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

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

The issue presented by this case is: Whether a lawsuit against a hospital (health care provider) based upon allegations that an in-patient sustained injuries when a bed rail collapsed, causing her to fall to the floor, is governed by California Code of Civil Procedure §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.

INTRODUCTION

Thirty-eight years ago, the Legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA). As part of MICRA, the Legislature amended the medical malpractice statute of limitations, C.C.P. §340.5, shortening the outer prong (the three-year portion) of the statute of limitations. The amendment to §340.5 also added the definitions of "health care provider" and "professional negligence." Since 1975, §340.5 has not changed. For thirty-eight years case law has broadly interpreted the statute and consistently held that if a negligent act or omission occurs in the

rendering of services for which the health care provider is licensed, then the allegations fall squarely within the provisions of MICRA. Such a lawsuit is one subject to the rules relating to professional negligence. Because the conduct of which plaintiff/appellant ("plaintiff') complains (that while a patient in the hospital, the bedrails collapsed and plaintiff fell to the ground injuring herself) falls squarely within the statute's definition of professional negligence, this lawsuit is one for professional negligence. Accordingly, this action, filed nearly two years after the incident, is barred by C.C.P. §340.5. The trial court properly sustained defendant/respondent's ("PIH") demurrer premised on C.C.P. §340.5 without leave to amend. The Court of Appeal disagreed. By this Petition for Review, PIH contends that this court should reverse the Court of Appeal and reinstate the Order of the trial court dismissing the action without leave to amend.

The decision of the Court of Appeal in *Flores* adopted the reasoning of an appellate court decision (*Gopaul vs. Herrick Memorial Hospital* (1974) 38 Cal.App.3d 1002) rendered forty years earlier, which had never been followed since its rendition and in which the appellate court interpreted a totally different statute of limitations which was applicable to medical malpractice actions.[1]

The *Flores* decision, if allowed to stand, exempts from the ambit of MICRA any personal injury lawsuit in which a patient as a result of a condition of hospital premises, specifically the equipment used in the care

[1] The statute of limitations discussed in the *Gopaul* decision was C.C.P. §340(3) which provided: Code of Civil Procedure §340(3) (then provided that an action founded on ordinary negligence must generally be commenced within one year of the commission of the negligent act, and at that time an action based upon professional malpractice" was covered by the same statute of limitations. (*Gopaul, supra*, 38 Cal.App.3d 1002, 1005.)

and treatment of patients. If the *Flores* decision is allowed to stand, it would incorrectly relegate such cases to the rules applicable to ordinary negligence.

Here, the Second District Court of Appeal characterized the "essential issue" as whether Flores' fall from the hospital bed arose out of, or constituted, professional negligence or ordinary negligence. In the course of doing so it surveyed the development of case law involving falls from hospital beds or gurneys, discussed the pre and post-MICRA cases on the issue, and described the conflict as whether such a "patient injury arising from the dangerous condition of hospital premises amounts to ordinary or professional negligence."

Prior to the decision in the case at bar, the only decision holding that such incidents constitute "ordinary negligence" was the decision in *Gopaul vs. Herrick Memorial Hosp.* (1974) 38 Cal.App.3d 1002. Since the adoption of MICRA in 1975, no California case involving a patient's fall from a hospital bed or gurney, with the exception of the instant matter (*Flores*) followed *Gopaul.* Instead the courts have consistently held that such cases are subject to the statute of limitations applicable to actions for professional negligence against health care providers. (C.C.P. §340.5.)

This court, in 1994, previously acknowledged the decisional conflict in this factual context (a patient's fall from a hospital bed or gurney) but expressly declined to resolve the conflict over whether such a claim constituted "ordinary" as opposed to "professional" negligence", as represented by the decisions in *Gopaul, supra*, and *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50. (See *Flowers vs. Torrance Memorial Medical Center* (1994) 8 Cal.4th 992.) There, this court expressly declined to resolve the conflict between those two cases, stating

the issue was not "squarely presented." (*Flowers, supra* at p.1002, fn.6.) It is now.

PIH asserts that the appellate courts of this State, until the decision in *Flores*, uniformly wisely interpreted and applied the legislative mandate that MICRA be read liberally and expansively to accomplish its mandate. The courts have consistently applied MICRA in all of those lawsuits brought against a hospital in which a patient is injured allegedly as a consequence of improperly utilized hospital equipment.

PIH will demonstrate that the factual basis underlying the lawsuit, the plaintiff's pleadings, the legislative history, and the decisions of the appellate courts of this State, all support a decision by this court that the applicable statute of limitations is C.C.P. §340.5. That statute properly applies to all claims of alleged negligence in supplying hospital equipment utilized by health care practitioners to accomplish the hospital's duty to provide appropriate care and a safe environment within which the diagnosis, treatment and recovery of its patients can 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.)

STATEMENT OF FACTS

Plaintiff filed her original complaint on March 2, 2011. (Appellant's Appendix ("AA") 1-5.) It contained two causes of action against PIH: (1) "General Negligence;" and (2) "Premises Liability", both containing identical allegations:

> "At said time and place, defendants, and each of them, failed to use reasonable care in maintaining their premises and failed to make a reasonable inspection of the equipment and premises, which were open to plaintiff and the public, and

> failed to take reasonable precautions to discover and make safe a dangerous condition on the premises."
>
> "Said defendants also failed to give plaintiff a reasonable and adequate warning of a dangerous condition so plaintiff could have avoided foreseeable harm. As the result of the above, plaintiff sustained injuries and damages when the bed rail collapsed causing plaintiff to fall to the ground injuring her left knee and elbow." (AA 4 and 5.)

The alleged medical negligence occurred on March 5, 2009. (*Id.*) PIH demurred to each cause of action in the Complaint (AA 6-23) arguing that based on *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, and its progeny, plaintiff's action was one for professional negligence and therefore barred by the one-year statute of limitations, C.C.P. §340.5. (AA 9-14.) Plaintiff opposed the demurrer, arguing that based on *Gopaul vs. Herrick Memorial Hospital* (1974) 38 Cal.App.3d 1002, the lawsuit was one for "ordinary" negligence and therefore subject to the more generous two year statute of limitations, C.C.P. §335.1. (AA 26-34.) In its reply brief, PIH demonstrated that *Murillo* and its progeny were controlling because *Murillo* was decided after MICRA was enacted and C.C.P. §340.5 was amended to include a definition of professional negligence. (AA 35-42.) *Gopaul*, decided under the law preceding the enactment of MICRA and the amendment of C.C.P. §340.5, was incompatible with the definition of professional negligence found in §340.5. (AA 36-39.)

The court (the Honorable Yvonne T. Sanchez), issued its tentative ruling the day before the May 13, 2011, hearing. Following oral argument on May 13, 2011, the Tentative Ruling became the final Order:

> "Defendant Presbyterian Intercommunity Hospital's demurrer is sustained without leave to amend. (C.C.P. §430.10(e).)
>
> Plaintiff alleges that on March 5, 2009, she sustained injuries at defendant Presbyterian Hospital when 'the bed rail

collapsed causing her to fall to the ground injuring her left knee and elbow.' Defendant demurs, arguing that the one-year statute of limitations bars the action, which was filed in March 2011."

"Code of Civil Procedure section 340.5 provides a one-year statute of limitations for an action against a health care provider based on alleged professional negligence. 'Professional negligence' is an act or omission by a health care provider in the rendering of professional services for which the provider is licensed. (C.C.P. §340.5(2).) The issue is whether defendant's allege acts are subject to section 340.5, or governed by the two-year statute of limitations for ordinary negligence. (C.C.P. §335.1.)"

"To decide whether an action arises out of the professional negligence of a health care provider, the 'nature and cause of a plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided.' (*Williams vs. Superior Court* (1994) 30 Cal.App.4th 318, 325.) The Court looks not at the degree of skill involved, but whether such skill is an integral part of the professional service being rendered. (But see *Gopaul vs. Herrick Memorial Hosp.* (1974) 38 Cal.App.3d 1002 (disapproved in *Murillo vs. Good Samaritan Hosp.* (1979) 99 Cal.App.3d 50)."

"Although not alleged, plaintiff acknowledges in her opposition that she was a patient at the time her injury occurred. As in *Murillo*, the hospital here has a duty 'to recognize the condition of patients under its care and to take appropriate measures for their safety.' (See also *Bellamy vs. Appellate Dept.* (1996) 50 Cal.App.4th 797.) Ensuring that bedrails, to the extent they are needed by a particular patient, are properly raised or lowered and properly latched is a duty that arises from the professional services being rendered. Plaintiff's claim is governed by section 340.5."

"Plaintiff's request to amend the pleading is denied. She has not met her burden of establishing an ability to amend the complaint to cure its untimeliness." (AA 42.)

PIH served Notice of Ruling on May 13, 2011 (AA 43) and Notice of Entry of Order of Dismissal on June 24, 2011 (AA 48). Plaintiff timely appealed the Order of Dismissal. After the matter was fully briefed, Division Three of the Second Appellate District of Court of Appeal of the State of California filed its unanimous opinion on February 27, 2013 reversing the Order of Dismissal and directing the trial court to overrule the demurrer and reinstate the original Complaint. (AA 50.)

On April 9, 2013 PIH filed its Petition for Review, an Answer to which was filed on April 25, 2013. A Rely to the Answer to the Petition was filed on May 17, 2013 and on May 22, 2013 this court unanimously voted to grant the Petition for Review.

STANDARD OF REVIEW

An appellate court applies two separate standards of review on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend. (*Aguilera vs. Heiman* (2009) 174 Cal.App.4th 590, 595.)

> "We first review the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory or to determine whether the trial court erroneously sustained the demurrer as a matter of law. Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend. **Under both standards, appellant has the burden of demonstrating that the trial court erred.** An abuse of discretion is established when 'there is a reasonable possibility the plaintiff could cure the defect with an amendment.' " (*Id.*, emphasis added, citations omitted.)

LEGAL ARGUMENT

1. The Legislative Intent Of MICRA Was That Lawsuits For Personal Injury By Patients In Hospitals Are Subject To the Provisions

of MICRA And Specifically, C.C.P. §340.5, Where Such Lawsuits Are Brought As A Consequence Of Equipment Utilized In The Care And Treatment Of Patients.

> "[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." (*Central Pathology Service Medical Clinic, Inc. vs. Superior Court* (1992) 3 Cal.4th 181, 186.)

Perhaps the best judicial pronouncement of the legislative intent behind MICRA was expressed by this court in *Western Steamship Lines, Inc. vs. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111-112:

> "[T]he Legislature enacted MICRA in response to medical malpractice insurance 'crisis,' which it perceived threatened the quality of the state's health care, [Citation.] In the view of the Legislature, 'the rising cost of medical malpractice insurance was imposing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments,' [Citations.] The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation. [Citations.] Accordingly, MICRA includes a variety of provisions all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence. [Citations.] [¶] 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." (Emphasis added.)[2]

The impetus for the adoption of MICRA was concisely articulated by Division One of the Second District Court of Appeal in *Perry vs. Shaw* (2001) 88 Cal.App.4th 658, 667:

> "In the decline of the economy in the early 1970s, California was in the middle of a medical malpractice crisis. Insurance carriers were concerned that fewer policies would be written and, at the same time, that the number of medical malpractice claims was escalating (as was the amount awarded for those claims). When the carrier increased their rates, doctor s and other health care providers cancelled or reduced their coverage. Some limited their practices by abandoning high-risk specialists and others moved out of state. There were concerns that doctors who continued in practice would increase the fees charged to their patients, that injured patients would be unable to collect judgments, and that the availability of affordable medical care was threatened. (Arentz, *Defining "Professional Negligence" After Central Pathology Service Medical Clnic vs. Superior Court; Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?* (Spring 1994) 30 Cal.Western L.Rev. 221-221-224, 252 (hereinafter Arentz); Finkelstein, *California Civil Code Section 3333.2 Revisited: Has It Done Its Job?*

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[2] Other Supreme Court cases stating the overall purpose of MICRA are: *American Bank & Trust Co. vs. Community Hospital* (1984) 36 Cal.3d 359, 363-364, 371-372; *Barme vs. Wood* (1984) 37 Cal.3d 174, 178-179; *Roa vs. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920-930; *Fein vs. Permanente Medical Group* (1985) 38 Cal.3d 137, 158-159; *Woods vs. Young* (1991) 53, Cal.3d 315, 319, 325; *Burgess vs. Superior Court* (1992) 2 Cal.4th 1064, 1082-1083; *Russell vs. Stanford University Hospital* (1997) 15 Cal.4th 783, 786; *Delaney vs. Baker* (1999) 20 Cal.4th 23, 33-34; *Barris vs. County of Los Angeles* (1999) 20 Cal.4th 101, 108; *Preferred Risk Mutual Ins. Co. vs. Reiswig* (1999) 21 Cal. 4th 208, 214-215; *Reigelsperger vs. Siller* (2007) 40 Cal.4th 574, 577-578; and *Potter vs. Firestone Tires & Rubber Company* (1993) 6 Cal.4th 965, 992-993.

(July 1994) 67 So.Cal.L. Rev. 1609. 1609-1613 (hereinafter Finkelstein)."

"MICRA was our Legislature's response to this crisis as adopted and several substantial changes were made in the law governing medical malpractice actions" [including the that] [t]he period of limitations during which a medical malpractice action could be brought was limited (C.C.P. §340.5)." (*Id.* at 667.)

C.C.P. §340.5 was originally enacted in 1970. At that time it read:

"In an action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, 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 first occurs. This time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known or though the use of reasonable diligence should have been known to him." (West's Annotated Code of Civil Procedure section 340.5.)

In 1975 the California Legislature adopted MICRA and as part-and-parcel thereof amended §340.5. Since that date, that statute has never been changed. It reads, in pertinent part, as follows:

"In an action for injury or death against a health care 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 purposes of this section:

> (1) **'Health care provider' means . . . any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code** . . . .
>
> **(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 is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of the services for which the provider is licensed** and which are not within any restriction imposed by the licensing agency or licensed hospital." (Emphasis added.)

Thus in addition to reducing one prong of the statute of limitations (sometimes referred to as the "outer" prong) from four years to three years, the Legislature amended §340.5 adding definitions for "health care provider" and "professional negligence." The 1975 MICRA version was intended to work "substantial changes" in the limitation period (*Young vs. Haines* (1986) 41 Cal.3d 883, 900).

In discussing the public policy underlying C.C.P. §340.5, the court in *Photias vs. Doerfler* stated:

> "The Legislature's objective was to reduce the number of 'long tail' claims attributable to the tolling provisions formerly available in the malpractice actions." (*Id.* (1996) 45 Cal.App.4th 1014, 1019-1020.)

Thus the courts have explained that the legislative goal in amending C.C.P. §340.5 was to give insurers greater certainty about their liability "for any given period of coverage, so that premiums could be set to cover costs." (*Young vs. Haines* (1986) 41 Cal.3d 883, 900; see *David M. vs. Beverly Hospital* (2005) 131 Cal.App.4th 1272, 1277.)

2. PIH Is A "Health Care Provider" As Defined By The MICRA Statutes, Including C.C.P. §340.5.

§340.5 (and the MICRA statutes generally) apply in an action for injury (1) against a health care provider; (2) based on professional negligence. (C.C.P. §§340.5, 364(a), 667.7(a)(e)(4), 1295(a) and Business and Professions Code §6146(a) and Civil Code §§3333.1(a) and 3333.2(a).) The MICRA statutory scheme "applies to two basic categories of health care providers: licensed practitioners and licensed facilities (*Unruh-Haxton vs. Regents of the University of California* (2008) 162 Cal.4th 343, 357.)

In describing the professional status of a hospital, and its duty to its patients, the appellate courts have stated that:

(1) A hospital is "primarily a service organization" which "makes available room, special diet, x-ray, laboratory, surgery, and a multitude of other services and equipment now available through the advances of medical science." (*Cedars of Lebanon Hospital vs. Los Angeles County* (1950) 35 Cal.2d 729, 735.)

(2) The "primary function [of a hospital] is to provide medical services . . . the essence of the relationship between a hospital and its patients does not relate essentially to any product or pieces of equipment it uses but to the professional services it provides." (*Silverhart vs. Mt. Zion Hospital* (1971) 20 Cal.App.3d 1022, 1027.) In rejecting the application of the doctrine of strict liability in tort to a hospital providing a defective pacemaker, the Court of Appeal in a later decision, noted that ". . . the essence of the relationship between a hospital and its patients does not relate essentially to any product or piece of equipment it uses but to professional services it provides . . ." noting, however that "this principle does not apply where the hospital is engaged in activities not integrally

related to its primary function in providing medical services, such as the situation where the hospital operates a gift shop which sells a defective product." (*Hector vs. Cedars-Sinai Medical Center* (1986) 180 Cal.App.3d 493, 506.)

(3) In 1989 Division One of the Fourth District of the California Court of Appeal noted that ". . . a hospital is primarily devoted to the care and healing of the sick . . . [a] hospital's paramount function [is to furnish] trained personnel and specialized facilities in an endeavor to restore the patient's health . . . . The patient who enters the hospital goes there . . . to . . . obtain a course of treatment [Citations.] (*Pierson vs. Sharp Memorial Hospital* (1989) 216 Cal.App.3d 340, 346, citing *Shepard vs. Alexian Brothers Hospital* (1973) 33 Cal.App.3d 606, 611, cited with approval in *Hector vs. Cedars-Sinai Medical Center, supra*, 180 Cal.App.3d at p.502.)" It further cited *Hector* for the principle that a hospital "is engaged in the process of providing everything necessary to furnish the patient with a course of treatment." (*Pierson* at 346, citing *Hector, supra*, at 506.) "A patient's room is part of the specialized facilities enabling the patient to receive 24-hour nursing care and immediate access to other vital medical services." (*Cedars of Lebanon Hospital vs. County of L.A., supra*, 35 Cal.2d at 735.) "The room is an integral component of the professional medical services hospitals provide. (See *Silverhart vs. Mt. Zion Hospital supra*, 20 Cal.App.3d at p.1027)." (*Pierson, supra*, at 346-347.)

(4) In 1994 in *San Diego Hospital Assn. vs. Superior Court* (1994) 30 Cal.App.4th 8,, Division One of the Fourth District Court of Appeal considered a claim against a hospital for injuries sustained by a physician while performing surgery allegedly due to a defective laser which the hospital supplied for use in the surgery. In the course of its decision it noted that "Whether a physician, hospital employee, bystander, or patient is

injured, does not alter the nature of the hospital's function, *i.e.*, providing professional services." (*San Diego Hospital Assn., supra*, 30 Cal.App.4th 8, 16.)

(5) In 1996 Division Three of the Fourth District of the Court of Appeal held that C.C.P. §425.13 applied to a claim of sexual assault by members of the hospital staff. The court characterized the cause of action against the employer-hospital as premised upon the hospital's failure to provide proper medical care to its patient since "[T]he 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 patient . . . there is a breach of the hospital's duty *qua* hospital." (*United Western Medical Center, supra*, 42 Cal.App.4th 500, 504, citing *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, 56-57).

(6) In 2005 Division Two of the Second District Court of Appeal held that C.C.P. §340.5 controlled in a lawsuit alleging child abuse. The lawsuit was brought against the doctor in a hospital where the child had been treated and against the hospital for negligent failure to report the suspected abuse. The court held that C.C.P. §340.5 applied as the alleged failure to report the sexual abuse constituted "professional negligence" as defined in C.C.P. §340.5. (*David M. vs. Beverly Hospital* (2005) 131 Cal.App.4th 1272.)

(7) In 2008 in *Canister vs. Emergency Ambulance Service* (2008) 160 Cal.App.4th 388, Division Eight of the Second District Court of Appeal held that a lawsuit for injuries sustained by a police officer while a passenger in an ambulance driven by an emergency medical technician (EMT) was subject to the provisions of MICRA. Based upon an

interpretation of the statutory intent of Health and Safety Code §1797.4 the court noted that where the statutory language is clear and unambiguous the court's inquiry ends. (*Canister vs. Emergency Ambulance* Service (2008) 160 Cal.App.4th 388, 400.) The court acknowledged that negligent operation of an ambulance could constitute "professional negligence." Since the EMT operating the ambulance was a health care provider, his negligent operation of the ambulance fell within the definition of "professional negligence." While the plaintiff asserted that an EMT was "no more subject to MICRA than is any other driver of a vehicle who negligently operates the vehicle", the Court of Appeal disagreed, holding 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." (*Canister, supra*, 160 Cal.App.4th 388, 404.) "Although the act of operating an ambulance may be performed by someone having no special knowledge, skill or care as a member of the medical profession, this does not mean the employees here in question were not acting as health care providers in transporting the patient to a medical facility." (*Id.* at 804.) Plaintiff further argued that an EMT's "professional services" can extend only to those services for which the EMT is licensed and "the only 'services' for which the EMT [is licensed] as a professional are medical services." The appellate court disagreed for two reasons: "EMTs are licensed to provide transport to patients **and in any case the term 'professional services' encompasses more than the distinct services that a health care provider is licensed to perform.**" (160 Cal.App.4th 388, 405.) (Emphasis added.)

> "Moreover, we disagree with appellant's further claim that 'professional negligence' does not encompass operation of an ambulance whether as a driver or an attendant. As previously noted courts have broadly construed 'professional negligence' to mean negligence occurring during the rendering of services

> for which the health care provider is licensed. (*Palmer vs. Superior Court* (2002) 103 Cal.App.4th 953, 957 [negligent recommendation and utilization review]; *Johnson vs. Superior Court, supra*, 101 Cal.App.4th at pp.884-885 [negligence in interviewing and approving sperm bank donor], *Bellamy vs. Appellate Dept.* (1996) 50 Cal.App.4th 797, 808 [failure to secure rolling x-ray table], *Williams vs. Superior Court*, supra, 30 Cal.App.4th at pp.3423-324 [failure to warn of violent patient], *Bell vs. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1051-1052 [failure to screen adequately competency of medical staff], *Murillo vs. Good Samaritan Hospital, supra*, 99 Cal.App.3d at p.57 [leaving patient unattended and unrestrained on gurney]; see also *Taylor vs. U.S., supra*, 821 Fd at p.1432 [negligent disconnection of ventilator, 'regardless of whether separation was caused by the ill-considered decision of a physician or the accidental bump of a janitor's broom'].") (Supporting citations omitted.) *Canister, supra*, 160 Cal.App.4th 388, 406-407.

Plaintiff has never claimed that PIH was not an "health care provider." Further the foregoing cases clearly establish that it was and that the term "health care provider" has been liberally construed by the courts of this State.

3. "Professional Negligence" As Defined In C.C.P. §340.5 (And In The MICRA Statutes) Has Properly Been Construed To Mean Negligence During The Rendering Of Services For Which The Health Care Provider Is Licensed. Therefore §340.5 Applies When A Patient Is Injured As A Consequence Of A Negligently Maintained Or Utilized Piece Of Hospital Equipment, Such As A Bed.

Although this court, in *Central Pathology Service Medical Clinic, Inc. vs. Superior Court* (1992) 3 Cal.4th 181, 188, addressed the applicability of C.C.P. §425.13, it noted that some of the MICRA statutes (such as C.C.P. §§340.5 and 364, as well as Civil Code §§3333.1 and 3333.2) applied to actions "based upon" professional negligence while

another statute (C.C.P. §425.13) utilized the term "arising out of the professional negligence of a health care provider." (C.C.P. §425.13.) However, the Supreme Court stated that it agreed with "amici curiae California Medical Association, et al. that committee reports before the Legislature at the time it was considering amending §425.13, indicate the Legislature did not intend to distinguish the terms "based upon" and "arising out of." The report stated "There is substantial precedent for [the amendment] the provisions of [MICRA] all pertain to claims of 'professional negligence'. [Citations.]" (Assem. Subcom. on the Administration of Justice, Analysis of Sen. Bill No. 1420 [1987-1988 Reg. Sess.]; Sen. Office of Research, 3d Reading Analysis of Sen. Bill No. 1420 [187-1988 Reg. Sess.] as amended Apr. 14, 1988; Assem. Office of Research Sen. 3d Reading Analysis of Sen. Bill No. 1420 [1987-1988 Reg. Sess.] as amended August 30, 1988.) (*Central Pathology, supra*, at 187, fn.3.)

Since the sometimes-noted distinction between "based upon" and "arising out of" was previously found by this court to have no applicability in interpreting the legislative intent behind C.C.P. §340.5 in defining and applying the term "professional negligence", it is apparent that the crux of the statutory interpretation is the term "professional negligence" as defined in the statute itself.

In *Russell vs. Stanford University Hospital* (1997) 15 Cal.4th 783, this court cited *Woods vs. Young* (1991) 53 Cal.3d 315, for the proposition that MICRA was enacted as "'an interrelated Legislative scheme . . . to deal specifically with all medical malpractice claims'" (*Woods, supra*, 53 Cal.3d at 324). In such a case "[i]t is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit. Wherever possible, potentially conflicting provisions

should be reconciled in order to carry out the overriding Legislative purpose as gleaned from a reading of the entire act. (*Wells vs. Marina City Properties, Inc.* (1991) 29 Cal.3d 781, 788.)" (*Russell, supra*, at 789.)

In fact, this court has acknowledged that "the ascertainment of Legislative intent is the paramount principle of statutory interpretation." (*Covenant Care, Inc. vs. Superior Court* (2004) 32 Cal.4th 771, 783, citing *In Re Michael G.* (1988) 44 Cal.3d 283, 289.)

In the matter at bar, there can be no dispute but that a hospital is a health care provider and that the plaintiff was injured as a consequence of allegedly negligent in-patient care. Accordingly, the alleged negligence of the hospital in providing such in-patient care is "within the scope of services for which [an] hospital is licensed." (See Health and Safety Code §1250; *So vs. Shin* (2013) 212 Cal.App.4th 652, 668.)

At issue in this case is whether a purported negligent failure to either properly latch the bedrail of the plaintiff's hospital bed, or negligent maintenance of the bed, constitutes "professional" or "ordinary" negligence.[3] The Court of Appeal, PIH maintains, incorrectly decided that such negligence was "ordinary" as opposed to "professional."

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[3] The original complaint accused PIH of negligence in failing "to use reasonable care in maintaining their premises" and failing "to make reasonable inspection of the equipment and premises" or failing to give "reasonable and adequate warning of a dangerous condition." In her Opposition to the Demurrer to the Complaint, plaintiff maintained that the "distinguishing factor" which involved the conclusion that PIH was guilty of "ordinary" as opposed to "professional" negligence was that the negligence did not occur while medical services were being rendered or x-rays were being taken, or in erroneously assessing the plaintiff's condition and erroneously determining that she did need side rails. "Instead, someone latched the rail improperly" (A.A.32). While the appellate court in *Flores*

This purported dichotomy in the law (recognized by this court in *Flowers*, and by the decision in *Flores* as well) is found in the dueling decisions in *Gopaul vs. Herrick Memorial Hosp.* (1974) 38 Cal.App.3d 1002 and *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50. PIH urges that an appropriate framework within which to examine these two cases, and some of their progeny, is the decision in *Bellamy vs. Appellate Dept.* (1996) 50 Cal.App.4th 797.

According to the court in *Bellamy*, the facts in *Gopaul* were that a patient was admitted to the hospital for x-rays and the patient was placed on, but not strapped to, the gurney and left unattended. Thereafter she experienced a coughing spasm and fell to the floor, injuring her back. She filed suit some 15 months later alleging that the hospital was negligent "in leaving her unattended and unstrapped to a gurney." (*Bellamy, supra,* at 801, citing *Gopaul, supra*, 38 Cal.App.3d 1002.)[4] Observing that "the dividing line between 'ordinary negligence' and 'professional malpractice' may at times be difficult to place" (38 Cal.App.3d at p.1007), the *Gopaul*

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acknowledged this theory of liability, it refused to give it any weight (despite finding that had it been plead in the complaint, the complaint would be "time-barred" since "[n]eglectful latching of the bedrail could constitute a negligent act or omission in the rendering of professional services, so as to be subject to the one-year statute for professional negligence" (§340.5, subd (2))." The Court of Appeal simply refused to acknowledge this judicial admission on the basis that it was the complaint. (Opinion, p.16, fn.6.)

[4] The applicable statute of limitations at that time was C.C.P. §340(3) "an action founded on ordinary negligence must generally be commenced within one year of the commission of the negligent act . . . . An action based upon "'professional malpractice' is covered by the same statute of limitations." The court therefore referenced the dictionary definition of "malpractice" as "any professional misconduct or any unreasonable lack of skill in the performance of professional or fiduciary duties" (referring to Webster's New Internat. Dict. [2d ed.].)

court found no difficulty with the facts before it, holding that "the need to strap plaintiff to the gurney while she was ill and unattended would have been obvious to all. The situation required no professional 'skill, prudence and diligence.' It simply called for the exercise of ordinary care." (*Bellamy, supra*, at 801, citing *Gopaul, supra*, at 1007.)

After *Gopaul* was decided, and in 1975, the Legislature enacted the Medical Injury Compensation Reform Act (MICRA). In the course of doing so, C.C.P. §340.5, which was originally enacted in 1970 (and after the incident complained of in *Gopaul*) was amended to set the limitations period for an action against a health care provider based upon alleged "professional negligence" at three years. For purposes of the statute, "professional negligence" was defined as "a negligent act or omission to act by a health care provider in the rendering of professional services." (*Bellamy, supra,* at 802.)

In 1979 another Court of Appeal faced with a factual situation similar to *Gopaul*, but subject to construction under C.C.P. §340.5, another Court of Appeal reached the opposite conclusion. In *Murillo vs. Good Samaritan* a patient who was sedated and sleeping, fell out of bed as a consequence of hospital staff's failure to raise the bedrails. (*Bellamy, supra*, at 802, citing *Murilllo, supra*, at 52-54.) On appeal the *Murillo* court determined, initially, that the defendant was a health care provider within the meaning of §340.5 and that whether to raise the bedrails on the plaintiff's bed came within the hospital's "duty to use reasonable care and diligence in safeguarding a patient committed to its charge [citations] and such care and guidance are measured by the capacity of the patient to care for himself." (*Bellamy, supra*, at 802, citing *Murillo, supra*, at p.55.)

With respect to the issue of ordinary negligence versus professional negligence, the *Murillo* court concluded "whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving a hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence (see *Mount Sinai Hospital of Greater Miami, Inc. vs. Wolfson* (Fla.App.1976) 327 So.2d 883, 884-885) and §340.5 governs the running of the statute of limitations . . . ." (*Bellamy, supra*, at 803, citing *Murillo, supra,* at 56.)

The *Bellamy* court characterized *Murillo* as agreeing with the premise in *Gopaul* that "not every act of negligence by a professional is an act of professional negligence, even where the victim is a client[.]" (*Bellamy, supra,* at 803, citing *Murillo, supra*, at 56.) "Hypothetical examples of ordinary negligence suggested in *Gopaul*, 38 Cal.'App.'3d at p.1006, 113 Cal.Rptr.811, such as injury to a patient from a collapsing chair in a doctor's office, or injury to a client from his attorney's negligent driving en route to the courthouse, were deemed apt." (*Murillo vs. Good Samaritan Hospital, supra*, at p.56.) But *Murillo* had difficulty with the third example found in *Gopaul* – injury to a hospital patient from a chandelier falling into his bed. "[T]he professional duty of a hospital, as we have seen, 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 patient, as a result of the hospital's negligence, there is a breach of the hospital's duty qua hospital." (99 Cal.App.3d at pp.56-57, 160 Cal.Rptr.33.) (*Bellamy, supra*, at 803, citing *Murillo, supra,* at 56-57.)

Murillo noted that *Gopaul* was decided under law that preceded the enactment of §340.5 and concluded that the result reached in *Gopaul* was

incompatible with the definition of professional negligence found in §340.5:

> "Under that definition, the test is not whether the situation calls for a high or 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 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." (*Murillo vs. Good Samaritan Hospital, supra*, 99 Cal.App. 3d at p.57, 160 Cal.Rptr.33.)" (*Bellamy, supra*, 50 Cal.App.4th 797, 803.)

The *Bellamy* court then reviewed four other decisions defining the types of actions which must be considered as ones for "professional negligence" as opposed to "ordinary" or "general" negligence:

(1) "The Ninth Circuit Court of Appeals followed *Murillo* in *Taylor vs. U.S.* (9th Cir.1987) 821 F.2d 1428, 143, holding that Letterman Army Hospital had a professional duty to prevent plaintiff'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 of a janitor's broom . . ." (*Bellamy, supra*, 50 Cal.App.4th 797, 803);

(2) The Fourth District, Division One, in *Bell vs. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1050 [260 Cal.Rptr.886], also cited the *Murillo* test with approval.

(3) Five years later the same division again cited *Murillo* with approval and explicitly rejected *Gopaul*, citing the language defining professional negligence in the later-enacted §340.5. (*Williams vs. Superior Court* (1994) 30 Cal.App.4th 391, 325-327, 36 Cal.Rptr.2d 112.) *Williams* agree[d] with *Murillo* "that it is not the degree of skill required but whether

the injuries arose out of the rendering of professional services that determines whether professional as opposed to ordinary negligence applies." (30 Cal.App.4th at p.327, 36 Cal.Rptr.2d 112.) (*Bellamy, supra*, 50 Cal.App.4th 797, 804.);

(4) Finally, the California Supreme Court criticized the analysis in *Gopaul* in its decision in *Flowers vs. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1000, 35 Cal.Rptr.2d 685 P.2d 142. In *Flowers* the trial court granted summary judgment in favor of a hospital and a nurse on an emergency room patient's complaint for negligence. The defendants' expert declared that prevailing standards of care did not require emergency room personnel to raise gurney siderails for patients like Flowers whose condition (bladder pain) did not appear to warrant this precaution. (*Id.* at pp.995, 1001, 35 Cal.Rptr.2d 685, 884 P.2d 142.) The Court of Appeal reversed. It concluded that defendants had negated an action for professional negligence but determined the pleadings were broad enough to state a cause of action for ordinary negligence. (*Id.* at p.1000, 35 Cal.Rptr.2d 685, 884 P.2d 142.) The Supreme Court reversed and remanded, holding a plaintiff cannot on the same facts, state causes of action for ordinary negligence as well as professional negligence, as a defendant has only one duty that can be measured by one standard of care under any given circumstances." (*Id.* at p.1001.)

> "[A]s a general proposition one 'is required to exercise the care that a person of ordinary prudence would exercise under the circumstances.' [Citations.] . . . 'Persons dealing with dangerous instrumentalities involving great risk of harm must exercise a greater amount of care than persons acting in less responsible capacities, but the former are no more negligent than the latter for failing to exercise the required care . . . .'" (*Flowers vs. Torrance Memorial Medical Center, supra*, 8 Cal.4th at p.997, 35 Cal.Rptr.2d 685, 884 P.2d 142, fn. omitted.) "[A] hospital's business is caring for ill persons, and its conduct must be in accordance with that of a person of ordinary prudence under the circumstances, a vital part of those circumstances being the illness of the patient and

> incidents thereof.' [Citations, italics added.]" (*Id.* at p.998, 35 Cal.Rptr.2d 685, 884 P.2d 142.)

The *Flowers* court added the following to its critique of the lower court opinion:

> "An additional analytical flaw, derived from the rationale of *Gopaul vs. Herrick Memorial Hosp., supra*, underlies the decision below. In drawing the distinction between ordinary and professional negligence, the court in *Gopaul* observed that '[t]he need to strap plaintiff to the gurney while she was ill and unattended would have been obvious to all.' (38 Cal.App.3d at p.1007 [113 Cal.Rptr.811].) In other words, it found that the circumstances did not require expert testimony to establish the appropriate standard of care. (*Id.*) 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. (*Flowers vs. Torrance Memorial Medical Center, supra*, 8 Cal.4th at p.1000.)" (*Bellamy, supra*, at 805.)

The *Bellamy* court further criticized and distinguished *Gopaul* as relying upon "on a dictionary definition of 'malpractice' as being 'any professional misconduct or any unreasonable lack of skill in the performance of professional or fiduciary duties.'" (*Bellamy, supra*, at 807, citing *Gopaul vs. Herrick Memorial Hosp., supra*, 38 Cal.App.3d at p.1005.) "Shortly after that decision the Legislature codified a statutory definition of 'professional negligence' which differs considerably from that in *Gopaul.* The statutory definition does not refer to 'professional misconduct' or 'unreasonable lack of skill'. Instead, it includes any 'negligent act or omission to act . . . in the rendering of professional services' by a licensed health care provider, if the services are within the scope of the provider's license. (§340.5, subd. (2).)" (*Bellamy, supra*, at 807.)

The analysis of the prior decisions by the *Bellamy* court was spot on. It should have settled the issue once-and-for-all. Numerous appellate cases decided after *Bellamy* have all uniformly followed the analytical framework of the *Murillo* decision in applying the professional negligence statute of limitations (C.C.P. §340.5) to a lawsuit alleging injury sustained by a patient in a hospital as a consequence of care and treatment rendered the patient.

Most recently in 2013 Division Four of the Second District Court of Appeal decided *Yun Hee So vs. Sook Ja Shin* (2013) 212 Cal.App.4th 652. At issue was whether §3335.1 (the statute of limitations for ordinary negligence) or §340.5 (the statute of limitations for professional negligence) applied. Based upon the peculiar facts in that case (that an anesthesiologist attempted to persuade plaintiff not to report that she had awoken during her surgery) the court applied the ordinary negligence statute of limitations. However it acknowledged that the courts have broadly interpreted the phrase "in the rendering of professional services", concluding that a negligent act that occurs in the rendering of professional services for which the health care provider is licensed constitutes "professional negligence" as that term is used in C.C.P. §340.5. (*So, supra*, at 663, citing *Murillo vs. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50.) *So* further cited *Murillo* favorably for the proposition that in determining whether the definition of "professional negligence" as contained in §340.5 applies, "the test is not whether the situation calls for a higher or lower of skill, or whether a higher or lower of skill was actually employed, but rather . . . whether the negligent act occurred in the rendering of services for which the health care provider is licensed." (*So, supra*, 212 Cal.App.4th 652, 663.) The opinion also favorably cites *Canister, supra.* (*So, supra*, at 664.)

Gopaul, to the extent that it was once precedential, is no longer so. Since 1975 with the adoption of MICRA and the amendments to C.C.P. §340.5, *Gopaul* is no longer good law on the statute of limitations applicable to "professional negligence" and the decision in *Flores* by the Second District Court of Appeal, which rests chiefly upon *Gopaul*, is wrongly decided.[5]

CONCLUSION

Based upon the statutory language, the legislative history, and the long string of cases decided in the almost forty (40) years following the adoption of MICRA, the cases uniformly establish that the procedural limitations in MICRA and, specifically, §340.5, apply whether or not a cause of action is titled "ordinary" rather than "professional" negligence, and whether or not the injury arises from conduct requiring professional judgment or skill (in the hospital context).

Respectfully submitted,

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PRESBYTERIAN INTERCOMMUNITY HOSPITAL

[5] Every court, before *Flores*, which considered the purported dichotomy between *Gopaul* and *Murillo*, has declined to follow *Gopaul*, instead broadly construing "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.

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 7,753 words, which is less than the 14,000 permitted by Rule 8.204(c)(1). 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 September 30, 2013.

PETER M. FONDA

Filed 2/27/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CATHERINE FLORES, Plaintiff and Appellant, v. PRESBYTERIAN INTERCOMMUNITY HOSPITAL, Defendant and Respondent.	B235409 (Los Angeles County Super. Ct. No. VC058225)

APPEAL from an order of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Reversed with directions.

Edward W. Lloyd & Associates and Edward W. Lloyd for Plaintiff and Appellant.

Fonda & Fraser, Kristen J. Heim and Rachael Kogen for Defendant and Respondent.

Plaintiff and appellant Catherine Flores (Flores) appeals an order of dismissal following the sustaining without leave to amend of a demurrer interposed by defendant and respondent Presbyterian Intercommunity Hospital (Hospital) to Flores's original complaint.

Flores, a patient, sued the Hospital for general negligence and premises liability. Flores pled she injured her left knee and elbow when the bed rail collapsed, causing Flores to fall to the floor. The trial court held the action was time-barred.

For purposes of determining the applicable statute of limitations, the essential issue presented is whether Flores's lawsuit arose out of professional malpractice or ordinary negligence. The trial court ruled the action arose out of the alleged "professional negligence" of a health care provider, so as to be subject to the one-year statute of limitations (Code Civ. Proc., § 340.5) imposed by the Medical Injury Compensation Reform Act of 1975 (MICRA) (Stats. 1975, 2d Ex. Sess., ch. 1, § 25, pp. 3969-3970, ch. 2, § 1.192, pp. 3991-3992). [1]

Based on a survey of case law and statutory analysis, we conclude Flores's action sounded in ordinary negligence, so as to be governed by the two-year statute applicable to personal injury actions. (§ 335.1.) Therefore, Flores's lawsuit was filed timely. We reverse the order of dismissal with directions to reinstate the action.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2011, Flores filed suit against the Hospital, pleading causes of action for general negligence and premises liability.[2] Flores pled that nearly two years earlier, on March 5, 2009, she "sustained injuries and damages when the bed rail collapsed causing plaintiff to fall to the ground injuring her left knee and elbow."

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1 All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

2 Although the complaint did not allege that Flores was a patient at the time her injury occurred, Flores acknowledged that fact in her opposition papers.

The Hospital demurred, contending that although Flores labeled her causes of action as "general negligence" and "premises liability," the action sounded in "professional negligence" and therefore was barred by the one-year statute of limitations. (§ 340.5.) The Hospital reasoned, "the alleged negligence was an integral part of the professional services being rendered to plaintiff. Plaintiff was under the care of [the Hospital] and her alleged injuries occurring in the [H]ospital. Any purported claim is for medical negligence."

In her opposition papers, Flores asserted this was a case of ordinary negligence, not professional negligence. Here, "no negligence was committed in assessing the condition of Plaintiff and in failing to raise the siderails. That medical assessment had already been made and a medical decision to raise the siderails had been made. As such, . . . there was no professional negligence. It was only after the rendition of all professional services (i.e., the assessment of Plaintiff's condition and medical decision to employ siderails), and after the siderails had been negligently latched, that those siderails collapsed, injuring Plaintiff."

On May 13, 2011, the matter came on for hearing. The trial court sustained the Hospital's demurrer to the original complaint without leave to amend. The trial court reasoned: "To decide whether an action arises out of the professional negligence of a health care provider, the 'nature and cause of a plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided.' [Citation.] The Court looks not at the degree of skill involved, but whether such skill is an integral part of the professional service being rendered. [Citations.] [¶] . . . [T]he hospital here has a duty 'to recognize the condition of patients under its care and to take appropriate measures for their safety.' [Citation.] Ensuring that bedrails, to the extent they are needed by a particular patient, are properly raised or lowered and properly latched is a duty that arises from the professional services being rendered. Plaintiff's claim is governed by section 340.5."

The trial court also denied Flores's request for leave to amend, stating she "had not met her burden of establishing an ability to amend the complaint to cure its untimeliness." Flores filed a timely notice of appeal from the order of dismissal.

CONTENTIONS

Flores contends her action is governed by the two-year statute of limitations applicable to personal injury actions, rather than the one-year statute of limitations applicable to medical malpractice actions. We agree.

DISCUSSION

1. *Standard of appellate review.*

In determining whether a plaintiff has properly stated a claim for relief, "our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid.*)

2. *Overview.*

The "impetus for MICRA was the rapidly rising costs of medical malpractice insurance in the 1970's. 'The inability of doctors to obtain such insurance and reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals.' (Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947, and quoted in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 363, fn. 1 [204 Cal.Rptr. 671, 683 P.2d 670, 41 A.L.R.4th

233].) The response was to pass the various statutes that comprise MICRA to limit damages for lawsuits against a health care provider based on professional negligence. (Civ. Code, §§ 3333.1, 3333.2; Code Civ. Proc., § 667; Bus. & Prof. Code, § 6146.)" (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33-34.)[3]

Section 340.5, MICRA's limitations provision, states in pertinent part: "*In an action for injury or death against a health care provider based upon such person's alleged professional negligence*, the time for the 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*." (§ 340.5, italics added.)

Section 340.5 neither deals with, nor defines, ordinary negligence. It defines "professional negligence" as "*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 . . . , 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." (§ 340.5, subd. (2), italics added.)

Section 335.1, which is outside MICRA, is the statute on which Flores relies. Section 335.1 is the limitations period for personal injury actions, i.e., ordinary

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[3] For an extensive discussion of the topic, see generally Annotation, What Patient Claims Against Doctor, Hospital, or Similar Health Care Provider Are Not Subject to Statutes Specifically Governing Actions and Damages for Medical Malpractice (1991) 89 A.L.R.4th 887 (Annotation). The Annotation observes, "Because all of the legislative responses to the medical malpractice crisis were attempts to limit the health care provider's exposure to liability, disputes arose concerning whether certain types of claims against health care providers constituted malpractice actions; plaintiffs seeking to avoid the statutes argue that a particular claim falls outside the definition of medical malpractice, while defendants seek to bring almost every claim against a health care provider within the definition. The courts have struggled with proper categorization of patient claims which arise in connection, however slight, with health care. [¶] In defining the scope of the medical malpractice statutes as applied to tort claims, the courts have weighed various considerations, including the statutory language and legislative history, and the factual basis and context of a claim." (*Id.* at § 2[a], p. 898.)

negligence. It states: "*Within two years*: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." (*Ibid.*, italics added.)[4]

Because the limitations period differs depending upon the characterization of the alleged negligence, the essential issue presented is whether Flores's fall from a hospital bed constituted professional negligence or ordinary negligence. If the complaint sounds in professional negligence, it would be barred by the one-year limitations period of section 340.5. Conversely, if the complaint sounds in ordinary negligence, this action would be governed by the two-year limitations period of section 335.1 and therefore would be timely.

3. *Survey of case law involving falls from hospital beds or gurneys.*

In order to determine whether the instant fact situation sounds in ordinary negligence or professional negligence, we set forth pertinent case law involving patient falls from beds or gurneys.

a. *Pre-MICRA cases.*

(1) *Gin.*

In the pre-MICRA case of *Gin Non Louie v. Chinese Hospital Assn.* (1967) 249 Cal.App.2d 774 (*Gin*), the plaintiff broke his hip when he fell out of bed while a patient at the defendant hospital. The evidence indicated that at the time of the fall, the sidedrails were raised and the plaintiff fell while attempting to climb out at the foot of the bed. (*Id.* at p. 779.) However, the evidence also showed the hospital staff knew the plaintiff was suffering from a progressive disease of the brain and nervous system and that he was restless and confused during the hours before his fall. Affirming a judgment for the plaintiff, the reviewing court held there was substantial evidence the hospital staff

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[4] Before section 335.1 extended the statute of limitations for personal injury actions to two years (Stats. 2002, ch. 488, § 2), the statute of limitations was one year (form. § 340, subd. (3)). (Sen. Bill No. 688, 2001-2002 Reg. Sess., Legislative Counsel's Digest.)

was negligent in failing to notify the plaintiff's physician of his deteriorating condition, and in failing to provide further supervision. (*Gin, supra*, 249 Cal.App.2d at p. 795.)

(2) *Gopaul.*

Gopaul v. Herrick Memorial Hosp. (1974) 38 Cal.App.3d 1002 (*Gopaul*) was decided shortly before the enactment of MICRA. There, a patient who was later diagnosed with bronchial pneumonia, went to the hospital for X-rays. Hospital employees placed her on a gurney and wheeled her to a room where the X-ray pictures were taken. She was then placed back on, but not strapped to, the gurney, after which she was left unattended while the hospital's technician developed the X-ray film. While so unattended, she developed a fit of coughing and fell to the floor, injuring her back. (*Id.*, at p. 1004.)

In affirming a judgment of nonsuit in favor of defendant hospital, *Gopaul* stated: "It will be seen that 'professional malpractice' was not involved in the defendant hospital's tortious conduct, and that the reasons for the extended statute of limitations for such malpractice are wholly inapplicable here. *The need to strap plaintiff to the gurney while she was ill and unattended would have been obvious to all. The situation required no professional 'skill, prudence and diligence.'* It simply called for the exercise of ordinary care." (*Gopaul, supra*, 38 Cal.App.3d at p. 1007, italics added.)

Gopaul reasoned, "inherent in the concept of 'professional malpractice' is that it must have occurred in the 'performance of professional or fiduciary duties.' It follows that not every tortious injury inflicted upon one's client or patient or fiducial beneficiary amounts to such malpractice. No reasonable person would suggest that 'professional malpractice' was the cause of injury to a patient from a collapsing chair in a doctor's office, or to a client from his attorney's negligent driving en route to the court house, or to a hospital patient from a chandelier falling onto his bed. Such injuries would, no doubt, have proximately resulted from 'ordinary negligence,' but they would not be brought about from 'professional malpractice.' " (*Gopaul, supra*, 38 Cal.App.3d at pp. 1005-1006.)

b. *Post-MICRA cases; conflict as to whether patient injury arising from dangerous condition of hospital premises amounts to ordinary or professional negligence.*

(1) *Murillo.*

In *Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50 (*Murillo*), a patient was admitted to a hospital for treatment of shingles on her lower back. The condition caused severe pain and prevented the patient from lying on her back. She fell out of bed during the night and was injured. (*Id.* at p. 53.) The defendant hospital successfully moved for summary judgment on the ground the alleged negligent conduct, i.e., failure to raise the bedrails, was ordinary negligence rather than professional negligence. Accordingly, the hospital maintained the action was barred by the one-year limitations period of then section 340, subdivision (3). (*Murillo, supra*, 99 Cal.App.3d at p. 53.)

Murillo reversed, stating: "In the present case, the question whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence [citation] and section 340.5 governs the running of the statute of limitations." (*Murillo, supra*, 99 Cal.App.3d at p. 56.)

Murillo disagreed with the pre-MICRA decision in *Gopaul*, explaining: "*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 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." (*Murillo, supra*, 99 Cal.App.3d at p. 57.)

With respect to the various hypotheticals set forth in *Gopaul*, the *Murillo* court agreed that a patient who is injured by a collapsing chair in a waiting room, or a client who is injured by his attorney's negligent driving to the courthouse, would *not* be victims of *professional* negligence. (*Murillo, supra*, 99 Cal.App.3d at p. 56.)

However, with respect to *Gopaul*'s third example, i.e., injury to a hospital patient from a chandelier falling onto his bed (*Gopaul, supra*, 38 Cal.App.3d at p. 1006), *Murillo* viewed that situation as involving professional negligence, stating "we have difficulty with the third example because 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 patient, as a result of the hospital's negligence, there is a breach of the hospital's duty *qua* hospital." (*Murillo, supra*, 99 Cal.App.3d at pp. 56-57.)

(2) *Flowers.*

In *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992 (*Flowers*), the plaintiff was admitted to a hospital emergency room complaining of bladder pain. She was assisted onto a gurney by a nurse to await further medical attention, at which time the nurse raised only the far side railing of the gurney. While awaiting treatment, plaintiff apparently fell asleep. When she awoke, she attempted to roll over but instead, fell off the gurney and sustained injury to her back and arm. (*Id.* at p. 995.)

The trial court granted summary judgment in favor of the hospital and the nurse on the emergency room patient's complaint for negligence. The defense expert declared the prevailing standard of care did not require emergency room personnel to raise gurney siderails for patients like the plaintiff, whose condition (bladder pain) did not appear to warrant this precaution. (*Flowers, supra,* 8 Cal.4th at p. 996.)

The Court of Appeal reversed. It concluded defendants had negated an action for professional negligence but determined the pleadings were broad enough to state a cause of action for ordinary negligence. (*Flowers, supra,* 8 Cal.4th at p. 996.)

The Supreme Court reversed and remanded, holding a plaintiff cannot, on the same facts, state causes of action for ordinary negligence as well as professional negligence, as a defendant has only one duty that can be measured by one standard of care under any given circumstances. (*Flowers, supra,* 8 Cal.4th at p. 1000.) Citing *Gopaul* and *Murillo*, the Supreme Court noted that "[t]wo decisions by Courts of Appeal have addressed the question of whether a patient's fall from a hospital bed or gurney constituted 'ordinary' or 'professional' negligence." (*Flowers, supra*, 8 Cal.4th at p. 999.) However, "[b]ecause the question [was] not squarely presented [*in Flowers*], [the Supreme Court] decline[d] to resolve the conflict between *Murillo v. Good Samaritan Hospital, supra,* 99 Cal.App.3d 50, and *Gopaul v. Herrick Memorial Hosp., supra*, 38 Cal.App.3d 1002, on the question of whether a patient's fall from a hospital bed or gurney implicates 'professional' or 'ordinary' negligence in a statutory context." (*Flowers, supra*, 8 Cal.4th at p. 1002, fn. 6.)

(3) *Bellamy*.

We conclude our California survey with *Bellamy* v. *Appellate Department* (1996) 50 Cal.App.4th 797 (*Bellamy*). There, plaintiff sued a hospital, alleging causes of action for general negligence and premises liability. She pled she was injured at the hospital " 'when she fell off a rolling X-ray table onto her head. Plaintiff was left unattended and said X-ray table was not secured.' " (*Id.* at p. 799.)

The hospital demurred to the complaint on the sole ground the action was barred by the one-year statute of limitations for personal injury actions. (Form. § 340, subd. (3).) The plaintiff opposed the demurrer, arguing she was subject to the notice requirement for professional negligence actions against health care providers, that she served the required notice within 90 days of expiration of the limitations period, that her time for filing suit was thus extended 90 days after service of notice, and that her complaint was timely filed under section 364, subdivision (d). The trial court sustained

the hospital's demurrer without leave to amend and dismissed the action. (*Bellamy, supra*, at pp. 799-800.)

Bellamy reversed, concluding the complaint sufficiently alleged facts amounting to professional negligence, bringing it within section 364, making the complaint timely. (*Bellamy, supra*, 50 Cal.App.4th at p. 809.) *Bellamy* reasoned that the plaintiff was injured "either in preparation for, during, or after an X-ray exam or treatment," and that section 340.5 defines professional negligence as " 'a negligent action or omission . . . in the rendering of professional services.' " (*Bellamy, supra,* at p. 805.) Under "the facts alleged, the hospital was rendering professional services to Bellamy in taking X-rays and she would not have been injured by falling off the X-ray table but for receiving those services. Consequently, under a broad reading of the statute any negligence in allowing her to fall off the X-ray table arose 'in the rendering of professional services.' " (*Id.* at pp. 805-806.) Further, "[t]his result is consistent with *Murillo*: '[T]he test is whether the negligent act occurred in the rendering of services for which the health care provider is licensed.' (*Murillo v. Good Samaritan Hospital, supra*, 99 Cal.App.3d at p. 57.)" (*Bellamy, supra*, 50 Cal.App.4th at p. 806.)

The defendant hospital urged the *Bellamy* court to reject the *Murillo* test on the ground said test "is overbroad and 'would make *any* act inside a hospital which causes any harm to a patient or to any person inside a hospital an act of "professional negligence." ' The hospital criticize[d] the *Murillo* court's dictum that a negligently maintained, unsafe condition of a hospital's premises which causes injury to a patient falls within professional negligence. According to the hospital, this rationale 'obliterates' the word 'professional' from the statutory definition, making any negligence by an agent or employee of a health care facility professional negligence." (*Bellamy, supra*, 50 Cal.App.4th at p. 806.)

Bellamy stated: "We do not need to agree with the *Murillo* dictum to apply that court's actual holding in this case. *Murillo*'s facts showed that a patient hospitalized for treatment of shingles on her lower back was placed on a hospital bed and given sedatives and tranquilizers. The alleged negligence was failure of the hospital staff to raise bedrails

designed to prevent the patient's falling while she was asleep. On these facts we agree with the court's holding that the case fell within the statutory definition of professional negligence. *That holding does not necessarily lead to the further conclusion that any negligent act or omission by a hospital causing a patient injury is professional negligence.*" (*Bellamy, supra*, 50 Cal.App.4th at p. 806, italics added.)

In sum, *Bellamy* agreed with *Murillo* to the extent *Murillo* held the issue is controlled by the statutory definition of professional negligence in section 340.5, "*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.* (*Murillo v. Good Samaritan Hospital, supra*, 99 Cal.App.3d at p. 57.)" (*Bellamy, supra*, 50 Cal.App.4th at pp. 806-807, italics added.)

Bellamy added, "That the alleged negligent omission was simply the failure to set a brake on the rolling X-ray table or the failure to hold the table in place, neither of which requires any particular skill, training, experience or exercise of professional judgment, does not affect our decision. We presume that during the course of administering an examination or therapy like that which Bellamy underwent, an X-ray technician may perform a variety of tasks, such as assisting the patient onto the table, manipulating the table into one or more desired positions, instructing the patient to move from one position to another, activating the X-ray machine, removing the photographic plates, assisting the patient from the table, etc. *Some of those tasks may require a high degree of skill and judgment, but others do not. Each, however, is an integral part of the professional service being rendered.* 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." (*Bellamy, supra,* 50 Cal.App.4th at p. 808.)

c. *Other jurisdictions.*

In discussing whether particular patient tort claims are subject to medical malpractice statutes, the Annotation observes that "[p]atient claims based on the negligent maintenance of a health care provider's premises or equipment failure are the *least likely* to be found subject to the medical malpractice statutes." (Annotation, *supra*, 89 A.L.R. 4th at § 2[a], p. 901, italics added.) The Annotation differentiates between: (1) patient injuries arising out of the failure to provide a safe hospital bed (*id.* at § 31, p. 981); (2) patient claims alleging that a health care provider failed to adequately observe or supervise a patient in order to prevent a fall from bed, where the condition of the bed is not an issue (*id.* at § 31, p. 981, fn. 88); and claims alleging the bed rails should have been raised, without reference to the condition of the rails. (*Ibid.*)

Guided by the above, we turn to the case at bench.

4. *Based on the aforesaid summary of case law, we conclude Flores sufficiently pled facts amounting to ordinary negligence, bringing her action within the two-year limitations period of section 335.1.*

"[I]t is recognized that the dividing line between 'ordinary negligence' and 'professional malpractice' may at times be difficult to place . . . ." (*Gopaul, supra*, 38 Cal.App.3d at p. 1007.)

Nonetheless, the instant fact situation is easily distinguished from the five California cases discussed above, arising out of patient falls from beds or gurneys. All those cases involve injury to a patient resulting from the failure to properly secure or supervise the patient while on a hospital bed or gurney. In *Gin*, although the siderails were raised, a confused patient who was not properly medicated and was unsupervised, fell while attempting to climb out at the foot of the bed. (*Gin, supra*, 249 Cal.App.2d at p. 779.) In *Gopaul*, a patient fell after being left unattended on a gurney, to which she had not been strapped. (*Gopaul, supra*, 39 Cal.App.3d at p. at p. 1004.) In *Murillo*, the bedrails were left down during the night and the patient fell out of bed. (*Murillo, supra*, 99 Cal.App.3d at pp. 53, 56.) In *Flowers*, the nurse raised only the far side railing of the gurney and the patient fell off the gurney. (*Flowers, supra*, 8 Cal.4th at p. 995.) Finally,

in *Bellamy*, the patient fell after being left unattended on a rolling X-ray table which had not been secured. (*Bellamy, supra*, 50 Cal.App.4th at p. 799.)

Here, in contrast, as alleged in the complaint, the patient was injured "when the bed rail *collapsed* causing plaintiff to fall to the ground injuring her left knee and elbow." (Italics added.) *Thus, Flores does not allege the Hospital was negligent in failing to elevate the bed rails or in otherwise failing to supervise or secure her.* Rather, Flores alleges she was injured by an *equipment failure*, i.e., a collapsed bed rail. The alleged negligence is the Hospital's failure "to use reasonable care in maintaining [its] premises and fail[ing] to make a reasonable inspection of the equipment and premises, which were open to Plaintiff and the public, and fail[ing] to take reasonable precautions to discover and make safe a dangerous condition on the premises." As set forth *ante*, the discrete issue presented is whether these allegations by Flores, involving a collapsed bed rail, sound in ordinary negligence or professional negligence.

In the era of MICRA, the controlling language is found in the statutory definition of professional negligence, which focuses on whether the negligence occurred in the rendering of *professional services*. To reiterate, for purposes of section 340.5,"professional negligence" is defined as "a negligent act or omission to act by a health care provider *in the rendering of professional services* . . . ." (§ 340.5, subd. (2), italics added.)[5]

Clearly, there is a dichotomy between ordinary negligence and professional negligence, with MICRA only governing the latter type of negligence. However, the statutory definition of professional negligence is less than clear. Therefore, the courts

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5 "The definition of 'professional negligence' was included in the following [MICRA] provisions: Business and Professions Code section 6146 (limitation on attorney contingency fees); Civil Code section 3333.1 (admissibility of evidence of recovery from collateral sources); section 3333.2 (limitation on noneconomic damages); Code of Civil Procedure sections 340.5, 364 (notice of intent to file action); section 667.7 (periodic payment of damage award); section 1295 (notice regarding arbitration provision in contract)." (*Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 701, fn. 5 (*Hedlund*).)

have grappled with whether a given fact situation constitutes ordinary negligence or professional malpractice.

We conclude the instant fact situation, consisting of a collapsed bed rail, does not constitute professional negligence. The test under section 340.5 is whether " 'the negligent act occurred in the rendering of services for which the health care provider is licensed.' " (*Bellamy, supra,* 50 Cal.App.4th at p. 806.) For example, in *Bellamy*, the patient "was injured either in preparation for, during, or after an X-ray exam or treatment." (*Id.* at p. 805.)

Case law recognizes that "not every tortious injury inflicted upon one's client or patient or fiducial beneficiary amounts to [professional] malpractice." (*Gopaul, supra*, 38 Cal.App.3d at p. 1006; accord, *Murillo, supra*, 99 Cal.App.3d at p. 56; *Bellamy, supra*, 50 Cal.App.4th at p. 803.) The case at bench is most analogous to *Gopaul*'s hypothetical examples of *ordinary* negligence involving a collapsed chair and a fallen chandelier. *Gopaul* observed, "No reasonable person would suggest that 'professional malpractice' was the cause of injury to a patient from a collapsing chair in a doctor's office, or to a client from his attorney's negligent driving en route to the court house, or to a hospital patient from a chandelier falling onto his bed." (*Gopaul, supra*, 38 Cal.App.3d at p. 1006.)

Murillo agreed with the first two hypothetical examples of *ordinary* negligence given in *Gopaul* (38 Cal.App.3d at p. 1006), i.e., injury to a patient from a collapsing chair in a doctor's office, and injury to a client from his attorney's negligent driving en route to the courthouse. (*Murillo, supra,* 99 Cal.App.3d at p. 56.) But, as *Bellamy* noted, "*Murillo* had difficulty with the third example found in *Gopaul*--injury to a hospital patient from a chandelier falling onto his bed. '[T]he professional duty of a hospital, as we have seen, 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 patient, as a result of the hospital's negligence, there is a breach of the hospital's duty qua hospital.*' ([*Murillo, supra*,] 99 Cal.App.3d at pp. 56-57.)" (*Bellamy, supra*, 50 Cal.App.4th at p. 803, italics added.)

We disagree with *Murillo* in this regard. We reject *Murillo*'s dictum that a negligently maintained, unsafe condition of a hospital's premises which causes injury to a patient falls within professional negligence. Injury to a patient from a fallen chandelier, or from a negligently maintained bed rail which collapses, does not amount to professional negligence within the meaning of section 340.5. To reiterate, "not every tortious injury inflicted upon one's client or patient or fiducial beneficiary amounts to [professional] malpractice." (*Gopaul, supra*, 38 Cal.App.3d at p. 1006; accord, *Murillo, supra*, 99 Cal.App.3d at p. 56; *Bellamy, supra*, 50 Cal.App.4th at p. 803.) The critical inquiry is whether the negligence occurred in the rendering of professional services. (§ 340.5, subd. (2); *Bellamy, supra*, 50 Cal.App.4th at pp. 805-806.)

We conclude Flores's complaint, which alleged she was injured "when the bed rail collapsed causing plaintiff to fall to the ground," sounds in ordinary negligence because the negligence did not occur in the rendering of professional services. As pled in the operative complaint, the alleged negligence was the Hospital's failure "to use reasonable care in maintaining [its] premises and fail[ing] to make a reasonable inspection of the equipment and premises, which were open to Plaintiff and the public, and fail[ing] to take reasonable precautions to discover and make safe a dangerous condition on the premises." Therefore, the action is governed by the two-year statute of limitations (§ 335.1), making the lawsuit timely.[6]

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[6] In her opposition to the *demurrer*, Flores theorized the bed rail collapsed either due to "neglectful latching" by an employee of the Hospital, or because the Hospital "negligently maintained" the locking mechanism on the bed rail. However, Flores's complaint did not plead "neglectful latching" of the bed rail as an alternative theory. Had "neglectful latching" been pled in the complaint, that theory would be time-barred. Neglectful latching of the bed rail would constitute a negligent act or omission in the rendering of professional services, so as to be subject to the one-year statute for professional negligence. (§ 340.5, subd. (2).)

DISPOSITION

The order of dismissal is reversed with directions to overrule the demurrer and to reinstate the original complaint. Flores shall recover her costs on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.

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 1360, Los Angeles, California 90067.

On September 30, 2013, I served the foregoing **OPENING 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 with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 30, 2013, at Los Angeles, California.

SHARLEEN INOUYE

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