Supreme Court number S209836
Court of Appeal number B235409
Los Angeles County Superior Court number VC058225

In the Supreme Court
State of California

Catherine Flores,

***Plaintiff-Appellant*,**

***v*.**

Presbyterian Intercommunity Hospital,

***Defendant-Respondent*.**

After a decision by the California Court of Appeal
Second Appellate District, Division Four

Application for Leave to File Amicus Curiae Brief;

Amicus Brief of Consumer Attorneys of California in Support of Plaintiff Catherine Flores

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A.

Application

Consumer Attorneys of California requests an order granting leave to file an amicus curiae brief in this matter. The amicus curiae brief is in support of the respondent-plaintiff, Catherine Flores. The proposed brief is attached to this application.

Counsel is familiar with the briefing filed in this action to date. The concurrently-filed amicus brief addresses fundamental public policy issues not otherwise considered or argued by the parties, including application of the law as advocated by the parties to this matter. The attached brief also reviews laws and judicial opinions from several Sister States. Amicus believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

B.

Statement of Interest

The Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000 attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent plaintiffs in personal injury, including medical malpractice, actions. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians, including those injured through the negligence of health care providers, in both the courts and the Legislature.

Mr. Stevens, a co-author of this Amicus Curiae brief, is a certified specialist in appellate advocacy (State Bar of California Board of Legal Specialization) and certified in medical negligence law (American Board of Professional Liability Attorneys), has handled dozens of medical negligence cases, and is a member of CAOC's Amicus Curiae Committee.

Mr. Ellis, a co-author of this brief, is a trial attorney who represents plaintiffs in numerous medical negligence cases over the past fourteen years and is a member of CAOC's Amicus Curiae Committee.

Respectfully submitted,

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I.

Summary of Argument

Does the relationship of health care provider and patient mean that, as a matter of law, all acts are "professional services" and, thus, all wrongful acts are "professional negligence" within the meaning of Civil Procedure Code section 340.5(2)? This Court and the Courts of Appeal have answered, "No." *Covenant Care, Inc. v. Superior Court*, 32 Cal.4th 771, 783, 11 Cal.Rptr.3d 222, 230 (2004) (neglect under Welf. & Inst.Code § 15600 *et seq*. is not "professional negligence"); *Gopaul v. Herrick Memorial Hosp.*, 38 Cal.App.3d 1002, 1006, 113 Cal.Rptr. 811, 813 (1974) ("not every tortious injury inflicted upon one's client or patient or fiducial beneficiary amounts to . . . [professional] malpractice"); *Murillo v. Good Samaritan Hospital*, 99 Cal.App.3d 50, 56, 160 Cal.Rptr. 33, 37 (1979) (agreeing with *Gopaul*, but disagreeing on where to draw the line).

There are sound public policy reasons for refusing to extend the definition of "professional services" to everything a health care provider does in relation to a patient. That extension would shift responsibility for compensation for damages for ordinary negligence from general liability insurers to medical malpractice insurers. This dramatic shift would undermine the Legislature's principal articulated intent: To protect medical malpractice insurers from increasing claims and to protect medical malpractice insureds from increasing premiums.

The language of Section 340.5(2), moreover, belies an intent to extend the provision to everything a health care provider does. If the Legislature intended such a rule, it could have fashioned one quite easily. It did not. Instead it chose its words carefully, using language that embraces a professional standard of care. Several of our Sister States, with similar medical negligence statutes, have reached the same conclusion under similar fact patterns: Acts of ordinary negligence fall outside of statutes that were intended to protect health care providers when they render professional services.

II.

Defining All Wrongful Acts Within a Hospital as "Professional Negligence" Would Undermine the Articulated Basis for MICRA

An interpretation of "professional services" that encompasses everything a hospital might do — including broken bed rails — would unravel one of Legislature's articulated concerns when it enacted the MICRA scheme. "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system . . .." Stats.1975, Second Ex.Sess. 1975–1976, ch. 2, § 12.5, p. 4007. This Court added its observation that the "crisis" was one of medical malpractice insurance: "Many factors have been tendered to explain why these problems arose in the medical malpractice field — the changing doctor-patient

relationship, a rapid "liberalization" of tort doctrine in medical malpractice cases, a uniquely *small number of insureds* over which to spread *premiums*, imprudent investments on the part of medical malpractice insurers, and others." *American Bank & Trust Co. v. Community Hosp.*, 36 Cal.3d 359, 372, 204 Cal.Rptr. 671, 679 (1984). Shifting indemnification for all wrongful acts from the general liability insurer to the malpractice insurer thus adds to the malpractice insurer's burden and, according to the insurance industry and the Legislature, would cause insurance premiums charged to this relatively small number of insureds to increase.

An Indiana appellate court considered and adopted this powerful argument against labeling everything a hospital does to be "medical care." In *Winona Mem. Foundation of Indianapolis v. Lomax*, 465 N.E.2d 731 (Ind.App. 1984), a patient tripped and fell over a protruding floorboard in the hospital as she was preparing to obtain physical therapy. She alleged in her complaint that the hospital was negligent for failing to maintain its floor in a reasonably safe condition. The hospital moved for summary judgment on the grounds that the patient did not comply with Indiana's Medical Malpractice Act which, in relevant part, requires a plaintiff to present a proposed complaint to the Insurance Commission for consideration by a medical review panel before filing her action in court. Ind.Code § 16-9.5-9-2. The trial court ruled that the patient's claim was outside the scope of the medical malpractice statute; the hospital took an interlocutory appeal; the appellate court affirmed.

Indiana's Medical Malpractice Act is similar to MICRA. While not mimicking MICRA word-for-word, the concepts and scope are analogous. Just as MICRA links "professional negligence" to "rendering of professional services," the Indiana statutes provide: "'Malpractice' means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." Ind.Code § 16–9.5–1–1(h). "'Tort' means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another." Ind.Code § 16–9.5–1–1(g). "'Health care' means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement." Ind.Code § 16–9.5–1–1(i).

Integrating these definitions, Indiana's Medical Malpractice Act applies to, "any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished by the hospital for, to, or on behalf of a patient during the patient's medical care, treatment or confinement." *Winona Mem.*, 465 N.E.2d at 734 n.3 (citation omitted).

The legislative intent of Indiana's Medical Malpractice Act, enacted in 1975, was the same as the rationale for the California Legislature's MICRA of 1975. *Winona Memorial*, explained —

> the Medical Malpractice Act was the legislative response to the crisis in the availability of medical malpractice insurance, which, in turn, was threatening the availability of health care services to the public. The supreme court's review of the historical background of the Act does not indicate the legislature was aware of any difficulties of health care providers in obtaining general liability insurance coverage for ordinary non-medical accidents on their premises. No threatened unavailability of such insurance existed as a link in the relational chain to the threatened diminution of health care services. *The legislature was responding only to a crisis in the ability of health care providers to obtain medical malpractice insurance coverage* (which did not cover non-medical accidents) and thus to continue providing health care services to the public.

Winona Mem., 465 N.E.2d at 739 (emphasis added).

Pushing routine premises liability claims into a statute that was designed to preserve the availability of medical malpractice insurance, and to reduce medical malpractice insurance premiums, would violate the legislative intent.

> To the extent that the coverage of medical malpractice insurance policies is defined by the terms of the Medical Malpractice Act, an interpretation of the Act that holds premises liability claims to be covered by the Act would operate directly contrary to the clearest purpose of the Act — to preserve the availability of health care services by guaranteeing the continued availability of medical malpractice insurance — by placing within the coverage of medical malpractice insurance many claims presently covered by general liability insurance.

Winona Mem., 465 N.E.2d at 739 n.6.

The articulated rationale for California's MICRA was the same as that of Indiana's Medical Malpractice Act: Preservation, availability and reduced cost of medical malpractice insurance. "As we have frequently recounted, the Legislature enacted MICRA in response to a medical malpractice insurance 'crisis,' which it perceived threatened the quality of the state's health care." *Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp.*, 8 Cal.4th 100, 111, 32 Cal.Rptr.2d 263, 269 (1994). "MICRA thus reflects a strong public policy to contain the costs of

malpractice insurance by controlling or redistributing liability for damages . . .." *Western Steamship*, 8 Cal.4th at 112, 32 Cal.Rptr.2d at 269.

> Thus, the conditions that were the impetus for the legislature's enactment of the Medical Malpractice Act had nothing to do with the sort of liability any health care provider — whether a hospital or a private practitioner — risks when a patient, or anyone else, is injured by the negligent maintenance of the provider's business premises. That not being the sort of liability that brought about passage of the Act, it is absurd to believe the legislature would have reached out to restrict such liability by including it within the Act.

Winona Mem., 465 N.E.2d at 739.

Winona Memorial also addressed *Murillo v. Good Samaritan Hospital*, 99 Cal.App.3d 50, 160 Cal.Rptr. 33 (1979), which the appellate court cited in a previous case, *Methodist Hosp. of Indiana, Inc. v. Rioux*, 438 N.E.2d 315 (1982). In *Methodist Hospital*, the patient alleged that the hospital failed to provide appropriate care to prevent her fall. The appellate court cited *Murillo* for the conclusion that the hospital has a duty to keep its premises safe.

Winona Memorial drew a sharp distinction between the case before it and *Methodist Hospital* and its reliance upon *Murillo*. In *Methodist Hospital* the patient pleaded her complaint as a breach of the duty to provide "appropriate care." In contrast, in *Winona Memorial*, the patient "in what is clearly and unambiguously a premises liability claim, [alleged] she fell as a proximate result of the defendant's negligent maintenance of the floor . . . in allowing a broken board to stick up in said floor." *Winona Mem.*, 465 N.E.2d at 741-742.

According to the defendant's Opening Brief here, Ms. Flores pleaded that the defendants "failed to use reasonable care in maintaining their premises and failed to make a reasonable inspection of the equipment and premises . . .." Also, according to the defendant, Ms. Flores' complaint alleges a "fail[ure] to give plaintiff a reasonable and adequate warning of a dangerous condition . . .." (Deft's Open.Brf. at 4-5.) The same policy reasons — protection of medical malpractice insurance, but not general liability insurance — are thus applicable in the present case.

III.

Neither an Injury at a Health Care Provider's Premises, Nor the Victim's Status as a Patient, Is Dispositive in Determining Whether MICRA's Limitation Period Applies

A.

This Court has Acknowledged the Distinction Between "Professional" and "Ordinary" Negligence for Purposes Of Statutory Construction

Civil Procedure Code section 340.5 applies only "to actions for injury against a health care provider based on professional negligence." Civ.Proc.Code § 340.5(a). "'Professional negligence' means a negligent act or omission to act by a health care provider *in the rendering of professional services* . . . ." Civ.Proc.Code § 340.5(b) (emphasis added). Although courts have commented that "professional negligence" is broadly construed, *Arroyo v. Plosay*, 225 Cal.App.4th 279, 297, 170 Cal.Rptr.3d 125, 140 (2014), no case has held that it encompasses everything that a hospital (or any other heath care provider) might do. *See Murillo*, 99 Cal.App.3d at 56, 160 Cal.Rptr. at 37 ("not every act of negligence by a professional is an act of professional negligence, even where the victim is a client," citing *Gopaul*, 38 Cal.App.3d at 1005-1006, 113 Cal.Rptr. at 813.

In *Flowers v. Torrance Mem. Hosp. Med. Ctr.*, 8 Cal.4th 992, 35 Cal.Rptr.2d 685 (1994), this Court held that — as a question of "substantive law" — there is not a dichotomy between professional negligence and ordinary negligence, but the distinction is relevant when the Legislature has altered or limited some aspect of a malpractice action. *Flowers*, 8 Cal.4th at 998-999, 35 Cal.Rptr.2d at 688.

In *Flowers*, a patient fell off of a gurney while awaiting treatment, because a nurse failed to raise one of the gurney's side rails. The hospital obtained summary judgment with an expert declaration that said, in effect, that the hospital met its professional standard of care even though it failed to raise both side rails. The appellate court reversed, finding that the hospital met a professional standard of care, but the pleadings also encompassed "ordinary" negligence and the manner of the plaintiff's injury did not involve a breach of duty to provide professional skill. *Flowers*, 8 Cal.4th at 996, 35 Cal.Rptr.2d at 687.

In this context, this Court faulted the appellate court for finding two separate causes of action, "professional negligence" and "ordinary negligence." There is only one duty of care — reasonableness under the circumstances:

> While 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.

Flowers, 8 Cal.4th at 997, 35 Cal.Rptr.2d at 687 (citation omitted).

> The Court of Appeal thus erred in finding plaintiff's pleadings "broad enough" to state a cause of action for ordinary negligence as well as professional negligence. This analysis necessarily implies that the same factual predicate can give rise to two independent obligations to exercise due care according to two different standards. But this is a legal impossibility: a defendant has only one duty, measured by one standard of care, under any given circumstances.

Flowers, 8 Cal.4th at 1000, 35 Cal.Rptr.2d at 689.

Flowers acknowledged, as noted above, that statutes do draw a distinction between "professional" and "ordinary" negligence and, thus, a professional standard of care, if any, plays a role in whether the statutes apply to a given set of facts. *Flowers* in fact pointed to the importance of the distinction in determining whether the limitations period of Civil Procedure Code section 340.5, or of section 340, apply to an action:

> 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).

Flowers, 8 Cal.4th at 998-999, 35 Cal.Rptr.2d at 688.

The Legislature's use of the term "professional service" is critical, because it reinforces the principle that not all wrongful acts or omissions of a "health care

provider" (as defined by Section 340.5) fall within the scope of Section 340.5. "Professional services" has a recognized meaning throughout statutes as well as the case law. It refers to the exercise of skill, prudence and learned judgment.

This Court has characterized a "profession" as an occupation whose practitioners must learn, possess and apply expert skill. *Huffman v. Lindquist*, 37 Cal.2d 465, 473, 234 P.2d 34, 39 (1951) ("physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession . . . and that he exercise ordinary care in applying such learning and skill to the treatment of his patient."). A similar standard applies to other services whose practitioners are expected to have specialized knowledge. *Estate of Beach*, 15 Cal.3d 623, 635, 125 Cal.Rptr. 570, 578 (1975) (professional fiduciary; "the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances . . .."); *Lucas v. Hamm*, 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 825 (1961) (professional standard for attorney); *see also Osborn v. Irwin Mem. Blood Bank*, 5 Cal.App.4th 234, 271, 7 Cal.Rptr.2d 101, 120 (1992) (adequacy of a blood bank's actions to prevent the contamination of blood is a question of professional standard of care; "the activities of [the blood bank] at issue here — the collection, processing, and testing of blood for transfusion — no doubt require the exercise of professional expertise and professional judgment.").

B.

Maintenance of Equipment and Premises Do Not Implicate a Professional Standard of Care Merely Because a the Equipment or Premises are Located at a Health Care Provider's Premises

The mere fact that a health care provider uses equipment, or must have a physical location, does not mean that everything the provider does is a "professional service." In *Johnson v. Chiu*, 199 Cal.App.4th 775, 131 Cal.Rptr.3d 614 (2011), a patient sued a dermatologist for professional negligence and for negligent maintenance of a laser machine that malfunctioned during a skin treatment. The trial court summarily adjudicated that the physician complied with his professional standard of care. Later, the trial court also summarily adjudicated (using the vehicle of a motion in limine) that the physician could not be held liable for negligent maintenance of the equipment that caused the patient's injuries. The trial court interpreted *Flowers* as precluding a count for negligent maintenance because *Flowers* held that there is only one standard of care and, with the determination that the physician met his professional standard of care, liability was foreclosed.

The Court of Appeal reversed, holding that cause of action for negligent maintenance of the laser machine survived the summary adjudication of the medical malpractice claim and was separate from it. *Johnson*, 199 Cal.App.4th at 782, 131 Cal.Rptr.3d at 619. The patient's professional negligence count alleged that the

physician "negligently and carelessly examined, cared for, followed up on, and treated [her] . . .." The negligent maintenance count, in contrast, alleged that the "negligent repair and maintenance of the laser machine." *Id.*

Analyzing the impact of *Flowers* upon the facts before it, *Johnson* observed a key distinction: In *Flowers*, the patient was injured by one negligent act, the failure to raise a guard rail on a gurney. In contrast, the patient in *Johnson* alleged two distinct acts or series of acts:

> Johnson alleged Chiu committed medical malpractice when he "negligently and carelessly examined, cared for, followed up on, and treated [her], so as to proximately cause [her] injuries and damages." The negligent maintenance cause of action alleged Chiu was "responsible for the repair and maintenance of the laser machine and knew or should have known that the laser machine . . . if not properly repaired or maintained could cause damages to the user of the product." It further alleged the "negligent repair and maintenance of the laser machine" proximately caused her injuries.

Johnson 195 Cal.App.4th at 782, 131 Cal.Rptr.3d at 619.

There was sufficient evidence that the dermatologist negligently maintained the laser system machine, so summary adjudication (as either a motion under Civil Procedure Code section 437c or as a motion in limine) was improper. *Johnson* concluded that "*Flowers* does not preclude Johnson from proceeding on the merits of her negligent maintenance cause of action." *Johnson* 195 Cal.App.4th at 777, 131 Cal.Rptr.3d at 615.

In the present matter, Ms. Flores' action dispensed with the professional negligence count. It is pleaded as negligent maintenance of equipment, premises liability and failure to warn claims. As in *Johnson*, the negligent maintenance of the equipment here, the defective bedrail latch, is not subsumed within the category of "professional services."

The obligation to use reasonable care to make the premises safe for customers — be they a restaurant's diners, a department store's patrons, or a hospital's patients — transcends any particular license. The equipment may be different of course, and the quantum of care will vary (the restaurant's need for vigilance to make sure tables do not collapse will differ from that of the hospital to make sure its bed rails are in working order), but the duty is the same: Ordinary care. *Ortega v. Kmart Corp.*, 26 Cal.4th 1200, 1205, 114 Cal.Rptr.2d 470, 474 (2001) (store owner owes patrons duty to exercise reasonable care in keeping the premises reasonably safe); *Flowers*, 8 Cal.4th at 997, 35 Cal.Rptr.2d at 687 ("Because application of this principle is

inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances.").

Greater vigilance — that is, a greater amount of due care — does not mean that all due care is necessarily a "professional service."

C.

Well-Reasoned Decisions of Sister States,
Even Those With Comparable "MICRA" Statutes,
Agree that Not Everything that a Health Care Provider
Does is a Professional Service

Several jurisdictions have considered the issue before this Court. While there are some variances in language in their medical negligence statutes, they do have a consistent theme: The scope of the statutes does not extend to everything that a health care provider might fail to do, even if the tort victim is the provider's patient and even if the injury occurred in conjunction with medical care.

In *Jones v. Bates,* 261 Ga. 240, 403 S.E.2d 804 (1991), the plaintiff's foot was burned by a lamp from which the heat shield had been removed during surgery. The surgeon needed more light during the operation; someone removed the heat shield

and, even after the surgery was completed, left the lamp on and over the plaintiff's foot. The defendant contended that the complaint was untimely and lacking a professional affidavit, as required by Georgia statute in medical malpractice cases. *Jones,* 261 Ga. at 240-241, 403 S.E.2d at 805-806. An issue on appeal is whether Georgia's requirement of a professional affidavit of merit was necessary.

The Georgia Supreme Court rejected the arguments that an injury is medical malpractice simply because it occurred in a hospital. "Simply because an alleged injury occurs in a hospital setting, a suit to recover for that injury is not necessarily a 'medical malpractice' action. . . . Likewise, not every suit which calls into question the conduct of one who happens to be a medical professional is a 'medical malpractice' action. . . ." *Jones,* 261 Ga. at 242, 403 S.E.2d at 806; Ga. Code Ann. § 9-11-9.1.

Jones also rejected the argument that the need for more light during the operation rendered all that followed a question of medical judgment.

> The decision in the first instance, to get more light to the operating site, may well involve medical judgment. On the other hand, *the decision to accomplish the goal of obtaining more light by removing a heat shield, or other protective device*, from a lamp as opposed to bringing in

> another lamp or increasing the volume of overhead lights, would not. If that particular act, coupled with leaving the lamp near the foot for an extended period, is the heart of this claim, then *simple negligence, not medical malpractice, is involved*. Medical testimony, then, would not be essential to establish liability, the existence of an affidavit was not critical . . ..

Jones, 261 Ga. at 242, 403 S.E.2d at 806 (emphasis added).

In *McGraw v. St. Joseph's Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997), a patient alleged that, on one occasion he fell out of bed and, on another occasion four nurses dropped him while trying to place him in his bed. West Virginia's Medical Professional Liability Act, W.Va.Code § 55-7B-7, required a plaintiff to establish the applicable standard of care in "medical professional liability cases" with the testimony of an expert, if the trial court in its discretion required such testimony. The trial court believed that state law mandated expert testimony and, without it, the plaintiff's action was dismissed on motion for summary judgment. *McGraw*, 200 W.Va. at 118, 488 S.E.2d at 393.

The West Virginia Supreme Court held that expert testimony was discretionary, not mandatory, under its statute and, moreover, expert testimony was

not necessary in this case under its Medical Professional Liability Act. Reviewing cases from across the Nation, *McGraw* noted that a majority of jurisdictions do not require expert testimony in "hospital fall incidents." *McGraw*, 200 W.Va. at 120, 488 S.E.2d at 395.

McGraw turned to the Wisconsin Supreme Court's *Cramer v. Theda Clark Mem. Hosp.*, 45 Wis.2d 147, 172 N.W.2d 427 (1969), a case in which a patient was left unrestrained and unattended, and slid off a bed in the hospital's intensive care unit. *Cramer* rejected a hospital's argument that expert testimony is necessary to establish the standard of care in a hospital fall case. Ensuring that a patient does not fall out of bed is not a professional service; it is routine custodial care:

> Courts generally make a distinction between medical care and custodial or routine hospital care. The general rule is that a hospital must in the care of its patients exercise such ordinary care and attention for their safety as their mental and physical condition, known or should have been known, may require. This rule is the subject of W.J.I.-Civil #1385,[1] but the words

[1]One of Wisconsin's pattern jury instructions. "A hospital employee has the duty to provide such services, care, and attention as a patient reasonably requires under the circumstances. To properly discharge this duty, the employee must exercise ordinary care and act reasonably under the circumstances . . .."

> 'reasonable care' used therein should be understood to mean ordinary care. *If the patient requires professional nursing or professional hospital care*, then expert testimony as to the standard of that type of care is necessary. This is usually done by establishing the care given in similar circumstances by hospitals in the area. But it does not follow that the standard of all care and attention rendered by nurses or by a hospital to its patients necessarily require proof by expert testimony. . . . The standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard.

Cramer, 45 Wis.2d at 149-150, 172 N.W.2d at 428 (footnote added).

West Virginia's Supreme Court quoted *Cramer* (even though *Cramer* did not concern a medical malpractice "reform" statute) and adopted its reasoning in *McGraw*, similarly holding that expert testimony was not necessarily required in all actions against a hospital. The hospital in *McGraw* insisted that the case involved "complex management issues" but introduced no evidence to support that contention.

McGraw returned the case to the trial court to determine whether there were "complex management issues" that would necessitate expert testimony. West Virginia's Medical Professional Liability Act was also based on notions that medical liability cases had to be curtailed in order to make liability insurance less costly. W.Va.Code § 55-7B-1 (1986). Yet that statute did not deter *McGraw* from reaching the reasonable conclusion that hospital fall cases do not necessarily implicate "professional" liability.

The West Virginia Supreme Court reinforced this reasoning in *Banfi v. American Hosp. for Rehab.*, 207 W.Va. 135, 529 S.E.2d 600 (2000). In that case, a stroke patient, who had problems with safety awareness and balance, required assistance for all ambulatory activities. She was found on the floor in a bathroom. In deposition she testified that she needed to use the bathroom, tried to summon assistance several times but no one arrived in her room, and thus tried to get to the bathroom on her own. She, and later, her estate, claimed that restraints should have been ordered, that the hospital was negligent in failing to provide assistance, that it was negligent in the treatment of her injuries sustained in the fall, and that no expert was needed to show negligence. *Banfi* agreed with the defendants that the decision of whether to restrain a patient and the care and treatment for injuries involved complex medical judgment, so an expert was necessary to establish the standard of care. As to the prevention of the fall itself, however, *Banfi* rejected that argument. Citing its previous decision in *McGraw*, the Court explained that "claims of

negligence arising from a hospital patient's fall generally do not required expert testimony as the applicable standard of care is within the common knowledge of the average lay jury." *Banfi*, 207 W.Va. at 143, 529 S.E.2d at 608; *see also Ex Parte HealthSouth Corp.*, 851 So.2d 33, 39 (Ala. 2002) (citing *McGraw* and *Cramer*, and holding that Alabama Medical Liability Act, Ala.Code § 6-5-548, which requires expert testimony in medical malpractice action, is inapplicable in action by hospital patient injured when climbing out of bed after repeated calls for assistance went ignored; expert testimony "should not be required . . . simply because [the plaintiffs'] claim arose on the premises of a hospital.").

Quintanilla v. Coral Gables Hosp., Inc., 941 So.2d 468 (Fla.App. 2006), also rejected the argument that everything a hospital does is "medical care or services." A nurse spilled hot tea on a patient, causing burns. The patient filed an action for negligence, alleging that the nurse failed to use reasonable precaution to prevent spilling hot tea on him. The patient also alleged that the nurse negligently brewed the tea, such that its temperature was unreasonably dangerous. The hospital, relying upon Florida's medical malpractice statutes, obtained summary judgment on the grounds that the patient failed to file a notice of intent to initiate the action and failing to have a medical expert corroborate the claim. Fla.Stat. 766.106 (2002). The appellate court reversed.

The Florida statutes are similar to those of MICRA. Although they are organized differently, the structure is analogous. Negligence against a health care provider is defined by reference to a professional standard of care, just as Civil Procedure Code section 340.5(b) defines "professional negligence" by reference to "professional services":

> In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider . . . the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing *professional standard of care* for that health care provider. The *prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment acceptable and appropriate by reasonably prudent similar health care providers*.

Fla.Stat. 766.102(1) (emphasis added).

Quintanilla explained that this statute was not so broad as to encompass everything that a hospital might do wrong:

> Section 766.106(1)(a), defines a claim for medical negligence or medical malpractice as "a claim arising out of the rendering of, or the failure to render, medical care or services." *Not every wrongful act by a medical provider is medical malpractice*. . . . To be a malpractice claim, a wrongful act must be directly related to the improper application of medical services and the use of professional judgment or skill. . . . The injury must be a direct result of receiving medical care or treatment by the healthcare provider. . . . In order to determine whether the pre-suit requirement of chapter 766 applies, the question is whether the plaintiff must rely upon the medical negligence standard of care, as set forth in section 766.102(1), Florida Statutes (2005), . . . in order to succeed in the plaintiff's case.

Quintanilla, 941 So.2d at 469-470 (citations omitted; emphasis added).

Serving tea to a patient "is not a claim that arises out of the nurse's medical judgment. . . . The injury is not a direct result of receiving medical care from the provider." *Quintanilla*, 941 So.2d at 470.

> Not only was Quintanilla not injured as a direct result of receiving medical care or treatment by the hospital employee, but in order to bring forth a claim of negligence, Quintanilla would not have had to show that a hospital employee breached a prevailing professional standard of care which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar healthcare providers, and that such a breach was the cause of his injuries. *There does not appear to be a medical standard of care for serving hot tea*. Therefore, Quintanilla was not required to comply with the medical malpractice pre-suit requirements.

Quintanilla, 941 So.2d at 470. The appellate court also rejected the hospital's argument that the decision to give the patient tea was a medical judgment, so burning the patient with the tea fell within the scope of medical care under the statutes. "[T]he

process of serving the hot tea did not require medical skill or judgment." *Quintanilla*, 941 So.2d at 470.

Similarly, in *Tenet St. Mary's, Inc. v. Serratore*, 869 So.2d 729 (Fla.App. 2004), an employee of a hospital tried to help a dialysis patient return her reclining chair to an upright position. The employee tried to kick the footrest, missed, and kicked the patient instead. The resulting injury eventually required a below-the-knee amputation of that leg. The appellate court ruled that Florida medical malpractice statutes did not apply. The negligence "[did not] arise out of the receiving of medical care." *Tenet*, 869 So.2d at 731. There is no professional standard of care in "kick[ing] a footrest of [a] reclining chair to return it to its upright position. The mere fact that this event occurred immediately after Serratore received dialysis treatment does not convert this to an action based upon medical negligence." *Tenet*, 869 So.2d at 731. *See also Mobley v. Hirschberg*, 915 So.2d 217, 218 (Fla.App. 2005) (dental patient struck in face with x-ray machine by dental technician trying to position it; statute that defined medical negligence claim as one "arising out of the rendering of, or failure to render, medical care or services," inapplicable; patient's action was for simple negligence; "Deciding how to unstick the arm of the x-ray machine was not a medical service requiring the use of a medical professional's judgment or skill."); *Friedmann v. New York Hospital-Cornell Med. Ctr.*, 65 A.D.3d 850, 884 N.Y.S.2d 733, 734-735 (2009) (aides struck patient's leg with bed rail while preparing her for dinner, causing hematoma and ultimately death; wrongful death action was one for

negligence, not malpractice, determinable by trier-of-fact based on common knowledge).

IV.

Conclusion

Not every tortious injury inflicted upon a patient amounts to professional negligence. This conclusion is consistent with the Legislature's articulated intent, the language that the Legislature chose to implement that intent, and sound public policy. The conclusion is supported by the well-reasoned decisions of other jurisdictions that have faced the same issue under similar circumstances. The tortious injury here did not involve a lapse of professional learning, training or skill. It was ordinary negligence.

Respectfully submitted,

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_____

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Certificate of Word Count

This brief (excluding the caption, tables, proof of service and this certificate) contains 5,667 words, as calculated by the WordPerfect 17 word processing program that was used to generate the brief.

_____
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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 18 years old and am not a party to this action. My business address is Steven B. Stevens, A Professional Corporation, 2934½ Beverly Glen Circle, Suite 477, Los Angeles, California 90077. On July 1, 2014, I served the following documents: **Application for Leave to File Amicus Curiae Brief; Amicus Brief of Consumer Attorneys of California in Support of Plaintiff Catherine Flores** on the interested parties or counsel in this action by:

✔ placing [____ the original] [✔ a true copy] enclosed in a sealed envelope addressed as stated on the attached service list, and:

✔ **By Mail** By placing the envelope addressed as above for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

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Steven B. Stevens

Flores v. Presbyterian Intercommunity Hosp.
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