S232197

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

KIRK KING, SARA KING,

Plaintiffs, Respondents

v.

COMPPARTNERS, INC. and NARESH SHARMA, M.D.,

Defendants, Petitioners.

Court of Appeal Fourth District, Division Two No. E063527

Riverside Superior Court No. RIC 1409797 (Hon. Sharon J. Waters)

ANSWER BRIEF ON THE MERITS

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I

SUMMARY OF ARGUMENT

Do people who make medical decisions concerning necessary medical treatment have any duties not to harm those whose lives they affect? Defendants contend they have *no* duties concerning their medical decisions and they contend *all* liability is preempted by the workers' compensation exclusive remedy provisions. Under settled law, people owe duties not to harm those who are affected by their actions except to the extent expressly provided by the Legislature or a recognized common law rule.

> Where there is negligence, as there manifestly was in this case, liability for resulting harm is the rule, and immunity is the exception. [Citations] Accordingly, particular immunities have been strictly construed to apply only to the functions which the statute or common law rule creating each immunity was intended to protect; immunities have not been applied to other activities, whether or not the person claiming immunity sometimes, or even ordinarily, fulfills the protected functions. [Citations]
>
> This limitation upon immunities is manifestly just. An immunity is, after all, a license to *harm.* Thus, it should not extend beyond those functions which are so necessary to the public good that the public benefit from the free exercise of discretion in such functions plainly outweighs the private harm that may flow from misfeasance. Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 144 (italics in original).

Since the workers' compensation exclusive remedy provisions are provided by statute, they are no broader than the Legislature intended. The contention that the exclusive remedy should be expanded beyond the intent of the Legislature should be rejected.

Plaintiff Kirk King received injuries during his employment for which he needed medical treatment. His treating doctor referred him to a psychiatrist who in turn prescribed the drug Klonopin, and Mr. King took it for several years. The workers' compensation insurer retained an outside company to review medical treatment for injured workers. An unqualified employee of the medical review company, Dr. Sharma, ordered an abrupt cessation of Klonopin, did not order replacement with a similar drug, and did not give any warnings of the effects of the abrupt discontinuance. A known side effect of abrupt discontinuance of Klonopin is seizures; the standard of care requires gradual discontinuance over time to prevent seizures. Dr. Sharma did not order tapering of Klonopin and did not provide a warning of the need to taper the drug. Mr. King suffered devastating effects from the abrupt discontinuance of Klonopin, including grand mal seizures.

Defendants contend they owed *no* duty to Plaintiffs, contend the workers' compensation exclusive remedy provisions apply, and contend they had a license to harm Plaintiffs with impunity. That contention is contrary to settled law, contrary to the plain language of the statutes, and contrary to Legislative intent.

Plaintiffs submit that the Court should decide: (1) utilization review doctors and companies who make decisions about people's lives have a duty to act reasonably, and (2) the exclusive remedy provisions do not apply to outside utilization review doctors and companies, and alternatively, (3) outside utilization review companies and doctors have a duty to give warnings of the known risks presented by their decisions which is not preempted by the exclusive remedy provisions.

II

REAL STATEMENT OF ISSUES

The statement of issues in the opening brief blatantly misstates both

the facts and issues. Dr. Sharma did not review a "recommendation" of Mr. King's treating doctor; rather, he made a decision to terminate a prescription which had been in effect for two years. Defendants ignore the fact that Dr. Sharma was not competent to make the decision and did so in blatant violation of statutory requirements. Defendant also ignore the issues of statutory interpretation presented by their contentions. The real issues are:

1. Are a doctor and the employing utilization review company who make medical decisions despite lack of competence to do so, and who then fail to notify the prescribing doctor of the decision, liable pursuant to Labor Code § 4610 and Evidence Code § 669? A subsidiary issue is whether there is liability if the doctor merely signs a decision made by an unqualified nurse without reviewing the relevant medical records.

2. Does any statute or common law rule provide an exception to the general rule that people are liable for injuries they cause to others, when a doctor and the employing utilization review company cause injury to a person by making erroneous decisions to terminate medical treatment that person has been receiving without using standard step down procedures or providing warnings of the known adverse effects of abrupt termination?

3. Are a doctor and the employing utilization review company "employers" within the meaning of the exclusive remedy statutes?

4. Does Labor Code § 4610.5(e) preempt tort suits based on erroneous utilization review decisions? If so, does the preemption extend to failure to warn of known risks presented by a decision to abruptly terminate a medication the injured worker is already receiving?

III

STANDARD OF REVIEW

A. DECISION ON DEMURRER

Since this case was decided on demurrer, it is reviewed de novo.

Lee v. Hanley (2015) 61 Cal. 4th 1225, 1230. This Court must treat the demurrer as admitting all material facts alleged in the complaint. Coker v. JPMorgan Chase Bank, N.A. (2016) 62 Cal. 4th 667, 671.

B. DENIAL OF LEAVE TO AMEND

The trial court sustained a demurrer to the *original* complaint without leave to amend, despite Plaintiffs' express request for leave to amend. (AA 68, 108-109) The decision not to allow Plaintiffs to amend is reviewed for abuse of discretion. Doe v. Superior Court (2015) 237 Cal. App. 4th 239, 243. If the plaintiff can cure the defect, the trial court has abused its discretion. Id.

C. INTERPRETATION OF STATUTES

> "We review de novo questions of statutory construction. In doing so, '"our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'"' [Citation.] As always, we start with the language of the statute, 'giv[ing] the words their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute's purpose [citation].' [Citation.]" Coker, 62 Cal. 4th at 674, quoting Apple Inc. v. Superior Court (2013) 56 Cal.4th 128, 135.

Additional rules relevant to the interpretation of statutes are addressed below.

IV
STATEMENT OF FACTS

A court assumes that a plaintiff can prove all facts alleged in the complaint. Lee, 61 Cal.4th at 1230. One of the issues on appeal is whether Plaintiffs should have been given leave to amend. The court of appeal expressly decided that leave to amend should be granted. A plaintiff who contends leave to amend should be granted has the burden of stating on

appeal the specific additional facts which would be alleged. Goodman v. Kennedy (1976) 18 Cal. 3d 335, 349. That showing can be made for the first time on appeal. Schultz v. Harney (1994) 27 Cal. App. 4th 1611, 1623. The statement of facts therefore includes additional facts Plaintiffs could truthfully allege if given leave to do so. See Paul v. Patton (2015) 235 Cal. App. 4th 1088, 1097; Shields v. Hennessy Industries, Inc. (2012) 205 Cal. App. 4th 782, 786; Schultz, 27 Cal. App. 4th at1623.[1]

Kirk King sustained a back injury on February 15, 2008 in the course of his employment. (AA 3, ¶ 11) His employer was insured by State Fund. (AF) Due to his chronic back pain, he experienced anxiety and depression. (AA 3, ¶ 11) Mr. King's general treating doctor referred Mr. King to a psychiatrist. (AF) The psychiatrist prescribed psychotropic medications, including Klonopin, Xanax, and Ambien. (AF) Mr. King began taking Klonopin in 2011 and was faring well with his medication regimen. (AA 3, ¶ 11; AF) While he was taking Klonopin he did not suffer any seizures. (AF) Although Klonopin was being used primarily as an anti-anxiety medication for Mr. King, it is also commonly used as an anti-seizure medication. (AF)

Comppartners is a private company that provides utilization reviews for employers and workers' compensation insurers. (AA 2, ¶ 4) In July of 2013, State Fund retained Compartners to do a utilization review of the psychotropic medications which had been prescribed by Mr. King's psychiatrist. (AF) Compartners assigned the utilization review to Naresh Sharma, M.D. (AA 3, ¶ 11) Dr. Sharma was only an anesthesiologist. (AA 3, ¶ 11) He did not have the training or qualifications necessary to make the

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[1]Some of the additional facts were not included in the court of appeal briefs, but are included in response to the court of appeal opinion or in response to new arguments made for the first time in this Court. Some of the additional facts were only discovered after the court of appeal opinion was published.

decision whether to discontinue psychotropic medications such as Klonopin. (AA 4, ¶ 11) A nurse employed by Comppartners reviewed only a few of Mr. King's medical records and did not contact the prescribing psychiatrist. (AF)[2] The nurse prepared a draft decision to terminate the prescriptions for Klonopin, Xanax and Ambien based solely on the ground that the three medications should not be taken on a long term basis. (AF) Dr. Sharma signed the draft decision prepared by the nurse without reviewing Mr. King's medical records and without contacting the psychiatrist who had prescribed the medications. (AA 4, ¶ 11; AF[3]) The signed decision terminated the prescriptions for Klonopin, Xanax and Ambien. (AA 3, ¶ 11; AF) Dr. Sharma knew that his decision to "decertify" the drugs would lead to the immediate denial of Klonopin to Mr. King. (AF) Dr. Sharma decided to decertify Klonopin without replacing it with *anything* else. (AF)

The decision to decertify Klonopin resulted in Mr. King being forced to undergo abrupt withdrawal from the Klonopin. (AA 4, ¶ 11) Any competent physician familiar with Klonopin would have known that the abrupt cessation of Klonopin would put the patient at significant risk for grand mal seizures if it was not tapered or replaced by another medication. (AF)[4] Dr. Sharma knew or should have known of the effects of abrupt

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[2]The provider denial letter sent by Comppartners only lists review of 5 documents. It does not mention any contact with the psychiatrist and it lists the wrong prescribing doctor.

[3]In response to the published court of appeal opinion Plaintiffs' counsel received information from several sources that Comppartners regularly has nurses prepare draft utilization review decisions which are then signed by physicians who do not review the relevant medical records before signing. Whether Dr. Sharma reviewed any records prior to signing the decision in this case will be addressed in discovery.

[4]The manufacturer's warnings for Klonopin include: "*Risks of Abrupt Withdrawal:* The abrupt withdrawal of Klonopin, particularly in

withdrawal from Klonopin. (AA 7, ¶ 24; AF) It is below the standard of care to abruptly discontinue a drug such as Klonopin. (AF) Dr. Sharma failed to continue Mr. King on the Klonopin until the step-down process of such medication was completed, failed to order a replacement medication, and failed to provide *any* warnings concerning the effects of abrupt cessation of Klonopin. (AA 4, ¶ 11)

Mr. King learned that his prescription for Klonopin had been decertified when he went to the pharmacy to pick up a refill but was told his prescriptions for Klonopin, Xanax and Ambien had ended. (AA 6, ¶ 19; AF) Dr. Sharma and Comppartners did not notify the psychiatrist who had prescribed Klonopin that it had been decertified; the notice was only sent to Mr. King's general treating doctor, who was erroneously listed on the notice as the prescribing doctor. (AF) The general treating doctor had not prescribed Klonopin and was not familiar with the risks of abrupt withdrawal. (AF) Mr. King was not advised by Dr. Sharma, Comppartners, his treating doctor, or anyone else, of the consequences of an abrupt discontinance of Klonopin or the need to take other medication to prevent seizures until after his seizures had occurred. (AF)

Due to the improper abrupt withdrawal of the medication, Mr. King sustained a series of four grand mal seizures resulting in additional physical injuries, a separate and distinct injury from the original injury. (AA 4, ¶ 11) Again, seizures are a known side effect of an abrupt withdrawal of Klonopin. (AF) His wife, Sara King, suffered loss of consortium as a result. (AA 8) As a result of the seizures, Mr. King's driver's license was suspended. (AF)

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those patients on long-term, high-dose therapy, may precipitate status epilepticus. Therefore, when discontinuing Klonopin, gradual withdrawal is essential. While Klonopin is being gradually withdrawn, the simultaneous substitution of another anticonvulsant may be indicated."

Mr. King filed a request for an independent medical review of the decision to decertify Klonopin, Xanax and Ambien. (AF) However, because he was not warned of the consequences of abrupt termination of Klonopin, he did not request expedited review, and he did not request independent medical review of the decision not to taper the dosage. (AF) The grand mal seizures occurred before there was any decision on the independent medical review. (AF)

V

CAUSES OF ACTION AGAINST DEFENDANTS

The causes of action alleged against Comppartners and Dr Sharma are:

1. Professional negligence. (AA 3)
2. Negligence. (AA 5)
3. Intentional infliction of emotional distress. (AA 7)
4. Negligent infliction of emotional distress. (AA 7)
5. Loss of consortium. (AA 8)

VI

STATEMENT OF THE CASE

Complaint

Kirk and Sara King filed a complaint on October 15, 2014 against Comppartners and Dr. Sharma. (AA 1)[5]

Demurrer, opposition and reply

Comppartners and Dr. Sharma filed a demurrer to Plaintiffs' complaint based on arguments that (1) Defendants owed no duty to Plaintiffs and (2) Plaintiffs' causes of action are preempted by the exclusive remedy provisions of the Workers' Compensation Act. (AA 19) Plaintiffs

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[5]Plaintiffs also sued two other defendants. Whittier Drugs settled. The case against Dr. Ali is on hold pending this appeal.

filed an opposition (AA 44) and Defendants filed a reply. (AA 57)

Trial court decision

The court issued the following tentative ruling: "Sustain the demurrer without leave to amend due to the workers' compensation exclusivity doctrine." (AA 71) After hearing oral argument, the court sustained the demurrer without leave to amend. (AA 111) An order of dismissal was entered. (AA 83)

Appeal

Plaintiffs filed a timely appeal. (AA 89)

Court of appeal decision

The court of appeal partly affirmed and partly reversed. Its decision is addressed below.

VII

THE UTILIZATION REVIEW PROCESS

Employers are required to have workers' compensation insurance to cover injuries to their employees or to be self-insured with the permission of the Department of Industrial Relations. Labor Code § 3700. An employer or workers' compensation insurer is required to pay for all reasonable and necessary medical treatment for the industrial injury. Labor Code § 4600.

A. WORKERS COMPENSATION UTILIZATION REVIEW STATUTES

If the employer or insurer is looking for a way to save money, or if there is a dispute between an employer/insurer and the employee about whether specific treatment should be provided, Labor Code § 4610 provides a "utilization review" process. See State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2008) 44 Cal. 4th 230. Every employer is required to establish a utilization review process "either directly or through its insurer or an entity with which an employer or insurer contracts for these services."

(Section 4610(b)) "No person other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services" is supposed to make decisions. (Section 4610(e)) Utilization decisions must be communicated to the "requesting physician" within 24 hours. (Section 4610(g)(3)(A))

An injured worker who disagrees with a utilization review decision can request an independent medical review. Labor Code § 4610.5(d). A form for doing so is required to be sent to the injured worker at the time the utilization review denies requested treatment. Labor Code § 4610.5(f). The independent medical review is the only procedure for reviewing a decision of a utilization review denying requested treatment. Labor Code § 4610.5(e).

Specific additional provisions relevant to this appeal are addressed below.

B. HMO AND DISABILITY UTILIZATION REVIEW STATUTES

Utilization review is a fairly new concept in workers' compensation, but it has a longer history in health maintenance organizations and disability insurance. Health and Safety Code § 1367.01 et seq., first enacted in 1999, regulates utilization review companies who contract with health maintenance organizations. Insurance Code § 10123.135 et seq, also originally enacted in 1999, regulates utilization review companies who contract with disability insurance companies. The workers' compensation provisions concerning utilization review largely track those provisions.[6] Those statutes do not include provisions for independent medical review of

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[6]The Legislative history documents addressed below confirm that the utilization review provisions in Labor Code § 4610 were copied from those statutes. See 9/1/12 Senate Labor and Industrial Relations Analysis for 2012 SB 863 ("Implements an Independent Medical Review (IMR) process, similar to what is found at the Department of Managed Health Care (DMHC), in order to provide independent medical review by doctors for health care disputes.").

utilization decisions.

VIII

THE COURT OF APPEAL DECISION

The court of appeal partly affirmed and partly reversed the trial court decision. The court made four primary decisions.

1. A utilization review doctor owes a duty of care to the injured worker who is affected by the decisions.

2. The workers' compensation exclusive remedy bars suit to the extent Plaintiffs challenge the decision to decertify Klonopin and the decision not to wean Mr. King from Klonopin over time. (As detailed below, Plaintiffs disagree with this portion of the court of appeal opinion.)

3. The exclusive remedy provisions do not apply to the extent Plaintiffs challenge the decision not to warn of the consequences of abrupt discontinuation of Klonopin.

4. The court found the allegations uncertain in some aspects and directed leave to amend on remand to address those issues.

IX

DEFENDANTS OWED A DUTY TO PLAINTIFFS

Defendants contend they owed *no* duty to Plaintiffs and could cause all the harm to Plaintiffs they wanted with impunity. Defendants contend the only choices are between (1) a treating doctor-patient relationship and (2) no duty of any kind. That contention misstates the issue. Settled law provides for liability for anyone who causes injury, whether or not there is a treating doctor-patient relationship. The type of relationship affects the details of the duty, but not whether a duty exists at all.

A. RECAP OF THE FACTS

To put this contention in perspective, a short recap of the facts may prove useful. Mr. King was taking Klonopin on the recommendation of a

qualified psychiatrist and had done so between 2011 and 2013. Klonopin is a psychotropic drug. A known side effect of abrupt discontinuance of the drug is seizures; the manufacturer warns that gradual termination is essential to prevent seizures. Dr. Sharma, who is an anesthesiologist and not qualified to determine whether the medication was necessary, decided to decertify it anyway, and did so without any contact with the psychiatrist who prescribed it. Even though a competent doctor knowledgeable about Klonopin would have known of the serious risks of abrupt cessation of Klonopin, he did not order weaning of the drug, did not any replacement medication, and did not warn of the serious risks of abrupt cessation. He either intentionally caused the abrupt cessation of a necessary medication and did not warn of the serious consequences of doing so, or because of his lack of understanding of the medication, he made the decision without bothering to determine the likely consequences of his decision. Mr. King suffered seizures as result of the abrupt discontinuation of Klonopin. The prescribing psychiatrist was not notified of the termination of Klonopin until after the seizures had occurred.

B. DEFENDANTS VIOLATED LABOR CODE § 4610

In addition to the common law duties addressed below, Defendants violated two provisions of Labor Code § 4610. First, subdivision (e) states:

> No person other than a licensed physician *who is competent to evaluate the specific clinical issues involved in the medical treatment services*, and where these services are within the scope of the physician's practice, requested by the physician may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve.

The psychotropic medications were prescribed by a psychiatrist. Dr. Sharma is an anesthesiologist and was not qualified to determine either whether a psychotropic medication was necessary or the necessary

procedures if the medication was discontinued. His decision on matters outside his expertise was a direct violation of § 4610(e). His lack of competence is the likely reason for his decision to terminate Klonopin abruptly rather than to taper it or to provide warnings. As noted above, Plaintiffs' counsel has received information that Comppartners commonly has nurses draft utilization review decisions which are then signed by doctors without reviewing the relevant medical records. If that occurred for Mr. King, that was another violation of § 4610(e).

Second, a decision terminating or rejecting treatment or medication is supposed to be communicated to the doctor who prescribed or requested it. Subdivision (g)(3)(A) states:

> Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the *requesting physician* within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review, as prescribed by the administrative director.

The decision was never communicated to the psychiatrist who prescribed Klonopin. Rather, the denial letter erroneously identified the general treating doctor as the prescribing doctor and it was only sent to the general treating doctor. The general treating doctor was not aware of the risks of abrupt discontinuation of Klonopin.

Evidence Code § 669(a) states:

> The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

The direct violations of § 4610(e) and (g)(3)(A) are a clear basis for liability. All of the elements of negligence per se are met:

1. Dr. Sharma and CompPartners violated the requirement that decisions be made only by "a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services." They also violated the requirement to notify the physician who prescribed Klonopin.

2. The violation caused injury to Mr. King. A physician who was competent to evaluate would have known that Klonopin cannot be abruptly discontinued without a high risk of seizures, and would have either tapered the medication or would have provided a warning of the need to do so. The failure to notify the prescribing psychiatrist prevented him from doing anything until after the seizures had already occurred.

3. The requirement that only "a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services" is so medical decisions are not made by doctors (or by nurses) who do not have the necessary expertise to do so. The requirement that the requesting physician be notified is so that the person with the necessary expertise has notice of a need to take action.

4. Injured workers whose medical treatment is affected by utilization

review doctors and companies are the intended beneficiaries of these provisions.

When a duty of care specified by a statute is breached, there is liability under a negligence per se analysis. See Norman v. Life Care Centers of America, Inc. (2003) 107 Cal. App. 4th 1233, 1244 (violation of a regulation applicable to nursing facilities); Daum v. Spinecare Medical. Group (1997) 52 Cal. App. 4th 1285, 1306-1308 (violation of a statute concerning informed consent for experimental medical treatment); Dirosa v. Showa Denko K.K. (1996) 44 Cal. App. 4th 799 (violation of FDA regulations).

C. PHYSICIANS OWE A DUTY OF CARE TOWARD ANYONE WHOSE MEDICAL TREATMENT THEY AFFECT OR WHOM THEY INJURE

A basic rule applicable to any doctor is "first, do no harm." (Hippocratic Oath) A more general statement of the same rule is found in Civil Code section 1714(a).

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.

The decision and actions of Dr. Sharma directly caused harm to Mr. King. If Mr. King's treating workers' compensation physician had ordered the exact same abrupt cessation of Klonopin without any warnings, there is no question that the doctor would be liable. Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1664 (doctor who prescribed an overdose of medication is liable); Nation v. Certainteed Corp. (1978) 84 Cal. App. 3d 813, 817 ("in addition to a workers' compensation proceeding, an employee injured in an industrial accident may institute and pursue a civil suit at common law

against a treating doctor for aggravation of the injury through negligent treatment").

1. There is no bright line between professional negligence and ordinary negligence

Defendants take the position that the only choices are between (a) treating doctor professional negligence and (b) no liability at all. They assume that doctors cannot be held liable other than for treating doctor professional negligence. In Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, this Court emphatically rejected contentions that professional negligence is a different tort than ordinary negligence. Rather, the nature of the professional relationship is simply one of the relevant factors in setting the scope of the duty.

> In this case, we consider the distinction between "ordinary" and "professional" negligence and conclude that with respect to questions of substantive law they comprise essentially one form of action. Apart from statutory considerations, characterizing misfeasance as one type of negligence or the other generally only serves to define the standard of care applicable to the defendant's conduct.
>
> . . .
>
> "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." (Rest.2d Torts, § 282.) Thus, as a general proposition one "is required to exercise the care that a person of ordinary prudence would exercise under the circumstances." [Citation and footnote] 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. [Citations] . . .

With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances" relevant to an overall assessment of what constitutes "ordinary prudence" in a particular situation. Thus, the standard for professionals is articulated in terms of exercising "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing ...." [Citation] . . .

Since the standard of care remains constant in terms of "ordinary prudence," it is clear that denominating a cause of action as one for "professional negligence" does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which "ordinary prudence" will be calculated and the defendant's conduct evaluated. Nor does it distinguish a claim separate and independent from some other form of negligence. As to any given defendant, only one standard of care obtains under a particular set of facts, even if the plaintiff attempts to articulate multiple or alternate theories of liability. [Citations] 8 Cal.4th at 995, 997.

This Court in Flowers did note that the distinction between professional and ordinary negligence can be relevant to other issues, such as the statute of limitations and the MICRA limits on damages. 8 Cal.4th at 998.

2. Doctors are liable to anyone injured by their actions and decisions

Defendants contend a doctor is never liable unless there is a treating

doctor-patient relationship with the plaintiff. In fact, whether or not there is a treating doctor-patient relationship, a doctor is liable for causing harm unless a specific exception or immunity applies. "As a general principle, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.' [Citation]" Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 434-435. Tarasoff held that a therapist who receives credible information that a patient is likely to harm a specific person has a duty to warn that person, even though the therapist has no relationship at all with the victim. 17 Cal. 3d at 439.

For example, a doctor who examines a person only for evaluation is liable for injuries caused during the examination, even though there is no treating doctor-patient relationship. Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, and cases cited therein (doctor who examines a workers' compensation employee solely for evaluation is liable for injuries caused during the examination). Cases from other states agree. Dyer v. Trachtman (2004) 470 Mich. 45 (independent medical examination doctor is liable for injuries caused during the examination); Harris v. Kreutzer (Va 2006) 624 S.E.2d 24 (same); Ramirez v. Carreras (Texas 2000) 10 S.W.3d 757 (same); Greenberg v. Perkins (Col. 1993) 845 P.2d 530 (independent medical review doctor is liable for injuries caused by a test he ordered); Smith v. Welch (1998) 265 Kan. 868 (independent medical examination doctor who was supposed to examine the plaintiff's neck is liable for groping the plaintiff's breasts); Eelbode v. Chec Med. Ctrs., Inc. (Wash. 1999) 948 P.2d 436 (doctor who conducts a pre-employment physical is liable for injuries caused during the examination).

Mero applied the Biakanja/Rowland[7] factors and held that all of them favor liability.

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[7]Biakanja v. Irving (1958) 49 Cal.2d 647 and Rowland v. Christian (1968) 69 Cal.2d 108.

It is reasonably foreseeable that a negligently conducted physical examination, particularly one involving mechanical or invasive testing, may result in physical injury to the examinee. The certainty the examinee suffered injury and the closeness of the connection between the physician's conduct and the injury would be no different whether the examination was conducted at the request of the examinee--in which case it already is established the physician may be held liable for malpractice--or at the request of a third person, such as an employer or insurance carrier. The moral blame attached to the physician's conduct should be the same no matter who requested the examination: a physician is a professional who is required to have a certain level of skill and training and whose conduct is measured by a standard of care commensurate with that skill and training; a physician should not be absolved of liability for failure to exercise that standard of care merely because the person being examined is not paying for the examination.

Imposing liability for negligence in the examination even in the absence of a physician-patient relationship would serve the policy of preventing future harm by precluding a situation in which a physician negligently could injure an examinee with impunity. No greater burden would be imposed on the physician and the community than already exists with respect to examinees who have paid for their own examinations and have relationships with their physicians. And, of course, insurance is available to physicians for the risk involved. 31 Cal.App.4th at 1377-1378.

Although an immunity applies to public employees under California law (see Tarasoff, 17 Cal.3d at 447), another line of cases holds that doctors

who evaluate whether people committed for mental health reasons should be released are liable for negligent decisions. Bragg v. Valdez (2003) 111 Cal. App. 4th 421 (private doctor who ordered a mental patient released solely because of a lack of medical insurance with no follow up care and no warnings to his family is liable to the person injured by the mental patient). Other states agree. Durflinger v. Artiles (10th Cir. 1984) 727 F.2d 888 (doctors who negligently recommended release are liable to the people killed by the released person); Wofford v. E. State Hosp. (Okl. 1990) 795 P.2d 516 (same); Perreira v. State (Col. 1989) 768 P.2d 1198 (same); Petersen v. State (Wash. 1983) 671 P.2d 230 (doctor negligently failed to take steps to extent commitment).

Another line of cases addresses people who are injured because a doctor fails to provide warnings to a patient. Myers v. Quesenberry (1983) 144 Cal. App. 3d 888, held that a doctor who directs a patient to drive while subject to an uncontrolled diabetic condition is liable to the person injured by the patient. Reisner v. Regents of University of California (1995) 31 Cal. App. 4th 1195, found liability when a doctor failed to notify a patient that she had AIDS and the patient infected the plaintiff. Cases from other states find a duty to warn a patient of the effects of medication or treatment, and potential liability to a third person injured by the patient. Gooden v. Tips (Tex. 1983) 651 S.W.2d 364 (doctor failed to warn a patient not to drive while taking medication); Freese v. Lemmon (Iowa 1973) 210 N.W.2d 576 (same); Kaiser v. Suburban Transportation System (Wash. 1965) 398 P.2d 14 (same); Wilschinsky v. Medina (N.M 1989) 775 P.2d 713 (doctor who injects a drug which impairs both ability to drive and reasoning ability has a duty not to allow the patient to drive).[8]

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[8]Under this line of cases, if Mr. King had suffered the exact same grand mal seizures while he was driving and then struck another motorist, Dr. Sharma and Commpartners would clearly be liable to the injured motorist.

3. Utilization doctors and companies are liable for their negligent acts and decisions

The court of appeal considered and properly rejected contentions that utilization review doctors are not liable for their negligent acts and decisions. Several cases expressly hold that utilization review companies and doctors are potentially liable for their decisions.

The court of appeal cited Palmer v. Superior Court (2002) 103 Cal.App.4th 953. In that case the plaintiff had medical insurance through a health care service plan. His treating doctor recommended replacement of prostheses, but an outside medical review company rejected the request and pressured the treating doctor to support denial. The plaintiff sued the utilization review company and included a request for punitive damages. In order to avoid the procedural provisions for seeking punitive damages against a medical provider, the plaintiff contended the utilization review company "was not providing health care to a patient, but rather was rendering administrative advice to the PacifiCare HMO/insurer." 103 Cal.App.4th at 964. The court rejected that contention.

> [W]e have no difficulty in concluding that the allegedly injurious utilization review, conducted by the SRS medical director, amounted to a medical clinical judgment such as would arguably arise out of professional negligence. We disagree with Palmer that this was a purely administrative or economic role played by SRS. Rather, the statutes require that utilization review be conducted by medical professionals, and they must carry out these functions by exercising medical judgment and applying clinical standards. 103 Cal.App.4th at 972.

In Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, the court held that a health care plan which contracted with the plaintiff's insurer for administration and utilization review services was potentially

liable in tort for negligent decisions. It applied the factors identified in Biakanja and Rowland, and found that all of them favored liability.

> Several of the Biakanja/Rowland factors need little explanation, as they clearly weigh in favor of imposing a duty of care on Blue Cross. First, the "transaction" here—Blue Cross's utilization review responsibility under the Mintz/CalPERS health insurance plan (evaluating whether health care services are medically necessary, and so on)—is obviously intended to, and necessarily does, affect the members of the plan. Second, it is certainly foreseeable that plan members may suffer harm if decisions on, say, the medical necessity of a treatment are imprudently made. Third, the "moral blame" from an erroneous decision to withhold a medical treatment is equally apparent. [Citation] Fourth, the policy of preventing future harm would necessarily be served by imposing negligence liability on the entity directly responsible for making health care determinations affecting plan members.
>
> The other two Biakanja factors are the degree of certainty that Mintz suffered injury, and the closeness of the connection between Blue Cross's conduct and the injury suffered. On the facts pleaded in this case, the certainty of injury is less than clear. While Mintz alleges that "the manner in which [Blue Cross] processed [his] claims" and failed to notify him of his right to an independent review was "a substantial factor in causing him financial harm, physical harm, and emotional harm," the complaint is silent on the nature of the "physical harm" he suffered as a result of not undergoing the RFA treatment, or as a result of Blue Cross's failure to tell him that he was entitled to an independent

review of Blue Cross's denial. [Citation] However, while problems of causation may be significant in this case, we cannot conclude there is no duty based on that factor, given the strength of the other considerations just discussed. (If physical harm was caused by Blue Cross's conduct, "the closeness of the connection between the defendant's conduct and the injury suffered" [citation] is apparent.) And, we can certainly conjure circumstances in which the certainty of injury flowing from an administrator's conduct in processing a claim would be entirely clear, as where a denial of treatment covered by the insurance contract results in an identifiable physical injury or death to the insured. [Citation]

In sum, application of the Biakanja criteria show that a third party administrator of a health care plan owes a general duty of care to plan members to protect them from physical injury flowing from its administration of claims and benefits under the plan. 172 Cal.App.4th at 1612.

In Wilson v. Blue Cross of Southern California (1990) 222 Cal.App.3d 660, the plaintiff's decedent was admitted for major depression and drug dependency. His treating doctor recommended 3-4 weeks of in patient treatment at a hospital, but a utilization reviewer for his insurer refused to pay for any further care and he was discharged. He then committed suicide. The court found potential liability of the company which performed the utilization review.

Cases in other states usually either find ERISA preemption or rely on specific immunity statutes applicable to utilization review. One case did find liability, and it stressed the significant control over medical treatment exercised by utilization review doctors. Long v. Great West Life & Annuity Co (Wy 1998) 957 P.2d 823 (third party administrator for a health insurance plan and its doctors who made an erroneous utilization review decision are

liable for their decision).

D. ANYONE OWES A DUTY NOT TO CAUSE HARM TO ANOTHER PERSON

More generally, people and entities have a duty not to cause intentional harm, have a duty to take reasonable steps to avoid negligent causation of harm, and are liable when their actions cause harm to others. Civil Code § 1714(a). In Cabral v. Ralphs Grocery Co. (2011) 51 Cal. 4th 764, this Court stressed that liability for harm caused to others is the rule, and is subject to exceptions only to the extent specified by statute or supported by public policy.

> The general rule in California is that "[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person ... ." (Civ. Code, § 1714, subd. (a).) In other words, "each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances ... .' " [Citation] In the Rowland decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." [Citations] As we have also explained, however, in the absence of a statutory provision establishing

an exception to the general rule of Civil Code section 1714, courts should create one only where "clearly supported by public policy." [Citations] 51 Cal.4th at 771.

The general rule that people are liable for harm they cause to others unless an immunity applies is well established and has been applied in thousands of cases. For a small sample see: Cabral (driver of a truck that stops on a highway shoulder for non-emergency reasons is liable to a driver who collides with the truck); Lugtu v. California Highway Patrol (2001) 26 Cal. 4th 703 (officer who stops a motorist is liable for directing the motorist to stop in an unsafe location); Lawson v. Safeway Inc. (2010) 191 Cal. App. 4th 400 (driver of legally parked truck is liable for impeding the vision of motorists); FNS Mortgage Service Corp. v. Pacific General Group, Inc. (1994) 24 Cal. App. 4th 1564 (organization that negligently certified pipe is liable to third parties damaged by defective pipe); Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128 (landlord is liable to a person who is bitten by a dangerous dog which reasonably should have been discovered by a landlord); Pedeferri v. Seidner Enterprises (2013) 216 Cal. App. 4th 359 (commercial vendor is liable for loading and securing cargo in a manner which distracts the driver and causes an accident); Booska v. Patel (1994) 24 Cal. App. 4th 1786 (property owner who severs encroaching tree roots on his own property has a duty not to damage the neighbor's tree).

E. APPLICATION OF THE BIAKANJA/ROWLAND FACTORS TO THE FACTS OF THIS CASE

Applying the Biakanja/Rowland factors to this case clearly shows liability.

(1) Foreseeability of harm to the plaintiff. When a review doctor terminates a medication the injured worker is already receiving, it is certainly foreseeable (and almost certain) that the injured worker will not continue to receive the medication. When there are known effects of abrupt discontinuation of a medication, and no warning is given of the need to take

steps to avoid those known effects, it is highly foreseeable that a decision to discontinue a medication abruptly will lead to injuries. When the decision to terminate is not sent to the prescribing physician, the likelihood of injury is compounded. In this case, the decision and actions by Dr. Sharma were the decisive factor in Mr. King being denied Klonopin, which caused his injuries.

(2) The degree of certainty that the plaintiff suffered injury. Again, it is well known within the medical profession that sudden cessation of Klonopin has severe injurious consequences, including seizure activity. The manufacturer's warnings stress the need to taper rather than terminate abruptly. Mr. King's injuries from the sudden withdrawal of Klonopin are well documented.

(3) The closeness of the connection between the defendant's conduct and the injury suffered. Dr. Sharma made the determination to deny Mr. King Klonopin, overriding the prescription ordered by Mr. King's treating psychiatrist, and he gave no warning of the known consequences of his decision. The failure to notify the prescribing psychiatrist of the decision to discontinue Klonopin prevented him from taking steps to reduce the risks of injury. The sole known cause of Mr. King's injuries is the sudden discontinuance of taking Klonopin.

(4) The moral blame attached to the defendant's conduct. Dr. Sharma made the decision without the necessary qualifications, and potentially without even reading the relevant medical records. His determination to suddenly terminate the use of Klonopin, rather continue providing the drug or at least wean Mr. King off of the drug gradually, when the black box warnings clearly advise against such action, was reckless and exposed Mr. King to an extreme danger, which either was known to Dr. Sharma or which certainly should have been know. Dr. Sharma failed to protect against such dangers or warn Mr. King of those dangers. Comppartners violated its statutory duty to notify the prescribing

psychiatrist and thereby prevented him from taking any preventive actions.

(5) The policy of preventing future harm. The portions of § 4610 which require decisions to be made by physicians competent to make them, and which require prompt notice to the prescribing physician, clearly are intended to prevent injured workers from being harmed by erroneous utilization review decisions. Holding doctors and utilization review companies liable for violating those provisions will make utilization review doctors and companies more likely to follow those provisions in future cases. Imposing a duty of care on utilization reviewers will help prevent future harm to members of society by holding utilization review physicians accountable for their erroneous medical decisions. The main purpose of utilization review is to save insurance companies money by denying non-medically necessary treatments. In the workers' compensation system an additional purpose is saving workers' compensation insurers money by denying treatment which is not necessary to treat the workers' compensation injury. The public will be at great risk if review doctors and companies are granted a free pass to deny medical treatments to injured workers without threat of liability, even when those decisions do not comport with the standard of care or even are intentionally harmful. If this Court does not find the existence of a duty, then physicians who perform utilization review, i.e. determine the medical necessity of treatment, will have no incentive to make correct decisions and would not even be subject to liability for intentional harm. See Cabral, 51 Cal.4th at 782 ("The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.").

(6) The extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach. The Legislature already imposed the burdens specified in § 4610(e) and (g)(3)(A). The burden on the Defendants if they are held accountable for their medical decisions is no different than the burden on

any other doctor; they simply must act within the standard of care. The consequence to the community if this Court finds a duty is that the community will be more safe. If utilization review doctors are not immune from civil liability, then they have more of an incentive to accurately and adequately assess the medical necessity of treatment for injured workers, to consider *both* the needs of the injured worker and the interests of the insurance company, and will be less inclined to deny medical treatment based solely on the financial motivations of the insurance companies that hire them.

(7) The availability, cost, and prevalence of insurance for the risk involved. Almost all doctors have medical malpractice insurance.

Finally, it is important to recognize that medical review doctors and companies are not neutral third parties. Rather, they are hired by insurance companies with no input by injured workers. (Defendants admit this fact at page 36 of the opening brief.) If there is no duty in tort, the *only* external influence on utilization review doctors would be the pressure by insurance companies to save money i.e., deny treatment and medication, with no consequences if those decisions are contrary to the standard of care or even if they are intentionally harmful.[9]

F. THE SCOPE OF THE DUTY OF UTILIZATION REVIEW DOCTORS AND COMPANIES

Defendants contend the only choices are between no duties at all or 100% of the duties of a treating doctor. That simply is not true. The court

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[9]By contrast, an independent medical review is conducted by a neutral third party on behalf of the administrative director of the Division of Workers' Compensation. Labor Code § 4610.6. Quasi-judicial immunity would apply to such a neutral third party decision. Bergeron v. Boyd (2014) 223 Cal. App. 4th 877 (family court child custody evaluator); Fisher v. Pickens (1990) 225 Cal. App. 3d 708 (probate court investigator); Howard v. Drapkin (1990) 222 Cal. App. 3d 843 (court appointed psychologist who made recommendations concerning child custody).

of appeal properly recognized that the scope of the duty of a doctor varies depending on the specific role played by the doctor.

> However, the existence of a duty does not mean "a doctor is required to exercise the same degree of skill toward every person he sees. The duty he owes to each varies with the relationship of the parties, the foreseeability of injury or harm that may be expected to flow from his conduct and the reliance which the person may reasonably be expected to place on the opinion received. A case-by-case approach is required." [Citation] In other words, determining the scope of the duty owed depends upon the facts of the case.

"The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*." Mann v. Cracchiolo (1985) 38 Cal. 3d 18, 36, italics added. Thus, the duties owed by a general treating physician, the duties of a specialist, and the duties of a physician who consults on a specific issue, such as providing a second opinion, are all different. CACI 502 and Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 159-160 (specialist); Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 438 (psychiatrist); Rupp v. United States (S.D. Cal. 2008) 2008 U.S. Dist. Lexis 109606, *32 (gynecologist).

The duties owed by a reviewing doctor and reviewing company are not the same as those of treating doctor, but they are not non-existent either. Again, the starting point is "first, do no harm." By statute, only a doctor can make the decision, and the reviewing doctor and company have a statutory obligation pursuant to Labor Code § 4610 not to make decisions unless the assigned doctor "is competent to evaluate the specific clinical issues involved in the medical treatment services." Having a non-doctor make the decision or assigning a utilization decision to an unqualified

doctor is a direct violation of § 4610 by the company, and making the decision despite lack of competence to do so is a direct violation of § 4610 by the doctor. The utilization company also has a statutory duty to promptly send the notice to the "requesting physician." Labor Code § 4610(g)(3)(A)

If the doctor is qualified to evaluate the specific clinical issues, the duty is the ordinary negligence duty: "due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances." Flowers, 8 Cal.4th at 997. That means the utilization review doctor is obligated to review the injured worker's medical history and information in sufficient detail to make an informed decision, and it means the utilization review doctor is obligated to either possess or acquire sufficient information about the treatment and medications the injured worker is receiving (or which the treating doctor has requested) to be able to make an informed decision about the necessary of that specific treatment and potential alternatives. If termination of an ongoing treatment or medication is contemplated, the utilization review doctor is obligated to either possess or acquire sufficient information about the risks presented by termination, including whether tapering or step down is required. Finally, if the doctor makes a decision that ongoing treatment or medication will be abruptly halted, and abrupt termination presents known risks, the doctor must provide a warning to the injured worker of the need to take alternative measures to protect against the risks posed by the abrupt termination, such as seeking treatment or medication outside of the workers' compensation setting.

As is the case with any lawsuit against a professional, to the extent the case presents issues beyond the knowledge of jurors, expert testimony is necessary to establish the standard of care. Flowers, 8 Cal.4th at 1001 (medical negligence); Quigley v. McClellan (2013) 214 Cal. App. 4th 1276, 1283 (veterinarian negligence); CACI 504 (negligence of a nurse); CACI 600 (negligence of a lawyer). Expert testimony would not be necessary to

address the failure to assign the decision to a "licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services" and would not be necessary to address the failure to send notice to the "requesting physician" since those duties are established by statute. Labor Code § 4610(e) and (g)(3)(A). Expert testimony would be necessary to address the required level of competence on the specific clinical issue, the types of records which need to be reviewed before making a decision, the types of information a reviewing doctor must know or obtain to make an informed decision, and the types of information available to a reviewing doctor, such as manufacturer's warnings.

G. RESPONSE TO CASES CITED BY DEFENDANTS

The cases cited by Defendants are not on point, because in none of those cases did the doctor do anything to harm the plaintiff and the doctor did not make any decisions about the plaintiff's medical treatment. Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313-314 ("where a doctor conducts an examination of an injured employee solely for the purpose of rating the injury for the employer's insurance carrier in a workers' compensation proceeding, neither offers or intends to treat, care for or otherwise benefit the person examined, and has no reason to believe the person examined will rely on this report, the doctor is not liable to the person being examined for negligence in making that report."); Harris v. King (1998) 60 Cal. App. 4th 1185 (a doctor examined a patient and prepared a report to the State Compensation Insurance Fund. As in Keene, the doctor did nothing which affected the patient's treatment. The court primarily addressed the litigation of privilege of Civil Code § 43 and it otherwise cited Keene); Felton v. Schaeffer (1991) 229 Cal. App. 3d 229 (the doctor only evaluated the plaintiff for a potential job and did nothing to affect the plaintiff's medical treatment); Clarke v. Hoek (1985) 174 Cal. App. 3d 208 (physician observed surgery solely for the purpose of evaluating the surgeon for membership on the hospital medical staff); Rainer v. Grossman (1973) 31

Cal. App. 3d 539 (a professor-doctor only addressed an abstract case during a lecture).

The out of state cases Defendants cite similarly addressed situations where the doctor did not injure the plaintiff or affect the plaintiff's medical treatment. Martinez v. Lewis (Col. 1998) 969 P.2d 213 (doctor only conducted an independent medical examination); Hefner v. Beck (Ariz. 1995) 916 P.2d 1105 (same); Canfield v. Grinnell Mut. Reinsurance Co. (Minn. Ct. App. 2000) 610 N.W.2d 689 (same); LoDico v. Caputi (1987) N.Y.S.2d 640 (same); Med. Crt. Of Cent. Ga. v. Landers (Ga. 2005) 616 S.E.2d 808 (doctor only performed a pre-employment physical). One cited case found no liability when an independent examination doctor prepared a report, but did find liability when the examination injured the plaintiff. Ramirez v. Carreras (Tex. 2000) 10 S.W.3d 757 (doctor who examined the plaintiff only for a rating is not liable for a negligent rating, but is liable for injuries caused by the examination). One of the cases was miscited because it addressed ERISA preemption rather than tort liability. Eid v. Duke (Md. 2003) 816 A.2d 844 (ERISA preempts suit against a disability plan and its medical advisor for cutting off disability benefits).

One of the cases cited by Defendants expressly distinguished cases in which the doctor *did* affect the patient's medical treatment. Felton distinguished Coffee v. McDonnell-Douglas Corp. (1972) 8 Cal.3d 551, and James v. United States (N.D.Cal. 1980) 483 F.Supp. 581, because in both cases a doctor who conducted a pre-employment physical did so both for the benefit of the employer and the employee. In both cases the courts held that negligent failure to detect medical problems of the employee was a basis for liability.

H. THE PROCEDURES SPECIFIED IN § 4610 DO NOT REPLACE THE NEED FOR A WARNING

Defendants contend that because Labor Code § 4610(g)(4) requires a utilization review doctor to make a written decision, no further warning can

ever be required. Again, this case was decided on demurrer. Nothing in the record shows what notice was provided to Mr. King. Because Commpartners listed the wrong doctor, no notice was ever given to the psychiatrist who prescribed Klonopin, and he learned of the discontinuance only after the seizures had occurred. Mr. King and the general doctor who erroneously received the notice did not have the background to understand the risks of abrupt termination of Klonopin.

But even if a detailed notice had been provided directly to Mr. King about the reasons for the determination that future treatment with Klonopin was not necessary for the workers' compensation injury, that is the only subject such a notice would address. Nothing in § 4610 requires warnings of risks of discontinuation of treatment or medications. A notice of the reasons why there was a decision that the medication was not necessary to treat the workers' compensation injury would do nothing to address the need to either taper use of the medication or to replace it with something else to prevent seizures.

And even if the notice of discontinuance had been sent to the prescribing psychiatrist, a warning was necessary to put the prescribing psychiatrist on notice of the need to take action. Unless the prescribing psychiatrist was hyper vigilant, a notice that medications had been terminated would not prompt the prescribing psychiatrist to interrupt his regular schedule of patient visits and look up manufacturer's warnings about abrupt termination of the prescriptions.

I. THE AVAILABILITY OF REVIEW PROCEDURES DOES NOT PREVENT ALL HARM OR REPLACE THE NEED FOR A WARNING

Defendants stress that injured workers have the right to request a review of a utilization decision, and can do so on an expedited basis if there is a reason for urgency. That remedy will suffice in many cases, but an injured worker who is not aware of the potential consequences of a medical

decision – such as abrupt withdrawal which is likely to lead to seizures – has no reason to request either review or an expedited review until after the harm has already occurred. In the present case Mr. King did request independent review, but the very lack of warnings gave Mr. King no reason to request an expedited review or to seek replacement medication on his own until after he had already suffered the seizures.

J. THE FACT THAT OTHER PEOPLE ARE ALSO POTENTIALLY LIABLE IS NOT A COMPLETE DEFENSE

Defendants contend that the availability of a malpractice lawsuit against the treating doctors somehow makes the harm caused by a reviewing doctor unforeseeable. Under settled law, a plaintiff is able to sue *all* people who caused harm. The fact that someone else is also potentially liable is a basis for *apportioning* fault, but it is not a complete defense. Leung v. Verdugo Hills Hospital (2012) 55 Cal. 4th 291, 303; Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 813; American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578.

In the present case there was no basis for suing the treating doctors. Because Compartners listed the wrong doctor on the notice, the prescribing psychiatrist was not notified of the termination of Klonopin until after the seizures had occurred. The general treating doctor, who erroneously received the notice, did not have the expertise to know the risks posed by abrupt termination of Klonopin.

X

PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY THE WORKERS' COMPENSATION ACT

Defendants also contend all tort liability is preempted by the workers' compensation statutes. That contention is based on distortions of the applicable statutes.

A. COMPPARTNERS AND DR. SHARMA ARE NEITHER EMPLOYERS NOR INSURERS

An injured employee cannot sue the *employer* in tort for injuries arising out of employment because the exclusive remedy is workers' compensation. Labor Code § 3600, 3602. The exclusive remedy provisions are a tradeoff: the injured worker is provided the certainty of compensation from the employer through the workers' compensation system in exchange for giving up the right to sue for damages. Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund (2001) 24 Cal. 4th 800, 811.

However, the exclusive remedy provisions are limited to the "employer." Labor Code § 3600, 3602. Under Labor Code § 3852, an injured worker may seek compensation against "any person other than the employer" for his or her injuries.

> The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation *does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer.* Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents. The respective rights against the third person of the heirs of an employee claiming under Section 377.60 of the Code of Civil

Procedure, and an employer claiming pursuant to this section, shall be determined by the court.

The Legislature has defined "employer" for purposes of the exclusive remedy provisions to include the workers' compensation insurer. Labor Code § 3850(b). An insurer, in turn, is defined in Labor Code § 3211.

> "Insurer" includes the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or interinsurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued.

This Court also extended the definition of "employer" to independent claims adjusting companies hired by employers to administer workers' compensation programs. Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal.3d 1.

The definition of employer, and the exclusive remedy provisions, do not apply to persons other than employers and their insurers. Phelps v. Stostad (1997) 16 Cal. 4th 23, 30 (driver of a vehicle who injured the employee); Eli v. Travelers Indem. Co. (1987) 190 Cal. App. 3d 901 (driver of a vehicle who killed the employee). The fact that the third party participated to some extent in the workers' compensation process is far from sufficient to make the exclusive remedy provisions applicable. For example:

1. A treating workers' compensation doctor can be sued for medical malpractice. Nation v. Certainteed Corp. (1978) 84 Cal. App. 3d 813, 817 ("in addition to a workers' compensation proceeding, an employee injured in an industrial accident may institute and pursue a civil suit at common law against a treating doctor for aggravation of the injury through negligent treatment").

2. Independent investigators retained by a worker's compensation insurer to investigate whether a claimed injury is legitimate may be sued for their torts. Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 626.

3. A parent corporation of an employer can be sued for its torts. Waste Management, Inc. v. Superior Court (2004) 119 Cal. App. 4th 105, 110.

Comppartners and Dr. Sharma do not qualify as either the "employer" or the "insurer" of Mr. King. Rather, they were hired by the insurer to perform services for the insurer, just as the doctor in Nation and the investigators in Unruh. Under the plain terms of the statutes, the workers' compensation exclusive remedy provisions do not apply to them.

The brief filed by Comppartners and Dr. Sharma completely ignores these statutes. There is no contention that Defendants qualify as either "employers" or "insurers" under these statutes. Instead, Defendants merely argue that if the *employer* can be required to pay compensation for an additional injury arising out of treatment, that is the end of the matter. That argument ignores § 3852 and ignores long settled law that the workers' compensation statutes do not preclude suit against anyone other than the employer and the insurer.

The court of appeal cited a provision in Labor Code § 4610.5(c)(4) which does define "employer" to mean "the employer, the insurer of an insured employer, a claims administrator, or a utilization review organization, or other entity acting on behalf of any of them." The court of appeal held that because of this definition, the exclusive remedy provisions of § 3600 apply to utilization review companies. Defendants echo the court of appeal opinion.

However, the court of appeal and Defendants overlook the fact that the Legislature limited the definition in § 4610.5 to the "purposes of *this section and Section 4610.6*." Section 4610.5(c). The Legislature did *not* include utilization review companies in the definition of either employer or

insurer for the purposes of the exclusive remedy provisions of § 3600 or 3602. There are no provisions in either § 4610.5 or 4610.6 which provide an exclusive remedy for employers. In context, the only relevance of the broad definition of "employer" in § 4610.5(c) is:

- The "employer" is not required to pay for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section. (4610.5(e))
- The "employer" is required to provide the injured worker with a form to initiate an independent medical review. (4610.5(f)) If that notice is not provided by the "employer" the injured worker's deadline to request review is extended. (4610.5(f)(3))
- The "employer" can terminate the independent medical review by agreeing to the disputed treatment. (4610.5(g))
- There is a deadline for the "employer" to request independent medical review. (4610.5(h)(2))
- An "employer" "shall not engage in any conduct that has the effect of delaying the independent review process." (4610.5(i))
- The "employer" must be notified whether an independent medical review has been approved. (4610.5(k)) If independent medical review has been approved, the "employer" is obligated to provide specified documents and to provide a list of those documents to the employee. (4610.5(l) and (m) and (o))
- The "employer" is responsible for the costs of independent medical review. (4610.6(l))
- The results of the independent medical review must be provided to the "employer." (4610.(f))
- The "employer" is required to comply with an independent medical review decision. (4610.6(j)) The "employer" is subject to fines if it

fails to do so. (4610.6(k))

None of these provisions even mention tort liability or exclusive remedies. The only relevance of including "a utilization review organization" in the definition of employer for "purposes of this section and Section 4610.6" is that utilization review organizations can provide the form to initiate an independent medical review (4610.5(f)) and "shall not engage in any conduct that has the effect of delaying the independent review process" (4610.5(i)).

B. LABOR CODE § 4610.5 DOES NOT PROVIDE AN EXCLUSIVE REMEDY

Defendants argue that Labor Code § 4610.5 contains its own exclusive remedy provisions which preempts tort suits. They do not cite any specific provision in § 4610.5 which preempts tort suits because no such provision exists. Instead, they contend it was the unstated intent of the Legislature to preempt tort suits.

The Legislature certainly knows how to write statutes which do preempt tort suits; its language in § 3600, 3601 and 3602 is plain. In each of those statutes there is an express preemption of civil suits: 3600 ("Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . .. "), 3601 ("Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment . . ."), 3602 ("Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer.")

Similarly, the Legislature knows how to write statutes which provide

immunities from tort liability when it intends to do so. For example, in the statutes governing utilization review for health maintenance plans, there is a statute expressly providing a limited immunity: "Notwithstanding any other provision of law, there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person who participates in plan or provider quality of care or utilization reviews by peer review committees which are composed chiefly of physicians and surgeons or dentists, psychologists, or optometrists, or any of the above, for any act performed during the reviews if the person acts without malice, has made a reasonable effort to obtain the facts of the matter, and believes that the action taken is warranted by the facts . . ." Health and Safety Code § 1370.

There is nothing remotely similar in § 4610.5. There is no mention of an exclusive remedy or a preclusion of civil lawsuits or monetary remedies. Rather, Defendants cite only to the *procedures* for resolving disputes about whether specific medical treatment should be provided.

> A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section. Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section. Section 4610.5(e).

That subsection never mentions tort suits and never suggests preclusion of tort suits. It only address *procedures* for challenging a utilization decision so an injured worker can obtain requested treatment. Plaintiffs are not suing to reverse the decision and are not suing to force the insurer to pay for Klonopin; they want tort damages for the harm the decision and the failure to warn caused. There is no suggestion of

preclusion of tort liability for wrong decisions, intentional misconduct or for failure to warn.

Standard rules of statutory interpretation confirm that the Legislature did not intend in § 4610.5 to preempt tort suits or to provide an immunity. First, when a comparison of statutes covering the same general subject shows a provision included in one statute and not in another, the Legislature is presumed to have intended different treatment. In re Young (2004) 32 Cal. 4th 900, 907 ("Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent."); Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market LLC (2011) 52 Cal. 4th 1100, 1108 ("It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes."). The statutes which do contain preemption of tort suits are quoted above. The lack of anything remotely similar in § 4610.5 shows an intent not to preempt tort suits.

Second, it is a "cardinal rule that courts may not add provisions to a statute." Los Angeles, 52 Cal.4th at 1108. See also Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 826-827. A court cannot add preemption to a statute where the Legislature did not mention it.

Third, where there are potential ambiguities in a statute, the legislative history can provide relevant insight. See In re Young, 32 Cal.4th at 907-908. The 2012 bill which added § 4610.5 (SB 863, 2012 Cal ALS 363) is completely silent about preemption of tort suits. The entire summary of the utilization review process is:

> (11) Existing law requires every employer to establish a medical treatment utilization review process, in compliance

with specified requirements, either directly or through its insurer or an entity with which the employer or insurer contracts for these services.

This bill would require the administrative director to contract with one or more independent medical review organizations and one or more independent bill review organizations to conduct reviews in accordance with specified criteria. The bill would require that the independent review organizations retained to conduct reviews meet specified criteria and comply with specified requirements. The bill would require that final determinations made pursuant to the independent bill review and independent medical review processes be presumed to be correct and be set aside only as specified.

The independent medical review process established by the bill would be used to resolve disputes over a utilization review decision for injuries occurring on or after January 1, 2013, and for any decision that is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury. The bill would require an independent medical review organization to conduct the review in accordance with specified provisions, and would limit this review to an examination of the medical necessity of the disputed medical treatment. The bill would prohibit an employer from engaging in any conduct that delays the medical review process, and would authorize the administrative director to levy certain administrative penalties in connection with this prohibition, to be deposited in the Workers' Compensation Administration Revolving Fund. The bill would require that the costs of independent medical review and the administration of the

independent medical review system be borne by employers through a fee system established by the administrative director.[10]

The Assembly and Senate analyses of the bill are also completely silent about preemption of tort lawsuits. Again, where a person causes harm to another person, the rule is liability and immunity (or preemption of civil suit) is the exception. Cabral, 51 Cal.4th at 771. Defendants make no contention that tort suits against utilization review doctors and companies were preempted prior to the 2012 enactment of § 4610.5. If the Legislature had intended to preempt tort suits when it enacted § 4610.5, it would have at least *mentioned* such an intent. The lack of even a mention shows the lack of any intent to preempt. In re W.B. (2012) 55 Cal. 4th 30, 56 ("If our Legislature had intended to extend ICWA's protections to a whole new realm of juvenile delinquency cases otherwise exempted under the federal law, one would expect evidence of this intent to feature prominently in the legislative history. Yet, no mention of such a purpose appears."); Riverside County Sheriff's Dept. v. Stiglitz (2014) 60 Cal. 4th 624, 644 ("If the Legislature contemplated a difference, as the dissent posits, one would expect the extensive legislative history would have mentioned it at least once.").

Defendants contend the injuries caused by the failure to provide tapering and the failure to warn could somehow be "appealed" to the independent medical review, and that such an appeal is the exclusive remedy. That contention ignores reality. The only remedy an independent medical review can provide is overruling a decision to deny treatment or medication. If the injured worker has already suffered injuries from the erroneous denial of tapering or the erroneous failure to warn, there is

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[10]The enrolled bill, prior versions of the bill, and the Senate and Floor analyses are found at: Leginfo.legislature.ca.gov/faces/billsearchclient.xhtml.

absolutely nothing the independent medical review can do to address those injuries. The Legislature is presumed not to have intended pointless acts. Riverside County Sheriff's Dept, 60 Cal. 4th at 632 (rejecting a contention that "the Legislature had expressly provided for the doing of an idle act"). An "exclusive remedy" that is completely incapable of providing *any* relief for an injury is not a remedy at all.

C. BACKUP POSITION: § 4610.5 DOES NOT PRECLUDE SUIT FOR FAILURE TO WARN

The court of appeal construed the language of § 4610.5(e) to preempt some tort suits based on utilization review decisions. However, it found any preemption to be limited to the scope of the language of that subsection: "A utilization review *decision* may be reviewed or appealed." The court of appeal held that failure to warn of the consequences of a utilization review decision is separate and apart from the decision itself, and any preemption that does exist does not apply to failure warn.

Citing nothing, Defendants contend liability for failure to warn is no different than liability for the decision itself. In fact, failure to warn is routinely treated differently than the act which requires the warning, and it is common for there to be liability for failure to warn even if the underlying act is not a basis for liability. For example, Tarasoff held that an immunity applies to a decision not to confine a mental patient, but the therapist was nevertheless liable for failure to warn a person who had been threatened by the mental patient. 17 Cal.3d at 446-449. In products liability cases there is a clear distinction between a defective product and failure to warn of risks presented by the product, and there is potential liability for failure to warn even if the product itself was flawlessly designed and manufactured. Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987; Taylor v. Elliott Turbomachinery Co. Inc. (2009) 171 Cal. App. 4th 564, 577. Public entities are immune from liability for some types of dangerous conditions of public property, but can still be held liable for failure to warn

of those dangers. Government Code § 830.8 (public entity is immune from liability for a dangerous condition caused by the failure to provide traffic or warning signs unless one was "necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care"); Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 1018 (even if a public entity is immune from liability for a dangerous condition due to design immunity, it "may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident."). Similarly, private entities are liable for failure to warn of some conditions of their property even though they are not liable for the conditions themselves. Annocki v. Peterson Enterprises, LLC (2014) 232 Cal. App. 4th 32 (restaurant is liable for not warning customers against making a left turn from its parking lot, even though it has no control over the road); Civil Code § 846 (owner of recreational land is immune from liability for conditions of the land, but is liable "for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.").

The common thread in cases finding liability for failure to warn even if the underlying condition is not a basis for liability is a risk which would not be apparent absent a warning. That principle squarely applies to the facts of this case. The decision that Klonopin was not necessary to treat injuries resulting from the employment injury may well have been completely reasonable from a workers' compensation standpoint. But since a known side effect of abrupt discontinuation of Klonopin is seizures, that decision placed Mr. King at risk of seizures unless he was warned of the need to do something himself to obtain a replacement prescription from his non-workers' compensation doctor either at his own expense or through non-workers' compensation insurance. To paraphrase the products liability

cases, the decision that Klonopin was not necessary to treat the workers' compensation injury may have been flawless, but absent a warning, that decision placed Mr. King at considerable risk of personal injury.

Thus, to the extent § 4610.5(e) can be construed to preempt tort suits, the scope of preemption should be limited to the language of that subsection, which is limited to challenges to the utilization review *decision* itself.

The court of appeal addressed the issue in terms of whether the failure to warn was related to the original employment injury. Defendants spend a lot of ink disagreeing with that portion of the court of appeal opinion. But it is completely unnecessary to address that issue when nothing in § 4610.5(e) even mentions failure to warn, settled law makes a clear distinction between the act itself and failure to warn, and the procedures specified by § 4610.5 are completely incapable of providing *any* relief for injury caused by failure to warn.

D. SUMMARY

For the reasons stated above, Plaintiffs respectfully request that this Court find that their claims are not preempted by the Workers' Compensation Act. Alternatively, any preemption should be limited to the decision itself, and not to the independent failure to warn of known risks to Mr. King presented by the decision.

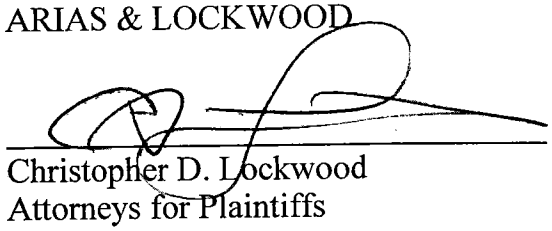
CONCLUSION

Medical utilization review companies owe a statutory duty to injured workers not to have utilization decisions made by unqualified doctors or nurses. Medical utilization doctors owe a duty of reasonable care toward injured workers to make informed judgments based on a review of the relevant medical records and knowledge of the relevant facts concerning the medical treatment or medication at issue. If a medical review doctor makes a decision to terminate or deny a medical treatment or medication, and there

are known risks of abrupt termination, the medical review doctor owes a duty either to take steps to address the abrupt termination or to warn the injured worker of the need to take steps to address the effects of abrupt termination.

The workers compensation exclusive remedies only apply to employers and insurers. Medical utilization review companies and doctors are not employers or insurers and are not covered by the exclusive remedy provisions. Labor Code § 4610.5(e) never mentions preemption of tort liability. To the extent, if any, that Labor Code § 4610.5(e) can be construed to preempt tort liability, it is limited to the decision itself and does not include failure to warn of the known consequences of the decision.

DATED: September 12, 2016 ARIAS & LOCKWOOD



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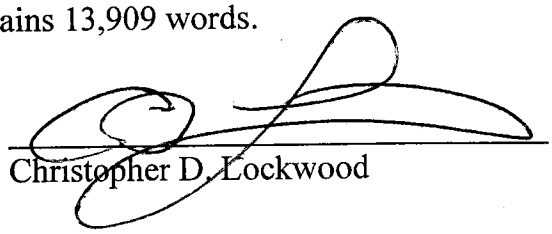
CERTIFICATION

This brief was prepared in Times New Roman 13 point type. According to Word Perfect it contains 13,909 words.



Christopher D. Lockwood

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action. My business address is 1881 S. Business Center Drive, Suite 9A, San Bernardino, California 92408.

On September 13, 2016, I served the following document described as **ANSWER BRIEF ON THE MERITS** on all interested parties in this action by placing a true copy of thereof enclosed in sealed envelopes addressed as follows:

See the attached list.

(BY MAIL, 1013a, 2015.5 C.C.P.) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same date with postage thereon fully prepaid at San Bernardino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on September 13, 2016, at San Bernardino, California.

Sharvonne R. Sulzle

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