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: