not go to law school to learn how to safely drive to avoid injuring their clients on the way to the courthouse for trial. Architects do not go to art and engineering classes to learn how to keep the furniture in their offices safe.

Dated: January 4, 2014

LAW OFFICES OF EDWARD W. LLOYD



by Edward W. Lloyd, Attorney for Catherine Flores

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1)

The text of this Answer Brief on the Merits consists of 13,577 words as counted by the Corel Wordperfect X6 word-processing program used to generate this Brief.

Dated: January 11, 2014

Edward W. Lloyd, Attorney

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing

and know its contents.

☐ **CHECK APPLICABLE PARAGRAPHS**

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner
☐ a of
a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.
☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for
a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.
Executed on , at , California.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

TYPE OR PRINT NAME SIGNATURE

PROOF OF SERVICE

1013a (3) CCP Revised 2004

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of ORANGE , State of California.
I am over the age of 18 and not a party to the within action; my business address is:
970 West 17th Street, Suite D, Santa Ana, Ca 92706

On January 21, 2014 , I served the foregoing document described as PLAINTIFF/APPELLANT'S ANSWER BRIEF ON THE MERITS; AND MEMORANDUM OF POINTS AND AUTHORITIES
on All parties in this action
☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
☒ by placing ☒ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:
The original to the Supreme Court and copies to all other addresses per the attached Service List.

☒ **BY MAIL**
☒ *I deposited such envelope in the mail at Santa Ana , California.
The envelope was mailed with postage thereon fully prepaid.
☐ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
Executed on January 21, 2014 , at Santa Ana , California.
☐ **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
Executed on , at , California.
☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Edward W. Lloyd, Attorney

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