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 BRIEF ON THE MERITS

FONDA, HESTER & ASSOCIATES, LLP
*Peter M. Fonda, State Bar No. 057023
Kristen J. Heim, Esq., State Bar No. 132657
1925 Century Park East, Suite 850
Los Angeles, California 90067-2701
Telephone: (310) 553-3320
Facsimile: (310) 553-4232
pfonda@fhallp.com

Attorneys for Defendant, Respondent, and Petitioner
PRESBYTERIAN INTERCOMMUNITY HOSPITAL

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Attorneys for Defendant, Respondent, and Petitioner
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ISSUES PRESENTED

In its Opening Brief on the Merits Presbyterian Intercommunity Hospital ("Hospital") described the issue presented by this case as: 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 §340.5 (hereinafter "C.C.P."), the statute of limitations for actions arising out of professional negligence, or by C.C.P. §335.1, the statute of limitations applicable, generally, to personal injury actions.

While Hospital recognizes that the statement of the issues presented by the case contained on the website of the California Supreme Court is intended to provide general information regarding the subject matter of the case and while that description "does not necessarily reflect the view of the court or to define the specific issues that will be addressed by the court", Hospital believes that it also properly reflects the issues presented by the case:

(1) Does the one-year statute of limitations for claims under the Medical Injury Compensation Act (Code of Civil Proc., §340.5) or the two-year statute of limitations for ordinary negligence (Code of Civil Proc., §335.1) govern an action for premises liability against a hospital based on negligent maintenance of hospital equipment; and

(2) Did the injury in this case arise out of "professional negligence," as that term is used in C.C.P. §340.5, or ordinary negligence.

Plaintiff and appellant, Catherine Flores ("Flores"), apparently disagrees. She fames the issue presented in the case as:

> "[W]hat is a definition of 'professional negligence' for universal application to MICRA." (Answer Brief on the Merits [hereinafter AB2].)

INTRODUCTION

Replying principally upon a strained and illogical interpretation of the statutes defining "professional negligence" (which are identical) in the "constellation of statutes and amendments" comprising MICRA (AB2-3), Flores would have this court reverse almost forty years of case law interpreting C.C.P. §340.5, the statute of limitations for claims subject to the Medical Injury Compensation Act, and narrow it considerably to apply that statute (and in fact the entirety of MICRA) to only those cases involving "medical treatment falling below the professional standard of care." (AB 33-49)

Hospital strenuously disagrees with Flores. The interpretation she supports would dramatically revise the understanding of the bench and bar of the intent and scope of MICRA and would effectively wipe out almost four decades of appellate decisions establishing that MICRA applies to all

cases in which a hospital allegedly fails to comply with its duty to provide a safe environment within which the diagnosis, treatment and recovery of patients may be carried out. (*Bellamy vs. Appellate Department* (1996) 50 Cal.App.4th 797 at 803, citing *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56-57.)

Specifically, this Court, to rewrite the law as Flores urges, would have to disapprove not only the decisions in *Murillo vs. Good Samaritan Hospital, supra*, but also numerous other decisions, including *Bellamy, supra*, and *Williams vs. Superior Court* (1994) 30 Cal.App.4th 318, 325.

To adopt Flores' position, this Court would necessarily have to hold that in making the decision of whether an action arises out of the professional services of a healthcare provider, the trial court and the trier of fact may no longer examine the "nature and cause of a plaintiff's injury . . . to determine whether each is directly related to the manner in which professional services were provided." (*Williams, Id.* at 325). This Court would necessarily have to disagree with the trial court which held that:

> "Ensuring that bedrails, to the extent they are needed by a particular patient, are properly raised or lower and properly latched is a duty that arises from a professional services being rendered." (Appellant's Appendix [AA42])

LEGAL ARGUMENT

1. THE CALIFORNIA SUPREME COURT IS THE FINAL AUTHORITY ON THE INTERPRETATIONS OF STATUTES ADOPTED BY THE CALIFORNIA LEGISLATURE.

Fallbrook Irrigation IRR Dist. vs. Bradley (1896) 164 U.S.112 17 SCt. 56, 61, 41 L.Ed. 369, 387. See also 7 Witkin, Summary of California Law, (10th Ed., 2005) "Constitutional Law" §112, p.218).

(A) The principles and rules for the interpretations of statutes are well-settled in California.

The California Supreme Court has set forth the principles by which it is guided in interpreting a statute:

> "'[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent . . . [Citations]'." (*Central Pathology Service Medical Clinic, Inc. vs. Superior Court* (1992) 3 Cal.4th 181, 186-187, quoting *Walnut Creek Manor Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268 [284 Cal.Rptr.718, 814 P.2d 704].)

Appellant's Answering Brief ("AB") principally, and almost exclusively, focuses on the term "professional negligence" in the statute at bar, C.C.P. §340.5:

> "In an action for injury or death against a healthcare provider based upon such person's alleged professional negligence, the time for commencement of action shall be three years after the date of injury or one year after the

> plaintiff discovers, or through the use of reasonable diligence, should have discovered the injury, whichever occurs first . . . ."
>
> For the purpose of this section:
>
> "(1) 'Health care provider' means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, 'Health care provider' incudes the legal representatives of a health care provider;
>
> (2) '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 to act 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."

This Court in *Central Pathology*, *supra*, considered "the meaning of the critical words 'professional negligence' in C.C.P §425.13(a) (*Id.* at 187). That statute as well as the statute involved here, (C.C.P. §340.5) were both part of the MICRA legislation." Both use the "critical words 'professional negligence.'" In *Central Pathology*, this Court observed that the words "professional negligence" are "no stranger to statutory definition" (Id. at 187). The Court recited that "In 1975 the Legislature passed the Medical Injury Compensation Reform Act (MICRA) containing no fewer than six

sections defining 'professional negligence' as a 'negligent act or omission to act by a healthcare 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 [Citations.] Although the Legislature did not repeat that definition in section 425.13, we must presume that the Legislature was familiar with existing statutory definitions." (*Central Pathology Service Medical Clinic, Inc. vs. Superior Court*, Id. at 187, citing *Bailey vs. Superior Court* (1977) 19 Cal.3d 970, 977 Fn.10 [140 Cal.Rptr.669, 568 p.2d 394].)

The actual issue in the *Central Pathology* case was whether plaintiffs were required to comply with C.C.P. §425.13(a) by filing a motion to seek leave of court before pursuing punitive damages. In *Central Pathology* the causes of action were pleaded as intentional torts. Therefore, the charge of the Court in *Central Pathology* was to ascertain what the legislative intent was with respect to the procedure for seeking punitive damages in a case where the punitive damages were sought for intentional torts, rather than on a negligence theory. Accordingly the Court examined the legislative history of C.C.P. §425.13 following the general rules of interpretation of statutes as set forth in a number of appellate decisions, perhaps the most approachable being that of *DeYoung vs. San Diego* (1983) 147 Cal.App.3d 11, 17, 194 Cal.Rptr.722. (See 7 Witkin Summary of California Law, "Constitutional Law", *supra*, §115, p.220-221.)[1]

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[1] As Flores points out, the more recent decision of our Supreme Court in *Calatayud vs. State of California* (1998) 18 Cal.4th 1057, [77 Cal.Rpt.2d 202; 959, p.2d 360], also sets forth the process by which a statute is to be examined to determine its legislative purpose: "The fundamental purpose of statutory

The California Court of Appeal in *DeYoung, supra*, cogently described this step-by-step process as follows:

> "(a) [A]scertain the intent of the Legislature so as to effectuate the purpose of the law [Citations.]
>
> (b) Give a provision a reasonable and commonsense interpretation consistent with the apparent purpose which will result in wise policy rather that mischief or absurdity [Citations.]
>
> (c) Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section of the content or the whole [Citations.]
>
> (d) Take into account matters such as context, object and view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction;
>
> (e) Give great weight to consistent administrative construction." (*DeYoung, Id.* at 17, see also 7 Witkin, Summary of California Law, *supra,* "Constitutional Law" §123 at 220-221.)

In properly interpreting a statute. to determine its intent, other rules come into play:

(1) The "plain meaning rule" pursuant to which "[c]ourts will adopt a literal interpretation of the statute unless it is repugnant to the

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construction is to ascertain the intent of the lawmakers as to effectuate the purpose of the law [Citations.] In order to determine this intent, we began by examining the language of the statute [Citation.] But '[i]t is a settled principle of statute interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act' [Citations.] Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness' [Citations.]" *Calatayud vs. State of California, Id.* at 1064-1065.

obvious purpose of the statute. (*Lundgren vs. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr.115, 755 p.2d, 299]; *J.A. Jones Const. Co. vs. Superior Court* (1994) 27 Cal.App.4th 1568, 1575 [33 Cal.Rptr.2d 206 [where text of statute is clear the court should not inquire into legislative intent] (Supporting citations omitted.)" (See 10 Witkin Summary of California Law, *supra*, "Constitutional Law" §121 p.226-227.)

The sources of legislative and constitutional intent which may be utilized as aids to interpretation of a statute are numerous. Witkin has collected the "Aids to Interpretation" of Statutes, noting that the sources of legislative intent are numerous and include:

(1) California Law Revision Commission Reports;

(2) Legislative counsel's digest;

(3) Attorney General's Opinions;

(4) Prior judicial construction of statute;

(5) Legislative history; and

(6) Statement of Legislative Findings or Intent.

See 7 Witkin, Summary of California Law, *supra*, "Constitutional Law" §123 p.229-230.

In reference to the statute at bar, there does not appear to be a California Law Revision Commission Report. However, we do have the benefit of the Legislative Counsel's digest, Legislative history, and various statements of legislative findings or intent.

Sources of legislative history include Legislative Committee reports, Legislative analyst's reports, and statements and memorandums of legislators. Other matters of legislative history include unpassed bills and other statutes as well as revisions of or omissions from bills, model bills and their commentary and, finally, public comments. (7 Witkin, Summary of California Law, *supra*, "Constitutional Law" §125, pp.232-233.) Views of the Legislature, evidenced by the passage of law in accordance with a particular interpretation, are deemed persuasive as to legislative intent. (7 Witkin, Summary of California Law, *supra*, "Constitutional Law" §126 p.233-234.)[2]

The appellate court in *Halbert's Lumber vs. Lucky Stores* (1922) 6 Cal.App.4th 1233, 8 Cal.Rptr.2d, 298, described the sequence of analysis in statutory interpretation as follows:

First, the actual language of the statute must be determined by the court as that language successfully braved the legislative gauntlet reasoning that the actual language of the statute . . . has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in

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[2] More than sixty years ago, Carl N. Llewellyn, an authority in the interpretation of statutes, authored a "classic" law review article in which he "took great delight in listing, side-by-side, contradictory maxims of statutory interpretations." His "thesis was that judges pick and chose among the rules to arrive at a result consonant with their own judicial temperament and philosophy." *Halbert's Lumber vs. Lucky Stores* (1922) 6 Cal.App.4th 1233, 8 Cal.Rptr.2d, 298, referring to Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Cannons About How Statutes Are to be Construed." The Court of Appeal in *Halbert's Lumbar* observed that "At its logical extreme, Llewellyn's thesis would mean there is no law when it comes to the interpretation of law itself. It all depends on the 'felt need' emanating from the particular 'situation' and 'controversy' before the court. But the rules of statutory interpretation are not quite so plastic as Llewellyn's article might lead us to believe. There is order in the most fundamental rules of statutory interpretation if we want to find it. The key is applying these rules in proper sequence." (6 Cal.App.4th 1238.)

committee, amended, re-amended, analyzed, reanalyzed and voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel's digest, and other documents, which make up a statute's 'legislative history'" (*Id.* at 1238.)

It is only where the meaning of the words in the statute is not clear that the courts must take the second step and refer to the legislative history. (*Id.* at 1239.)

The "final step", which the *Halbert's Lumber* court believed should be taken (only when the former two steps have failed) "is to apply reason, practicality and commonsense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable . . ., in accord with common sense and justice and avoid an absurd result." (*Id.* at 1239).

Nearly fifty years have passed since the adoption of MICRA. As the briefs in this appeal reveal California appellate courts have almost uniformly, and for nearly forty years (the exception being the decision in *Flores*, the case at bar,) held that when a patient sustains an injury by virtue of a malfunction of a piece of hospital equipment utilized in that patient's care, treatment, and recovery, the provisions of MICRA (including C.C.P. §340.5) apply. These courts, without reference to legislative intent, apparently concluded that the words "professional negligence", as used in the various MICRA statutes, clearly encompass torts emanating in such a factual setting, and no ambiguity, doubt, or uncertainty was found to exist.

(See, for example, *Murillo, supra*, *Bellamy, supra*, and *United Western Medical Centers vs. Superior Court* (1996) 42 Cal.App.4th 500.)[3]

(B) Assuming *arguendo* that the statute is not clear on its face and resort must be had to extraneous material, legislative history also supports the position of Hospital that MICRA and, specifically, C.C.P. §340.5, apply to the matter at bar.

In the Preliminary Report dated June, 1974, the Assembly Select Committee on Medical Malpractice, Assemblyman Henry A Waxman, Chairman, summarized its findings as including:

> 11. Medical malpractice claims filed against hospitals are rising at a faster rate than claims filed against physicians, and all indications are that this trend will continue for the immediate. (Exhibit B, Legislative Intent Service, "Assembly Select Committee on Medical Malpractice Preliminary Report, June, 1974, p.44-45.)

In its discussion of Hospital Liability, the Assembly Subcommittee stated:

> "Hospitals occupy a unique position in the malpractice controversy. As **health care providers**, they share with physicians the same concern about the tremendous rise in claims and verdicts. In fact, claims against hospitals are rising at a greater rate than claims against

[3] "[T]he professional duty of a hospital . . . is primarily to provide a safe environment within which diagnosis, treatment and recovery can be carried. Thus if an unsafe condition of the hospital's premises causes injury to [a patient], . . . there is a breach of the hospital's duty qua hospital." (*United Western Medical Centers* at 504, citing *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56-57.)

> physicians. in the majority of malpractice suits brought today, the hospital is a codefendant. [49]
> Testimony of James Ludlam, Attorney, California Hospital Association, Hearings I, *supra* at 146.)
>
> Years ago most hospital liability originated from what may be described as physical mishaps. Patients falling out of their beds was a common example. Very few claims arose from the actual practice of medicine. In other words, there was a time when hospital liability was significantly different than physician medical malpractice.
>
> Today the picture has changed substantially. Hospital liability can occur in several different ways. As employers of interns and residents, they are liable for malpractice actions against these doctors. **An additional increasing source of hospital liability originates from the acts and omissions of allied health personnel, i.e., nurses and technicians. Today hospital personnel are intimately involved in the practice of medicine. This is because doctors are not constantly attending their patients. Nurses are being called upon to do more and more of what formerly was purely the work of doctors. Consequently, a typical malpractice case today usually involves a series of alleged errors, some on the part of the hospital employees** and some on the part of the attending physicians." (Emphasis added.)

Throughout Flores' Answer Brief On the Merits, Flores maintains that professional negligence refers exclusively to educated "professionals" arguing, implicitly, that MICRA's statutory scheme extends its protection to only licensed healthcare practitioners (and apparently excluding unlicensed hospital personnel).

However, it is well-established in California that MICRA's "statutory scheme applies equally to licensed facilities." Indeed C.C.P. §340.5(1) provides that a "healthcare provider" includes "any clinic, health dispensary or health facility licensed pursuant to Division 2 (commencing with [s]ection 1200) of the Health and Safety Code." (C.C.P. §340.5 and see *Unruh-Haxton vs. Regents of the University of California* (2008) 162 Cal.App.4th 343, 357.)

In further aid to the conclusion that MICRA protections, including C.C.P. §340.5, were meant to apply to a licensed hospital acting through its "allied health personnel", such as technicians, the Summary Digest to Assembly Bill No. 1 and Senate Bill No. 24, states that:

> "*Existing law defines medical malpractice insurance as insurance coverage against the legal liability of the insured against loss, damage or expense incident to a claim arising out of the death of injury of any person as the result of negligence or malpractice in rendering professional services by any licensed physician.*" (Italics in original.)

The Summary Digest provides that one of the aims of the bill is to change the term "licensed physician" to "licensee in the above definition": "*The bill defines medical malpractice insurance for general purposes to mean insurance coverage against legal liability as specified in rendering professional service by a person licensed pursuant to the Medical Practice Act, the Osteopathic Act,* ***or a licensed health facility***." (Italics in original, emphasis added.) (Exhibit C, pp.1293-1295)

The final version of the Assembly Bill No. 1 (September 2, 1975 approved by the Governor on September 23, 1975 and filed with the Secretary of State on September 23, 1975), removed from the statute the lengthy list of healthcare providers, substituting instead the definition of "healthcare provider" as those persons licensed under various statutes. It

also adopted the definition of "professional negligence" as "*an action for personal injury or wrongful death proximately caused by a healthcare providers' negligent act or omission to act in the rendering of professional services, provided that such services are within the scope for which licensed and are not within any restriction imposed by the licensing agency or any licensed hospital.*" (See C.C.P. §340.5(2) and Exhibit D, Legislative Counsels Digest to Assembly Bill No. 1, p.3-4.)

As signed into law, C.C.P. §340.5(2) provided:

> "'Professional negligence' means a negligent act or omission to act by a healthcare provider in the rendering of professional services, which negligent 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."[4]

The "Summary Digest of Statutes Enacted and Resolutions (Including Proposed Constitutional Amendments) Adopted in 1975" and the "1969-1975 Statutory Record" (see Exhibit C) provides that "Under provisions of existing law actions against physicians and surgeons, dentists, registered nurses, dispensing opticians, optometrists, registered physical therapists, podiatrists, licensed technologists, osteopaths, chiropractors, clinical laboratory bio-analysts, clinical laboratory technologists, veterinarians, or **against a licensed hospital as the employer of such persons**, based upon such person's alleged professional negligence, battery

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[3] Flores has never alleged that Hospital is not properly licensed or does not qualify as a "healthcare provider" as that term is used in C.C.P. §340.5. In fact, Flores conceded that Hospital was a healthcare provider as that term is used Code of Civil Procedure §340.5, in her Opposition, in the trial court, to Hospital's Demurrer (Appellant's Appendix ["AA"] p.32).

or errors, omissions in such person's practice, must be commenced within four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury, whichever occurs first." The Legislative Counsel opines that "this bill would provide instead that such an action against such healthcare providers based upon professional negligence, as defined, must be commenced within three years from the date of the alleged wrongful act or within one year from the date the plaintiff discovers or should have discovered the injury, whichever occurs first . . ." (Exhibit C, p.1294.)

Accordingly from the report by the Assembly Select Committee on Medical Malpractice, the legislative history, and the Legislative counsel's digest, it is beyond dispute that when MICRA was adopted it was meant to apply to the negligent acts of licensed healthcare professionals such as physicians, surgeons, nurses, physical therapists, clinical laboratory bio-analysts, clinical laboratory technologists, and other allied health personnel who are employed by, or working in, licensed hospitals.

The professional duty of a hospital is to provide a safe environment within which the diagnosis, treatment and recovery of patients may be carried out. Therefore, when a hospital, through its "allied health personnel", negligently acts and thereby breaches its duty to provide such a safe environment, MICRA applies.

Such would obviously include patients' injuries caused by negligence in the maintenance or use of hospital equipment including hospital beds and the bedrails attached thereto (in which a patient "recovers"), autoclaves (used for the sterilization of surgical instruments), gurneys, operating tables, wheelchairs, bags of fluid utilized in the transfusion or medication of patients, etc. The list is endless but the key is

that if the injury is caused by a hospital employee, or other healthcare personnel who have privileges to practice medicine in such a hospital, it does not matter whether professional skill or judgment is involved, nor is the level of skill or judgment involved determinative, as the hospital itself is the "professional." When a hospital is sued for its failure, by its employees, or other "allied health personnel", to provide a safe environment in which the diagnosis, treatment and recovery of patients may be carried out, it was clearly the legislative intent to make such lawsuits subject to the full panoply of MICRA.

2. THE LEGISLATIVE INTENT OF MICRA, CONTRARY TO FLORES' ASSERTION, WAS NOT SOLELY TO REDUCE MEDICAL MALPRACTICE INSURANCE PREMIUMS.

Flores is dead wrong that "the legislative intent of MICRA was and is to reduce medical malpractice insurance premiums and nothing more." (AB13, citing *American Bank & Trust Co. vs. Community Hospital* (1984) 36 Cal.3d 359, 372.) While this Court in *American Bank & Trust Co., supra*, may have stated that the impetus to the enactment of MICRA was to hold down the "skyrocketing medical malpractice premium costs", that was not the sole purpose of the adoption of MICRA.

In fact, Flores recognizes that one of the intents of the California Legislature in the enactment of MICRA was to reduce the number of medical malpractice lawsuits. (AB18-20) In fact, in *Western Steamship Lines, Inc. vs. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111-112, this Court stated:

"MICRA thus reflects a strong public policy to contain the costs of malpractice insurance *by controlling or redistributing liability for damages thereby maximizing the availability of medical services to meet the state's*

healthcare needs." (*Western Steamship Lines, Inc., Id.* at 111-112 and see Hospital's Opening Brief on the Merits at p.8-9.)[5]

Much of Flores' discussion is conjecture and Hospital notes that the various statutes discussed therein assume that this Court has granted plaintiff's Motion to Take Judicial Notice, which Motion has not yet been ruled upon by this Court as of the time of filing of this Brief.

3. FLORES' RELIANCE UPON THE DECISION IN *UNRUH-HAXTON vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA* IS MISPLACED.

Flores improperly contends that the application of MICRA is limited to cases involving medical treatment falling below a professional standard of care. Flores asserts that MICRA does not apply to a premises defect which neither involves active medical care nor the professional standard of care (AB33).[6]

In partial support of her contention, Flores relies upon *Unruh-Haxton vs. Regents of the University of California* (2008) 162 Cal.App.4th 343 (AB45-46). The crux of the causes of action in *Unruh-Haxton*

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[5] Much of Flores Answer Brief on the Merits is devoted to a fanciful, though legally unsupported, excursion into the purported impact of classifying cases arising from defects in a hospital's premises as "ordinary negligence" as opposed to "professional negligence." (AB20-30)

[6] Flores has confused the requirement of expert testimony with what constitutes "professional negligence. While expert testimony may be required to prove "professional negligence" in a majority of circumstances, that is not the issue nor is the necessity for expert testimony determinative of the definition of "professional negligence." (See *Flowers vs. Torrance Memorial Medical Center* (1994) 8 Cal.4th 992, 1000[". . . this reasoning confuses the manner of proof by which negligence can or must be established and the character of the negligence itself, which does not depend upon any related evidentiary requirements."]

concerned an alleged theft of human genetic material from the plaintiffs. The defendants were a fertility clinic operated by the Regents of the University of California (another defendant) the medical center in which the clinic was located, and the physicians employed there. The physicians, the Regents and the medical center allegedly entered into a joint venture to share the profits of the fertility clinic. The defendants demurred to the complaint and the trial court ruled the claims for intentional infliction of emotional distress, negligent supervision, and negligent supervision by the medical center were time-barred but that the causes of action for fraud and conversion were not. The Court of Appeal reasoned that the plaintiffs' claims for fraud, conversion and intentional infliction of emotional distress were related to intentional wrongful conduct and not the type of negligence subject to C.C.P. §340.5.

The Fourth District of the California Court of Appeal framed the issue as whether MICRA applied to a genetic material stealing case (*Id.* at 352). That court observed that it is settled that additional causes of action may arise out of the same facts as a medical malpractice action, yet additional causes of action might not trigger MICRA (referring to *Perry vs. Shaw* (2001) 88 Cal.App.4th 658, 668-669). This appellate court observed that where a complaint contains a cause of action against a healthcare provider on a legal theory other than malpractice it is incumbent upon the court to determine whether it is nevertheless based upon the "professional negligence of a healthcare provider so as to trigger MICRA" (*Id.* at 352-353). The court responded that the answer is "sometimes yes and

sometimes no" depending on the particular cause of action and the particular MICRA provision at issue (*Id.* at 353).[7]

The cases it found instructive included *Perry vs. Shaw, supra*. That was a case in which a patient expressly refused to consent to a breast lift or enlargement but, nonetheless, the surgeon did substantially enlarge her breasts. The plaintiff sued on the intentional tort of battery. The Court of Appeal in *Perry* relying upon the Supreme Court's decision in *Cobbs vs. Grant* (1972) 8 Cal.3d 229, reasoned that the cause of action for battery was not negligence and therefore not subject to MICRA.

However, there was no hospital-based instrumentality involved in either *Unruh-Haxton vs. Regents of the University of California, supra*, nor in *Perry vs. Shaw, supra*.[8]

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[7] For example in *Preferred Mutual Ins. Co. vs. Reiswig* (1999) 21 Cal.4th 208, 214-218, the Supreme Court held that C.C.P. §364, tolling the statute of limitations for 90 days where a Notice of Intent to Sue is given, applied in an equitable indemnity action based on professional negligence but governed by non-MICRA causes of action. In *Barris vs. County of Los Angeles* (1999) 20 Cal.4th 101, 101-106, the Supreme Court held that damages recoverable under a federal statute, the Emergency Medical Treatment Act of Labor Act (EMTALA), was subject to MICRA's non-economic damages cap of $250,000.00 (Civil Code §3333.2) for failure to stabilize a patient. In *Western Steamship Lines vs. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 101-117, the California Supreme Court held that Civil Code §3333.2 limiting recovery of non-economic damages of $250,000.00 applies to an equitable indemnity action based on professional negligence irrespective of the total amount of damages sustained by the party seeking indemnity. In *Central Pathology Services Medical Clinic, Inc. vs. Superior Court* (1992) 3 Cal.4th 181, 188-191, the Supreme Court held that even though intentional torts are pleaded, the plaintiff was required to comply with C.C.P. §425.13 and obtain an order, upon noticed motion, to seek punitive damages when the act was based upon "professional negligence." Finally in *Hedlund vs. Superior Court* (1983) 34 Cal.3d 695, 701-704, the California Supreme Court held that a therapist's failure to warn of a threat made by a patient was subject to MICRA as the failure to warn was "inextricably interwoven" with the therapist's professional responsibilities.

[8] It is difficult to ignore that the *Perry* court observing the potential effect of the non-economic damages cap of $250,000.00, described it as the most significant limitation created by MICRA, [and] one of the "most Draconian." *Unruh-Haxton, Id.* at 354 quoting *Perry vs. Shaw, Id.* at 668-669.

The import of the discussion of *Perry vs. Shaw* in the *Unruh-Haxton* decision is that "[T]here is nothing in the legislative history of MICRA or [Civil Code] section 3333.2 to suggest "Legislature intended to exempt intentional wrongdoing from liability by treating such conduct as though it had been nothing more than mere negligence." (*Unruh-Haxton, Id.* 354-355, citing *Perry vs. Shaw, Id.* at 668-669.)

The *Unruh-Haxton* court also noted that ". . . the provisions of MICRA relating to statutes of limitations relate to the legislator's goal of reducing the number of medical malpractice actions filed." It further noted that "the legislators deliberately used the limiting term 'professional negligence.' 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 other forms of professional negligence. As discussed above, we have no reason to conclude the 'Legislature intended to exempt intentional wrongdoing from liability by treating such conduct as though it had been nothing more than mere negligence.'" (*Unruh-Haxton, Id.* at 356, citing *Perry, Id.* at 88 Cal.App.4th at p.669.)

There is nothing whatsoever in this discussion which aids the plaintiff in her interpretation of, and attack upon, MICRA. There is no contention here that either the neglectful latching or the negligent maintenance of the hospital bed was egregious. It was nothing more, Flores concedes, than negligence.[9]

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[9] As noted in the Opening Brief on the Merits, the two causes of action (for negligence and premises liability) in plaintiff's Complaint, to which the Hospital's demurrer was sustained without leave to amend, were identical. In Flores' Opposition to the Demurrer, Flores conceded that "Facts ***may*** be developed during discovery to show that the actual negligent act was not committed by a healthcare provider but instead by an untrained (in the medical field) layperson for whom the hospital is vicariously liable." (Emphasis added.) (AA32) Flores thereby conceded, in the trial

4. FLORES' RELIANCE UPON *JOHNSON vs. CHIU* IS SIMILARLY MISPLACED.

This decision by the same division of the Fourth District that decided the *Unruh-Haxton* case is of questionable applicability due to the peculiar procedural history which brought it before the Court of Appeal.

Johnson vs. Chiu involved the alleged negligent maintenance of laser machine in a physician's office or an out-patient facility (not a hospital) in which the machine allegedly malfunctioned during a skin treatment causing the plaintiff injury. (*Johnson vs.* Chiu (2011) 199 Cal.App.4th 775, 777-778.)

In its discussion the court in *Johnson vs. Chiu* confronted the decision of the California Supreme Court in *Flowers vs. Torrance Memorial Medical Center* (1994) 8 Cal.4th 992.

The *Flowers* case involved a patient brought to the Emergency Room of a hospital and placed on a gurney. Unfortunately the nurse left one of the railings on the gurney down and the patient fell asleep. When she awoke and attempted to turn over, she fell off the gurney. (199 Cal.App.4th 775, 781.) The defendants moved for summary judgment. Since the plaintiff's expert's declaration was defective in several respects, the defendant's evidence as to the standard of care, as well as to the exercise of due care, was unrebutted. Therefore no triable issue of material fact remained. The court denied the plaintiff's Motion for Reconsideration (*Johnson vs. Chiu, Id.* at 781, citing *Flowers, Id.* at 996.)

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court, that she had no idea, when the complaint was filed, whether the negligence was committed by a healthcare provider or instead by allied health personnel employed by the Hospital.

The Court of Appeal in *Flowers* reversed, concluding that the pleadings were "broad enough to encompass a theory of liability for ordinary as well as professional negligence" because the manner of the plaintiff's injury "did not involve a breach of duty to provide professional skill or care." (*Johnson vs. Chiu, Id.* at 781, citing *Flowers, Id.* at 996).

The Supreme Court in *Flowers* reversed again, finding that the majority of the Court of Appeal erred by erroneously premising its result on "a perceived distinction" between "ordinary" and "professional" negligence *even when the claim is based on the same facts asserted by the same plaintiff.* (Emphasis supplied.) (Italics added in *Johnson vs. Chiu, Id.* at 781-782, citing *Flowers, supra,* 8 Cal.4th at pp.996-997.)

The court in *Johnson vs. Chiu* found that the negligence in *Flowers*, whether termed "medical malpractice" or "general negligence" consisted of only one act: "the failure to raise a guardrail on the gurney." (*Johnson vs. Chiu, Id.* at 775, 782.)

However, the facts in *Johnson* were somewhat different from those in *Flowers*. In *Johnson* there were two causes of action: one for medical negligence on which summary adjudication was granted, and another for negligent maintenance of a laser machine, the negligent repair and maintenance of which was the alleged cause of plaintiff's injuries.

The court in *Johnson vs. Chiu* held that plaintiff Johnson alleged that defendant Chiu committed medical malpractice when he "negligently and carelessly examined, cared for, followed up on, and treated [plaintiff] so as to proximately cause [plaintiff's] injuries and damages." It further observed that the negligent maintenance cause of action asserted that the defendant was "responsible for the repair and maintenance of the laser machine and knew or should have know that the laser machine . . . if not properly

repaired or maintained could cause damages to the user of the product." (*Id.* at 782.)

The *Johnson vs. Chiu* court further noted that even if the allegations in separately plead negligent maintenance and medical malpractice causes of action could be said to constitute but one cause of action for negligence, the evidence which the plaintiff offered in support of the negligent maintenance theory was not considered by the court when it granted summary adjudication on the medical malpractice cause of action. The court noted that the procedural defect was that when Chiu filed his summary judgment motion, the complaint had been amended to add him as a defendant in the negligent maintenance cause of action and there was evidence that Chiu negligently maintained the laser system machine. The court presumed that it was for this reason that the trial court treated Chiu's summary judgment motion as a motion for summary adjudication on the medical malpractice cause of action. Moreover, the *Johnson vs. Chiu* court observed that when Chiu brought a second motion for summary judgment, the court considered plaintiff's evidence in support of the negligent maintenance cause of action and denied the motion. (199 Cal.App. 775, 782.)

Therefore it appears that the cause of action for negligent maintenance survived for trial and that the trial court had erroneously granted a motion for limine, wrongly concluding that the negligent maintenance cause of action had been subsumed in the order granting the motion for summary adjudication on the medical malpractice cause of action.

While the decision in *Johnson vs. Chiu* got the procedural aspects of the case correct, any implication that the negligent maintenance or repair of

the laser by the physician should not be subject to MICRA is illogical and ill-decided. Accordingly, this Court should take this opportunity to declare that to the extent that *Johnson vs. Chiu* holds that negligent maintenance and repair of a piece of medical equipment utilized by a physician in the care of patient is not subject to MICRA is an incorrect statement of the law and is to be disregarded.

However, to be clear, Hospital maintains that the decision in *Johnson vs. Chiu* was driven by procedural rather than substantive considerations.

CONCLUSION

It is respectfully submitted that based on the "plain language" of the statute (C.C.P. §340.5) the principles of statutory construction and the legislative history the decision of the Court of Appeal should be reversed, the decision of the trial court should be reinstated, and C.C.P. §340.5 be held to be the applicable statute of limitations to any cause of action arising by virtue of a injury sustained by a patient from a piece of equipment utilized by the hospital in the diagnosis, treatment and recovery of the hospital's patients.

Respectfully submitted,

FONDA, HESTER & ASSOCIATES, LLP
PETER M. FONDA, ESQ.

Attorneys for Defendant and Respondent
PRESBYTERIAN INTERCOMMUNITY HOSPITAL

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record hereby certifies that, pursuant to Rule 8.204(b)(4) of the California Rules of Court, this Opening Brief on the Merits was produced using 13-point Roman type and contains approximately 7061 words, which is less than the 8,400 permitted by Rule 8.520(h). Counsel relies on the word count of the computer program used to prepare the brief.

I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed at Los Angeles, California on May 29, 2014.

PETER M. FONDA

PROOF OF SERVICE
(Code Civ. Proc., § 1013a, subd. (3))

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action; my business address is 1925 Century Park East, Suite 850, Los Angeles, California 90067.

On May 30, 2014, I served the foregoing **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED PROOF OF SERVICE LIST

I am familiar with the business practice at my place of business for collection and processing of correspondence for mailing by overnight mail.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 30, 2014, at Los Angeles, California.

SHARLEEN INOUYE

Edward W. Lloyd, Esq. Law Offices of Edward W. Lloyd 2900 Adams Street, Suite C130 Riverside, CA 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, CA 90650
California Court of Appeal Second District, Division Three 300 S. Spring St. Los Angeles CA 90013	Supreme Court of California Office of The Clerk - First Floor 350 McAllister Street San Francisco, CA 94102