POUZBARIS v. PRIME HEALTHCARE SERVS. - ANAHEIM

S226846

Supreme Court of California

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ASMA POUZBARIS, PLAINTIFF/APPELLANT, VS. PRIME HEALTHCARE SERVICES - ANAHEIM, LLP dba WEST, ANAHEIM MEDICAL CENTER, DEFENDANT/RESPONDENT/PETITIONER

Type: Petition for Appeal

Prior History: AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, G048891.

Counsel

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Title

Petition for Review

Text

ISSUE PRESENTED

Petitioner asks this Court to grant review and hold this matter pending the Court's decision in *Flores v. Presbyterian Intercommunity Hospital* (S209836, review granted April 9, 2013).

Prime Healthcare Services - Anaheim, LLP dba West Anaheim Medical Center (″Medical Center″) requests ″grant and hold″ because, as in *Flores*, the issue presented here is whether the provisions of the Medical Injury Compensation Reform Act (″MICRA″) apply to an action against a hospital based on alleged negligence and premises liability.

As in *Flores*, the issue presented is whether MICRA applies, which depends on whether the alleged negligence of Medical Center is ″professional negligence″ arising from services ″within the scope of services **[*2]** for which the provider is licensed″ as a hospital to perform. (See Code of Civil Procedure § 340.5(2).) Here, plaintiff was a hospital patient when she alleges she slipped and fell because of the mopping of the floor of her hospital room. In *Flores*, the plaintiff alleged injury due to falling to the floor, also while she was a hospital patient, when her hospital bed rail collapsed.

The Court of Appeal's decision in this case parallels, in its order of analysis and its discussion of case law, the decision rendered by the court of appeal in *Flores*. The decision here is functionally equivalent to the Court of Appeal's decision in *Flores*. Implicitly suggesting that a grant and hold would be appropriate, in the introduction to its decision, the Court

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of Appeal explicitly stated: ″The California Supreme Court recently granted review of a case involving the similar issue concerning a hospital's alleged negligence in allowing a patient's bed rail to collapse,″ with citation to *Flores*. (Slip op., p. 2.)

In both this case and *Flores*, the application of MICRA hinges on the interpretation of the meaning of ″professional negligence.″ Here, Medical Center contends that the **[*3]** Court of Appeal failed to properly interpret the meaning of that term, by failing to heed the full definition of that term that term from the MICRA statutes defining its meaning to include ″such services″ that ″are within the scope of services for which the provider is licensed.″ (E.g., Code of Civil Procedure § 340.5, subd. (2).) Medical Center contends that the meaning of the statute must take into account the statutory definition of the phrase ″within the scope of services for which the provider is licensed″ to correctly assess the full meaning of the definition of ″professional negligence.″ As demonstrated by this Court's decision in *Rashidi v. Moser (2014) 60 Cal.4th 718,* focusing on the statutory word ″damages″ imposed by judgment as distinguished from settlement ″losses,″ the assessment of the actual words of the statute govern its meaning and application. (*Id. at 725.)* In contrast to this Court's careful analysis of the term ″damages,″ the Court of Appeal did not address the meaning of the phrase ″within the scope of services for which the provider is licensed″ in reaching its conclusion of whether the alleged negligence was ″professional **[*4]** negligence,″ despite prominent briefing by Medical Center asserting the point.

The conclusion that the issues here (and in *Flores*) were ″within the scope of services for which the provider is licensed,″ and therefore within the definition of ″professional negligence″ of MICRA, is supported by the regulatory and statutory obligations on hospitals, distinguished from general business operators, to maintain the hospitals' premises and equipment ″in good repair at all times″ and to provide and surveil ″services and procedures for the safety and well-being of patients, personnel and visitors,″ including the cleaning and disinfecting of floors in patients' rooms (the hospital activity at issue here) and the provision and maintenance of safe beds and other equipment (the hospital activity at issue in *Flores*.) Therefore, this Court should grant review in this case and hold this matter until the decision in *Flores* is rendered.

WHY REVIEW SHOULD BE GRANTED

The issue raised by the Court of Appeal's opinion is quintessentially one for this Court to decide. This case satisfies both requirements for review under Rule 8.500(b)(1) of the California Rules of Court - ″to secure **[*5]** uniformity of decision″ and ″to settle an important question of law.″

As did the Court of Appeal in *Flores*, the Court of Appeal in this matter departed from the precedent of *Murillo v. Good Samaritan Hospital (1979) 99 Cal.App.3d 50,* which applied MICRA to a plaintiff's action alleging a hospital ″was negligent to leave the bedrails down during the night while plaintiff was asleep,″ describing the issue as ″a question involving hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety,″ an issue that was deemed ″squarely one of professional negligence.″ (Slip Op., p. 6; citing *Murillo* at p. 56.) The Court of Appeal in this matter explicitly rejected the reasoning of *Murillo* and ignored *Murillo*'s progeny (except for its misstatement of the holding in *Bellamy v. Appellate Department (1996) 50 Cal.App.4th 797).*

Moreover, review should be granted because the Court of Appeal's decision (like that in *Flores*) is inconsistent with this Court's decision in *Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992,* which instructs: ″a defendant **[*6]** has only *one* duty, measured by *one* standard of care, under any given circumstances.″ (*Id. at 1000,* italics by the Court.) The Court of Appeal improperly concludes that some of the services provided by a hospital to its patients are not ″professional services.″

A hospital has a specific obligation to maintain hospital premises in a safe and clean condition that promotes health, with that obligation imposed by regulations and statutes specifically governing hospitals' operations. That specific duty goes beyond the general duty to act reasonably towards others, as reflected by Civil Code section 1714(a), and the general duty of property owners to keep premises reasonably safe as otherwise described in *Ortega v. K-Mart Corp. (2001) 26 Cal.4th 1200, 1205.*

As to hospitals, as at issue here and in *Flores*, the regulations in Title 22 affirmatively require each hospital to ″make provision for the routine cleaning of articles and services such as...floors...with a detergent/disinfectant″ and to otherwise

implement ″written policies and procedures″ for the ″[c]leaning of occupied patient areas″ and for ″maintain[ing] the interior of the hospital **[*7]** in a safe, clean, orderly, attractive manner.″ (Title 22, California Code of Regulations, §§ 70827(a), 70015(b), (d).) The regulations require: ″The hospital shall be clean, sanitary and in good repair at all times. Maintenance shall include provision and surveillance of services and procedures for the safety and well-being of patients, personnel and visitors.″ (22 CCR section 70837(a).) Further, Business and Professions Code section 2725(b)(1) requires hospitals to provide ″[d]irect and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients.″

Consistent with the services those provisions require hospitals to perform as health care providers, *Murillo v. Good Samaritan Hospital, supra, 99 Cal.App.3d 50,* held, relative to an issue of a patient fall in a hospital, that ″because the professional duty of a hospital … is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out,″ ″if an unsafe condition of the hospital's premises causes injury to a patient, as a result of the hospital's negligence, there is a breach of the hospital's duty *qua* hospital.″ (*Id. at 56-57.)* **[*8]** The above-cited provisions specify duties of a hospital as a hospital.

In its decision, the Court of Appeal otherwise disregarded case law explicitly referring to such regulations as defining the scope of professional services of the hospital as a health care provider, such as *Arroyo v. Plosay (2014) 225 Cal.App.4th 279,* concluding that Title 22 sets standards for hospitals. (*Id. at 296-298;* see also, *Norman v. Life Care Centers of America, Inc. (2003) 107 Cal.App.4th 1233, 1244* [Title 22 sets standards for skilled nursing facilities].) In *Arroyo*, the Court of Appeal applied MICRA to a claim of mishandling of human remains because of Title 22's requirement for a hospital to maintain a morgue. (*Arroyo* at p. 296, referring to 22 CCR § 70829.)

Before filing this petition, Medical Center petitioned for rehearing because the Court of Appeal did not in its stated reasons for decision comment on the foregoing regulatory/statutory obligations, nor did the Court of Appeal refer to the cases cited, such as *Arroyo*, applying MICRA to issues arising from those obligations. Considering that point, and the authorities in support **[*9]** of it, were the very heart of Medical Center's arguments on appeal, the issue should have been addressed in the ″reasons stated″ for decision. (Cal. Const., Art. VI, § 14; *People v. Kelly (2006) 40 Cal.4th 106, 117, 122.)* Rather than addressing the arguments asserted by Medical Center in this proceeding, the Court of Appeal rendered a decision that simply tracked that of uncitable decision of the Court of Appeal in *Flores*.

As in *Flores*, the reasoning of the Court of Appeal is generally inconsistent with well-established parameters for the application of MICRA, leaving the application of MICRA subject to technical arguments of capacity or purpose, and case-by-case assessments by judges. That approach is inconsistent with the guidance of *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital (1994) 8 Cal.4th 100,* wherein this Court reiterated the view that MICRA is to be interpreted broadly enough to assure that its purposes are advanced, and admonishing that ″courts must avoid a myopic perspective in favor of a more comprehensive evaluation of the larger context,″ in assessing the applicability of MICRA in the context of a claim for **[*10]** indemnification. (*Id. at 111.)* ″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 health care needs.″ (*Id. at 112.)* The Court of Appeal's refusal to apply MICRA to a basic function of a hospital ″jeopardize[s] the purpose of MICRA to ensure the availability of medical care.″ (*Id. at 116.)* Additionally, the Court of Appeal's approach is inconsistent with the guidance of this Court from *Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181,* that laws applicable to health care providers apply to issues that ″emanate[] from the manner in which defendants performed″ as part of the ″ordinary and usual part of medical professional services.″ (*Id. at 193.)*

This Court's intervention is needed to assure MICRA is correctly applied to issues arising from the activities and obligations of a hospital's license, regardless of the relative level of skill applicable or that a similar duty of care may exist outside **[*11]** the hospital setting. Consideration of the specific laws governing the behavior of licensed hospitals is consistent with principles of law arising in other contexts. For example, workers' compensation laws, as opposed to general rules of tort law, apply to employees' claims of slip-and-fall against employers. (*Bonner v. Workers' Comp. Appeals Bd. (1990) 225 Cal.App.3d 1023, 1034;* quoting Labor Code § 6306.) An employee who slips and falls on a negligently mopped floor during the course of employment cannot avoid workers' compensation exclusivity simply because workers'

compensation laws would not have applied if the same accident had occurred while the employee was not within the course and scope of the employment. Because specific rules also apply to the operations of hospitals, and the cleaning of hospitals' floors, the same reasoning should be applied.

Otherwise, the Court of Appeal would lead to ad hoc assessments of professional capacity or professional purpose. Such an assessment of capacity or purpose conflicts with well-established decisions from the Courts of Appeal. For instance, in *Palmer v. Superior Court (2002) 103 Cal.App.4th 953,* the **[*12]** court rejected an argument that the laws applicable to health care providers did not apply to ″administrative″ or ″economic″ decisions made by a medical group and its physician in the context of utilization review because decisions to deny ″requested medical services and equipment were contentions that ″arise out of professional negligence.″ (*Id. at 960-961, 972.)* When a plaintiff's contentions of a different capacity or purpose are ″intertwined″ with the defendant's role as a health care provider (as here and in *Flores*) the specific provisions of law applicable to health care providers are appropriately applied. (*Palmer* at 968.)

The published decision of the Court of Appeal will impact more than 500 hospitals licensed in the State of California, thousands of other health care facilities, and tens-of-thousands of individual health care providers providing services throughout the state. Because the issue raised by the Court of Appeal's decision presents an important question of law, it should be settled by this Court to promote the orderly application of the law.

FACTUAL AND PROCEDURAL HISTORY

A. PLAINTIFF ALLEGED INJURIES FROM A SLIP AND [*13] FALL WHILE A HOSPITAL PATIENT. THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT WAS GRANTED BASED UPON THE MICRA STATUTE OF LIMITATIONS

On June 11, 2012, plaintiff Asma Pouzbaris filed her complaint alleging personal injuries suffered on June 15, 2010 when she slipped and fell on the recently mopped floor of her hospital room, naming Medical Center as the only defendant. (1 CT 17-20.)

Medical Center's answer included the defense of the MICRA statute of limitations applicable to licensed healthcare providers, Code of Civil Procedure section 340.5. (1 CT 27.) Other provisions of MICRA were also asserted as affirmative defenses, including the limit on general damages of Civil Code section 3333.2. (1 CT 28.)

Medical Center filed a motion for summary judgment on the ground that plaintiff's claim was barred by the statute of limitations of section 340.5 (1 CT 35-36.) Relative to the application of the MICRA statute of limitations, Medical Center asserted its status as a ″health care provider.″ Section 340.5 defines ″[h]ealth care provider″ to include ″any clinic, health dispensary or health facility,″ as licensed by Health & Safety Code section 1200, et seq. (**[*14]** 1 CT 38-39; section 340.5(1).) That definition includes negligence of employees, or ″legal representatives of a health care provider.″ (*Ibid.*)

Medical Center contended that section 340.5 applied under the circumstances because plaintiff's action for injury was ″based upon [Medical Center's] alleged professional negligence,″ referring to the definition stated in section 340.5(2), which states: ″'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.″ (1 CT 38-39.)

The motion was supported by evidence that plaintiff had ″presented to the Emergency Department of West Anaheim Medical Center″ and her ″reason for going to the hospital included intermittent episodes of chest tightness with shortness of breath,″ and she was ″admitted to hospital for medical care and treatment associated with [those] complaints,″ and that **[*15]** she slipped and fell while a patient of the Medical Center. (1 CT 47-48, 51-54.) Further, the evidence in support of the motion included plaintiff's interrogatory responses stating that the slip and fall occurred while she was in a ″hospital room at West Anaheim Medical Center″ while plaintiff ″was walking to her hospital bed and slipped on a wet substance″ while ″wearing shoes that were given by the hospital.″ (1 CT 65, 76.) Plaintiff further acknowledged she was hospitalized for medical treatment at the time the alleged fall occurred. (1 CT 66-76.)

In opposition, plaintiff contended that the two year statute of limitations, of Code of Civil Procedure section 335.1, applied, arguing ″that plaintiff's complaint has asserted a garden variety 'premises liability'/negligence claim for plaintiff's personal injury - slip and fall on a wet mopped floor.″ (1 CT 117.) Plaintiff presented evidence that the Medical Center's ″cleaning lady″ apologized to plaintiff in support of the contention that ″this cleaning lady was the likely source of the water on the ground.″ (1 CT 130.)

In opposition, plaintiff had relied heavily upon the Court of Appeal decision in **[*16]** *Flores*. (1 CT 123.) While the motion for summary judgment was pending, this Court granted review in *Flores*, and Medical Center promptly notified the Superior Court of that fact. (1 CT 204-208.)

In granting the motion for summary judgment, the Superior Court reasoned that ″this action is for professional negligence committed in the act of rendering services for which the hospital is licensed.″ (1 CT 291-292.) Going on, the trial court explained: ″The underlying rationale of the applicable cases is that a hospital has a duty to use reasonable care and diligence in safeguarding a patient committed to its charge. So whether Plaintiff fell because she was not supervised or assisted on her trip to the restroom, or because a 'cleaning lady' mopped her room while she was in the restroom is irrelevant for this analysis: in either event, the claim concerns Defendant's duties to take appropriate measures for patient safety, and concerns rendering of services for which Defendant is licensed. It is thus a claim for alleged professional negligence subject to Section 340.5.″ (*Ibid*; citing *Murillo, supra, 99 Cal.App.3d 50,Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992,* **[*17]** *Bellamy v. Appellate Department, supra, 50 Cal.App.4th 797,Taylor v. United States (9th Cir. 1987) 821 F.2d 1428,* and *Canister v. Emergency Ambulance Service (2008) 160 Cal.App.4th 388.)* (1 CT 291-292.)

The trial court further explained: ″The controlling law is that this action is subject to Section 340.5 under *Murillo v. Good Samaritan Hospital of Anaheim (1979) 99 Cal.App.3d 50* and its progeny, because the claim is one brought by a patient against a hospital for an alleged injury sustained in the course of the hospital's care for her it is a claim for professional negligence.″ (1 CT 291-292.) Relative to plaintiff's arguments citing *Flowers, supra, 8 Cal.4th 992,* the trial court explained: ″Plaintiff urges that under *Flowers*, the 'test' is whether the act complained of by plaintiff involves the manner in which professional services were rendered,″ and concluded: ″However, *Flowers* did not create any such 'test' for evaluating statutory claims under MICRA; instead, *Flowers* specifically *declined* to draw a distinction between ordinary and professional negligence as it relates **[*18]** to MICRA.″ (1 CT 291-292; citing *Flowers* at 1002, fn. 6.) Going on, the trial court observed that other more recent cases did not otherwise state such a standard. (1 CT 291-292; citing *Bellamy, supra, 50 Cal.4th at 806-807;Canister, supra, 160 Cal.App.4th at 404.)*

Finally, the Superior Court explained: ″In addition, plaintiff is also incorrect in claiming that expert testimony is needed to decide whether CCP § 340.5 applies. While the manner of proof by which negligence can be established may require expert testimony, the character of the negligence claimed does not.″ (1 CT 291-292; citing *Flowers, supra, at 1001.)*

B. Court of Appeal's Published Decision Concluding that MICRA Does Not Apply and Reversing Summary Judgment

In reaching a conclusion conflicting with the holdings of both *Bellamy* and *Murillo*, the Court of Appeal in this matter claimed to agree with those decisions. (Slip op., p. 10.) The Court of Appeal stated: ″the statutory definition of professional negligence in section 340.5 requires us to determine 'whether the negligence occurs in the rendering of professional services' **[*19]** and not the level of skill required for each individual task.″ (Slip op. pp. 10-11; quoting *Bellamy, supra, 50 Cal.App.4th at pp. 806-807.)*

The Court of Appeal then bluntly concluded: ″Because mopping the floor and putting a warning sign up did not occur during the rendering of such services, plaintiff sufficiently alleged facts to support an ordinary negligence claim so as to bring her action within the two-year limitations period of section 335.1.″ (Slip op., p. 11.)

Acknowledging its departure from other precedent, the Court of Appeal stated: ″We disagree with *Murillo*'s dictum that a negligently maintained, unsafe condition of a hospital's premises which causes injury to a patient qualifies as professional negligence.″ (Slip op., p. 11.) Although the Court of Appeal derided some aspect of *Murillo's* analysis as ″dictum,″ it ironically discussed whether MICRA would apply to injuries due to a ″falling chandelier,″ dictum from *Gopaul*, in

rendering its decision in this case dealing with the issue of ″a recently mopped floor.″ (Slip op., p. 11; citing *Gopaul, supra, 38 Cal.App.3d at pp. 1005-1006.)*

The Court of Appeal did not confront (or **[*20]** even mention) the significance of the regulations and statutes requiring hospitals to clean hospitals' floors and protect safety of patients, and relevant case law, cited by Medical Center. Therefore, the Court of Appeal failed to adequately address whether the issue was one of ″professional negligence″ arising from services ″within the scope of services for which the provider is licensed″ as a hospital to perform. Rather, the Court of Appeal curtly brushed off those authorities, stating ″we are not persuaded by defendant's citations to various authorities to establish that it 'is a health care provider within the definition of MICRA' with duties to its patients including ensuring their safety,″ and bluntly concluded: ″Plaintiff's complaint, alleging she was injured when she slipped and fell on a recently mopped floor, did not occur in the rendering of professional services but rather sounds in ordinary negligence.″ (Slip op., p. 11.) Therefore, it decided that ″the action is governed by the two-year statute of limitations (§ 335.1), making the lawsuit timely.″ (Slip op., p. 11.)

LEGAL DISCUSSION

I. REVIEW IS NECESSARY TO ADDRESS THE IMPORTANT QUESTION OF THE SCOPE OF MICRA

In *Western Steamship Lines, supra, 8 Cal.4th 100,* this Court recounted that ″The Legislature enacted MICRA in response to a medical malpractice insurance 'crisis,' which it perceived threatened the quality of the state's health care.″ (*Id. at 111-112;* citations omitted.) As stated in *Western Steamship*, those MICRA statutes include: Business and Prof. Code section 6146 [limiting contingency fees in medical malpractice actions]; Civil Code section 3333.1 [admitting evidence of collateral source payments and precluding subrogation on behalf of collateral sources]; Civil Code section 3333.2 [cap on noneconomic damages]; Code of Civil Procedure section 667.7 [authorizing periodic payments for future damages in excess of $ 50,000, with termination of benefits in the event of death].

A. This Court's Decision in *Flowers v. Torrance Memorial Hospital Medical Center* Illustrates the Importance of the Issue Presented and the Appropriateness of Review

In *Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992,* this Court concluded that the decision of the court of appeal in **[*22]** that action had ″erroneously premised their result on a perceived conceptual distinction between 'ordinary' and 'professional' negligence, which in their view differentiates separate and independent theories of liability even when based on the same facts asserted by the same plaintiff.″ (*Id. at 996-997.)Flowers* recognized, however, ″[w]hile this distinction may be relevant and necessary for purposes of *statutory construction and application* ..., it is misplaced in resolving a motion for summary judgment in which the question is whether the moving party has demonstrated or negated negligence as a matter of law. In the latter context, the nature of the alleged breach of duty affects only the determination of the appropriate standard of care, which otherwise remains constant irrespective of the terminology used to characterize it.″ (*Id. at 997;* referring to *Central Pathology Service Medical Clinic, Inc. v. Superior Court, supra, 3 Cal.4th 181, 187, 192.)*

The holding of *Flowers* necessarily requires a court to consider the definition of ″[p]rofessional negligence,″ when it comes to the *statutory construction and application* **[*23]** of section 340.5(2), the statute at issue here. Indeed, *Flowers* explicitly said so: ″Any distinction between 'ordinary' and 'professional' negligence has relevance primarily when the Legislature has statutorily modified, restricted, or otherwise conditioned some aspect of an action for malpractice not directly related to the elements of negligence itself. For example, the statute of limitations for professional negligence against a health care provider can extend up to three years (Code Civ. Proc., § 340.5), in contrast to the one year applicable to ordinary negligence (Code Civ. Proc., § 340).″ (*Id*. at 998-99.) What's more, *Flowers* broadly observed MICRA ″contains numerous provisions effecting substantial changes in negligence actions against health care providers.″ (*Id*. at 999.)

Flowers criticized *Gopaul* as utilizing ″reasoning [that] 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.″ (*Id*. at 1000.) Nevertheless, the Court of Appeal here relied heavily upon *Gopaul* to support its decision.

Flowers specifically **[*24]** explained that the Supreme Court ″has on numerous occasions articulated the general rule″ that although ″'[t]he standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts,″ there are times when the professional conduct at issue 'is within the common knowledge of the layman,'″ particularly ″in situations in which the plaintiff can invoke the doctrine of res ipsa loquitur.″ (*Id*. at 1001; citations omitted.) ″The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery.″ (*Ibid*.) *Flowers* held: ″Regardless of whether expert testimony is necessary, however, the standard remains constant, unaffected by the 'ordinary' or 'professional' nature of the proof upon which it rests.″ (*Ibid*.)

The Supreme Court in *Flowers* ″[b]ecause the question [was] not squarely presented,″ ″decline[d] to resolve the conflict between *Murillo* … and *Gopaul* on the question of whether a patient's fall from a hospital bed or gurney implicates 'professional' or 'ordinary' negligence in a statutory context.″ (*Id*. at 1002, fn. 6.)

This case, as does *Flores* **[*25]** , presents the issue.

B. The Court of Appeal Holding of *Murillo* Should Have Been Followed and Is Consistent with *Flowers*

For thirty-five years, *Murillo v. Good Samaritan Hospital of Anaheim (1979) 99 Cal.App.3d 50,* has informed that actions seeking damages for falls that occur on hospital premises are governed by the MICRA statute of limitations, Code of Civil Procedure section 340.5 (″section 340.5″). Considering that provision's ″definition of professional negligence″ does not depend on ″whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed, but rather the test is whether the negligent act occurred in the rendering of services for which the health care provider is licensed,″ section 340.5 (and MICRA overall) applies. (*Id. at 57.)Murillo* distinguished decisions pre-dating the enactment of MICRA's section 340.5 that contained divergent definitions of ″professional negligence,″ specifically referring to *Gopaul v. Herrick Memorial Hospital (1974) 38 Cal.App.3d 1002* as such a case. (*Murillo* at 57.)

In *Murillo*, the plaintiff, also **[*26]** a hospital patient, fell out of the hospital bed because, she claimed, the hospital staff had ″negligently and recklessly left the rails of the hospital bed down, allowing plaintiff to fall out of bed.″ (*Id*. at 52.) She sued, but the trial court granted the defendant hospital summary judgment on the basis that the (then) one-year statute of limitations for ordinary negligence had run. The appellate court reversed; in so doing, it rejected the hospital's claim that the *Gopaul* decision articulated the principles applicable to such actions, stating: ″*Gopaul* was decided under the law existing before enactment of Code of Civil Procedure section 340.5. Whether the case was correctly decided under that law we need not decide. We do conclude, however, that the result reached in *Gopaul* is incompatible with the definition of professional negligence found in section 340.5. Under that definition, the test is not whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed, but rather the test is whether the negligent act occurred in the rendering of services for which the health care provider is licensed. When a seriously **[*27]** ill person is left unattended and unrestrained on a bed or gurney, the negligent act is a breach of the hospital's duty as a hospital to provide appropriate care and a safe environment for its patients.″ (*Id*. at 56-57.)

C. Statutory and Regulatory Standards Support the Conclusion of Murillo that MICRA Applies to a Hospital's Negligent Cleaning of Its Floors

The laws defining the duties and services to be performed by hospitals should have been considered in deciding whether the issue was one of ″professional negligence″ arising from services ″within the scope of services for which the provider is licensed″ as a hospital to perform.

Health and Safety Code section 1250 defines ″health facility″ to mean ″a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation.″

Subdivision (a) of section 1250 further provides: ″'General acute care hospital' means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour **[*28]** inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services.″

The types of licensed health facilities include those providing ambulatory care, nursing supervision of patients, supportive care, and social and recreational services. (See Health and Safety Code § 1250(d), (i).)

Further, the legislature has imposed general obligations that encompass the issues implicated by Pouzbaris' claims, as ″health facilities,″ including hospitals, shall provide services that include ″Direct and indirect patient care services that ensure *the safety, comfort, personal hygiene, and protection of patients*.″ (Business and Professions Code § 2725(b)(1), emphasis added.)

Health and Safety Code section 1275 confers ″the power to adopt rules and regulations to effectuate legislative policy with respect to the health care industry … upon the State Department of Public Health.″ (*People v. Firstenberg (1979) 92 Cal.App.3d 570, 583.)* Pursuant to such regulations, hospitals are generally obligated to provide appropriate setting for patients' care with, as section 70207 of Title 22 of the California **[*29]** Code of Regulations, mandates to hospitals: ″There shall be adequate equipment and supplies maintained related to the needs and the services offered.″

Section 70837, regulates the ″General Safety and Maintenance″ of hospitals, subdivision (a) requiring: ″The hospital shall be clean, sanitary and in good repair at all times. Maintenance shall include provision and surveillance of services and procedures for the safety and well-being of patients, personnel and visitors.″ Relative to a hospital's obligation to maintain sanitary conditions to promote health of patients, an obligation encompassing mopping the floors, subdivision (b) requires: ″Hospital buildings and grounds shall be maintained free of such environmental pollutants and such nuisances as may adversely affect the health or welfare of patients to the extent that such conditions are within the reasonable control of the hospital.″ (See also, § 75062.)

More specifically, section 70827(a) requires ″[e]ach hospital shall make provision for the routine cleaning of articles and surfaces such as furniture, floors, walls, ceilings, supply and exhaust grills and lighting fixtures with a detergent/disinfectant.″ Subdivision (b) of **[*30]** that regulation requires hospitals to have ″written policies and procedures″ for the ″Cleaning of occupied patient areas.″ Subdivision (d) instructs: ″Housekeeping personnel shall maintain the interior of the hospital in a safe, clean, orderly, attractive manner free from offensive odors.″ ″Cleaning means the process employed to free a surface from dirt or other extraneous material.″ (22 CCR § 70015.)

D. The Rule of *Murillo* Has Been Consistently Followed and the Cases Have Consistently Recognized the Significance of Regulatory and Statutory Standards Applicable to Licensed Health Care Providers in Applying MICRA

The guidance of *Murillo* has since been consistently followed, including approval in Supreme Court decisions. The exception *was* the Court of Appeal decision in *Flores, now* pending on review.

Those decisions include *United Western Medical Centers v. Superior Court (1996) 42 Cal.App.4th 500,* reiterating: ″The professional duty of a hospital … is primarily to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus if an unsafe condition of the hospital's premises causes injury to a **[*31]** patient … there is a breach of the hospital's duty qua hospital.″ (*Id. at 504;* quoting *Murillo* at 56-57.) In *United Western*, this court concluded that although a plaintiff was not required to comply with the procedures of Code of Civil Procedure section 425.13, for asserting a claim of punitive damages, against individuals alleged to be sexual abusers, that the role of the medical center was still, in that context, that of a health care provider. ″Here, [plaintiff's] only relationship with hospital was as a patient. Since the claim against hospital arises out of its alleged failure to adequately protect [plaintiff] real party, she must abide by section 425.13 before she may pursue a punitive damage claim against United or Western.″ (*United Western* at 504.) ″The actions upon which the claim for punitive damages against hospital are based are directly related to the manner in which professional services were rendered. … Real party [plaintiff] contends hospital either negligently or intentionally failed to supervise its staff, or hired incompetent staff and thereby allowed real party to be sexually assaulted.″ (*Ibid*.)

In *Canister v. Emergency Ambulance Service (2008) 160 Cal.App.4th 388,* **[*32]** the court explained that negligent operation of an ambulance constitutes ″professional negligence.″ The plaintiff in *Canister* argued ″'[t]he negligent conduct

upon which [appellant] brings his action … is not related to any ″facets of basic life support,″ but rather the negligence of the [EMT's] in the operation of the ambulance vehicle.'″ (*Id. at 404.)* Therefore, Canister asserted, similar to Pouzbaris' ″cleaning lady″ arguments herein, that EMTs were ″'no more subject to MICRA than is any other driver of a vehicle who negligently operates the vehicle, causing injury to third parties'″ and ″the only 'services' for which EMT's are licensed as professionals are 'medical services - not driving a vehicle.'″ (*Ibid*.)

Rejecting Canister's contentions, the court of appeal held: ″as a matter of law, that the act of operating an ambulance to transport a patient to or from a medical facility is encompassed within the term 'professional negligence.'″ (*Ibid*.) In support of that holding, *Canister* explained: ″The MICRA statutes define 'professional negligence' as that negligence that occurs while the health care provider is providing services that are 'within **[*33]** the scope of services for which the provider is licensed.' ([Citing, *inter alia*, Code Civ. Proc., § 340.5].) ***The relevant test is not the degree of skill required, but whether the negligence occurred in the rendering services for which a provider is licensed***.″ (*Canister* at 404, emphasis added; citations omitted.) Notably, the plaintiff is *Canister* was not the subject of the ambulance services, but was an on duty police officer who was injured while ″accompanying an arrestee in the back of an EAS ambulance when it hit a curb, injuring appellant. (*Id. at 392-93.)* Further, *Canister* did not address the quality of diagnostic or treatment services. Rather, the plaintiff in *Canister* ″alleged the ambulance was being driven negligently.″ (*Id. at 393.)* Because the driving was part of the professional services related to the provision of ambulance services, MICRA applied.

The recent decision of *Arroyo v. Plosay (2014) 225 Cal.App.4th 279* reflects the vitality of *Murrillo's* holding, and demonstrates the significance of regulations and statutes describing the scope of services to be performed by a hospital. **[*34]** In *Arroyo*, the court of appeal analyzed causes of action described as ″medical negligence,″ ″wrongful death,″ and ″negligence.″ (*Id. at 292.)* As to medical negligence and wrongful death, the wrongdoing element of both related to prematurely declaring plaintiffs' decedent ″dead and having her placed in the morgue while still alive.″ (*Ibid*.) As to the ″negligence″ theory, *Arroyo* explained ″we agree with the Hospital's contention that the alleged negligence in mishandling the decedent's remains, causing disfiguring injuries, is 'professional negligence' within the meaning of section 340.5, subdivision (2).″ (*Id. at 293.)*

In *Arroyo*, plaintiffs contended that ″the Hospital's alleged negligence does not meet the definition of professional negligence, because the decedent was dead when the body was mishandled.″ (*Id. at 298.)* The *Arroyo* plaintiffs argued that the mishandling/mutilation of their decedent's body was outside of the meaning of section 340.5, subdivision (2) and not ″the proximate cause of a *personal injury or wrongful death*.″ (*Arroyo* at 298; italics added.)

Arroyo recognized: ″'*[C]ourts have* **[*35]** *broadly construed ″professional negligence″ to mean negligence occurring during the rendering of services for which the health care provider is licensed*.'″ (*Arroyo* at 297, emphasis added; quoting *Canister, supra, 160 Cal.App.4th at 406-407.)*

Arroyo followed the reasoning of *Canister*, regarding the breadth of MICRA, explaining the limitations apply ″'to any foreseeable injured party, including patients, business invitees, staff members or visitors, provided the injuries alleged arose out of professional negligence.'″ (*Arroyo, 225 Cal.App.4th at 298;* quoting *Canister, supra, 160 Cal.App.4th at p. 407.)* Further, *Arroyo* concluded, ″it is foreseeable that plaintiffs - the husband and children of the decedent - would suffer emotional distress from the disfigurement of the decedent's remains, incapable of being masked by the morgue, caused by the Hospital's negligent handling of the remains on the way to, or in, the Hospital's morgue. Thus, plaintiffs' negligence claim is covered by section 340.5.″ (*Arroyo* at 297-98.) *Arroyo* explained, MICRA statutes' application ″to negligent conduct by a health care provider **[*36]** is not limited to actions by the recipient of professional services.″ (*Arroyo* at 298.)

In concluding that section 340.5 applied to the cause of action for negligence, for mishandling of remains, *Arroyo* based its reasoning upon the hospital being licensed as a health facility. ″Section 340.5 applies to actions 'for injury or death against a health care provider based upon such person's alleged professional negligence.' Within the meaning of the statute, the definition of 'health care provider' includes 'any … health facility … licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code.' (§ 340.5, subd. (1).)″ (*Arroyo* at 296.) *Arroyo* further based its holding on the obligations accompanying a hospital's licensure, including 22 CCR § 70829, which requires hospitals with at least 100 beds to have a morgue with capabilities of preserving human remains. (*Arroyo* at 296.)

Consistently, in *Williams v. Superior Court (1994) 30 Cal.App.4th 318,* the plaintiff, a phlebotomist, was injured while drawing blood from a violent patient at the San Diego Rehabilitation Institute (the Institute). (*Id. at 321.)* **[*37]** ″Williams allege[d] the Institute knew of the patient's violent tendencies of which it failed to warn her.″ (*Ibid*.) The *Williams* court concluded ″any negligence attributable to the Institute would constitute professional as opposed to ordinary negligence.″ (*Ibid*.)

Williams instructed: ″The professional duty of a hospital is primarily to provide a safe environment within which diagnosis, treatment and recovery could be carried out.″ (*Id. at 325;* citing *Murillo, supra, 99 Cal.App.3d at 56-57.)*

Williams explained: ″In *Murillo* … the court concluded the result reached in *Gopaul* was incompatible with the definition of professional negligence here in issue. 'Under that definition, the test is not whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed, but rather the test is whether the negligent act occurred in the rendering of services for which the health care provider is licensed.' … We agree with the *Murillo* court that it is not the degree of skill required but whether the injuries arose out of the rendering of professional services that determines **[*38]** whether professional as opposed to ordinary negligence applies.″ (*Williams* at 326-27.)

In *Bell v. Sharp Cabrillo Hospital (1989) 212 Cal.App.3d 1034,* plaintiff alleged the hospital consciously disregarded the safety of its patients by granting staff privileges to a doctor without investigating warnings of his possible incompetence. (*Id. at 1038.)Bell* recited the holding of *Murillo* with approval, relative to ″the professional duty of a hospital … to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus if an unsafe condition of the hospital's premises causes injury to a patient, as a result of the hospital's negligence, there is a breach of the hospital's duty *qua* hospital.'″ (*Bell* at 1050; quoting *Murillo* at 56-57.)

Bell also cited approvingly *Taylor v. U.S. (9th Cir.1987) 821 F.2d 1428, 1432,* ″echoing the Murillo standard and holding the hospital 'had a professional duty to prevent Taylor's husband from becoming separated from his ventilator, regardless of whether separation was caused by the ill-considered decision of a physician or the accidental bump **[*39]** of a janitor's broom.'″ (*Bell* at 1050.)

In *Yun Hee So v. Sook Ja Shin (2013) 212 Cal.App.4th 652,* the court of appeal found an action against a hospital for negligently allowing an offensive physician to remain on staff was governed by MICRA. (*Id. at 668.)So* applied to MICRA to plaintiff's claim negligence against a hospital for keeping a belligerent doctor on staff, because the hospital was a licensed health care provider with a duty 'to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and diligence are measured by the capacity of the patient to care for [herself].'″ (*Ibid*.; quoting *Murillo, supra, 99 Cal.App.3d at 55.)* ″Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence.″ (*Id*. at 668.)

E. *Bellamy* Followed *Murillo's* Holding and Supports Summary Judgment Here

The Court of Appeal has adopted plaintiff's misstatement of the holding **[*40]** and significance of *Bellamy v. Appellate Department (1996) 50 Cal.App.4th 797.*

In a case where an allegedly unattended plaintiff fell off ″a rolling X-ray table onto her head,″ *Bellamy* applied the principles articulated in *Murillo*. (*Id. at 799.)Bellamy* rejected *Gopaul*, stating: ″The rationale advanced by the hospital is that expressed in *Gopaul*, that is, if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. [Citation.] We agree with *Murillo* that this standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required.″ (*Bellamy* at 806-807.)

Bellamy criticized the *Gopaul* standard as ″impracticable,″ stating as an example, ″the need to remove foreign objects, such as sponges, clamps, and surgical instruments, from a patient's body during an operation should be 'obvious to all,' but the surgeon's negligent failure to do so is unquestionably professional, not ordinary, negligence.″ (*Id. at 807.)* **[*41]** *Bellamy* cited *Flowers* in support of its reasoning. (*Id. at 807.)* Further, *Bellamy* admonished: ″Trying to categorize each individual act or omission, all of which may occur within a space of a few minutes, into 'ordinary' or 'professional' would add

confusion in determining what legal procedures apply if the patient seeks damages for injuries suffered at some point during the course of the examination or therapy. We do not see any need for such confusion or any indication the Legislature intended MICRA's applicability to depend on such fine distinctions." (*Id. at 808.)*

Relative to any dictum in *Murillo, Bellamy* stated that its decision was based upon the facts and circumstances before it, to the extent that and refusing to accept a broad definition of "professional negligence" without factual context. (*Id. at 806.)* Ironically, the "dictum" comment in Bellamy itself appears to be dictum. *Bellamy* concluded, nevertheless, as the Court of Appeal here should have, that identified obligations of a hospital to protect patient safety necessitates a conclusion that a failure to satisfy such obligations arises from professional **[*42]** negligence, subject to MICRA.

CONCLUSION

For the foregoing reasons, review should be granted. Because of the pendency of *Flores*, the Court should hold this matter pending its decision in *Flores*. Otherwise, the petition demonstrates that this Court's review would be needed apart from the pendency of *Flores*.

DATED: June 2, 2015

CARROLL, KELLY, TROTTER, FRANZEN McKENNA & PEABODY

/s/ [Signature]
DAVID P. PRUETT
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, I hereby certify that the enclosed **PETITION OF RREVIEW** was produced using 13-point Times New Roman type style and contains 7,249 words, including footnotes. In making this certification, I have relied on the word count function of Microsoft Word which was used to prepare the Petition.

DATED: June 2, 2015

By: /s/ [Signature]
DAVID P. PRUETT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to **[*43]** the within action. My business address is 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 908024646. On June 2, 2015, I served a true and correct copy of the following document(s) on the attached list of interested parties:

PETITION FOR REVIEW

(X) **By Overnight Delivery/Express Mail (CCP §§1013(c)(d), et seq**.): I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at 111 West Ocean Boulevard, Long Beach, California.

( ) **By Messenger Service**: I enclosed said document(s) in a sealed envelope or package to each addressee. I provided them to a professional messenger service (Signal Attorney Service) for service. An original proof of service by messenger will be filed pursuant to California *Rules of Court*, Rule 3.1300(c).

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office **[*44]** of a member of the Bar of the within court at whose direction this service was made.

Executed on June 2, 2015, at Long Beach, California

/s/ [Signature]

DAVID PRUETT

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[SEE ATTACHMENT IN ORIGINAL]

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