S232197

In the
Supreme Court
of the
State of California

KIRK KING and SARA KING,

Plaintiffs and Appellants,

v.

COMPPARTNERS, INC. and NARESH SHARMAN,

Defendants and Respondents.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E063527
SUPERIOR COURT OF RIVERSIDE COUNTY, NO. RIC1409797
HON. SHARON WATERS

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and [PROPOSED] *AMICUS CURIAE* BRIEF OF CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY, INC. IN SUPPORT OF PLAINTIFFS AND APPELLANTS KIRK KING and SARA KING

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FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Society of Industrial Medicine and Surgery, Inc. [hereinafter "CSIMS"], hereby requests leave to file a brief as *amicus curiae* in support of Petitioners and Appellants, KIRK KING and SARA KING in the above-captioned case. In support of this application, CSIMS states as follows:

INTERESTS OF AMICUS CURIAE

1. CSIMS is a professional organization whose members are physicians and other medical providers whose purpose is to improve the workers' compensation system in California; to increase the public's awareness of the role of medicine in the workers' compensation system; to promote health and safety; to provide continuing education in the field of industrial medicine; and to set standards of professional conduct for those in the system.

CSIMS, through its representatives, has appeared as *amicus curiae* before other Courts of Appeal and Supreme Court in the matters of: Valdez v. WCAB (2013) 57 Cal. 4th 1231; [164 Cal. Rptr. 3d 184; 78 Cal. Comp. Cases 1209]*Milpitas Unified School District v. W.C.A.B.* (Guzman) (2010) 187 Cal. App. 4th 808; [115 Cal. Rptr. 3d 112; 75 Cal. Comp. Cases 837.];*State Comp. Insurance Fund v. W.C.A.B.* (Almaraz),(2011) Cal. App. 5th Dist. 2011; [2011 Cal. Wrk. Comp. LEXIS 88, 76 Cal. Comp. Cases 687, review denied.]; *State Compensation Insurance Fund v. W.C.A.B. (Sandhagen),* (2008) 44 Cal. 4th 230; [79 Cal. Rptr. 3d 171, 73 Cal. Comp. Cases 981], *Facundo-Guerrero v, W.C.A.B.* (2008) 163 Cal. App. 4th 640; [77 Cal. Rptr. 3d 731, 73 Cal. Comp. Cases 785], *Palm Medical Group, Inc.*

v. State Compensation Insurance Fund (2008) 161 Cal. App. 4th 206 [74 Cal. Rptr. 3d 266; 73 Cal. Comp. Cases 352]*Sierra Pacific Industries v. W.C.A.B.* (Chatman)(2006) 140 Cal. App. 4th 1498, [45 Cal. Rptr. 3d 550, 71 Cal. Comp. Cases 714]; *Wal-Mart Stores, Inc. v. W.C.A.B.* (Garcia) (2003) 112 Cal. App. 4th 1435, [5 Cal. Rptr. 3d 822, 68 Cal. Comp. Case 1575]; *Lockheed Martin v. W.C.A.B.* (McCullough) (2002) 96 Cal. App. 4th 1237, [117 Cal. Rptr. 2d 865, 67 Cal. Comp. Cases 245]; *Vacanti v. S.C.I.F.*, (2001) 24 Cal.4th 800 [102 Cal. Rptr. 2d 562, 65 Cal. Comp. Cases 1402]; *Boehm & Associates v. W.C.A.B.* (Lopez) (1999) 76 Cal. App. 4th 513 [90 Cal. Rptr. 486, 64 Cal. Comp. Cases 1350]; *Christian v. W.C.A.B.*, (1997) 15 Cal.4th 505, [63 Cal.Rptr.2d 336, 62 Cal. Comp. Cases 576]; *American Psychometric Consultants, Inc. v. W.C.A.B.*, (1995) 36 Cal.App.4th 1626, [43 Cal.Rptr.2d 254; 60 Cal. Comp. Cases 559]; *Beverly Hills Multispecialty Group, Inc. v. W.C.A.B.*, (1994) 26 Cal.App.4th 789, [32 Cal.Rptr.2d 293, 59 Cal. Comp. Cases 461].

2. The Court's ruling and decision in this case will determine if the costs for Defendant doctor's negligence will be shifted entirely onto the Workers Compensation system, as requested by Respondents in their RB on pages 8-14 by the application of the exclusive remedy, which is already facing a problem with costs and how to manage the system to reduce high expenses and still maintain and increase benefits including medical treatment to injured workers, as described by the California Supreme Court in State Compensation Insurance Fund v WCAB (Sandhagen) 44 Cal. 4th 230 (2008) (see Section II at pages 31-34 of this Brief). By any resulting adverse effect on this system, the ruling will also determine the ability of California's injured workers to effectively access necessary medical treatment for their work-related injuries and, as such, will directly affect CSIMS members and all parties and stakeholders in the Workers Compensation system state-wide.

CSIMS PROPOSED AMICUS CURIAE BRIEF

3. CSIMS is familiar with the issues before this court and the scope of their presentation and believes that further briefing is necessary to address matters not fully addressed by the briefs filed by the parties to this case and those filed by amicus curiae. For one, there are issues relating to Workers Compensation in general and Utilization Review which have not been briefed fully.

4. CSIMS therefore requests leave to file the following proposed amicus curiae brief.

Wherefore, CSIMS respectfully requests permission to file the proposed *amicus curiae* brief in support of Petitioners Kirk King and Sara King in King v CompPartners.

Dated: February 24, 2017

Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK

By:_____

Charles Edward Clark
Counsel for Amicus Curiae
California Society of Industrial
Medicine and Surgery, Inc.

ISSUES PRESENTED TO THE COURT

In connection with whether the trial court's granting of the Defendants' (Appellee's) demurrer, which ruled there was no liability, should be reversed, the following are the issues presented:

1. Does the Defendant Utilization Review (UR) doctor owe a duty of care to the Plaintiff?

2. If so, what are the factors which support the existence of a duty of care and hence liability?

ARGUMENT

INTRODUCTION

The Defendant UR doctor who is licensed as a medical doctor in the state of California and whose license number is 68991 (ARJN page 5) seeks to escape his responsibility to the Plaintiff for the injury he has caused by contending he had no doctor-patient relationship with the Plaintiff and no duty of care in his UR determination in the Plaintiff's Workers Compensation case.

As the UR doctor, he determined that the medication the Plaintiff was taking which is Klonopin could be abruptly stopped in the absence of a period of weaning without warning of the extremely serious and potentially deadly consequences of seizures, and on his determination and without warning to the Plaintiff this medication was stopped. The Plaintiff in fact suffered grand mal seizures within days (ARB on page 5) of this abrupt cessation consistent with the known serious and dangerous effects.

The Defendant UR doctor knew or should have known that the U.S. Federal Drug Administration (FDA) issued a warning[1] long before his determination against the abrupt cessation of this medication without a

[1] See page 21 hereof for the full citation to the FDA's warning.

period of weaning. The Defendant UR doctor knew or should have known that this was a breach of the standard of care.

The Medical Board of California (MBC) has held since 1998 that a doctor making a UR determination in Workers Compensation cases was in fact practicing medicine in the state of California. Thus, the Defendant doctor knew or should have known his UR determination constituted the practice of medicine.

The MBC has also filed an Accusation (ARJN) to revoke or suspend Defendant's medical license for gross negligence and repeated negligence for an extreme departure from the standard of care arising out of the injuries he caused to Plaintiff.

Defendant's contentions will cause great damage to the public.

I. THE UR DOCTOR IS LIABLE BECAUSE HE FAILED TO USE ORDINARY CARE TO PREVENT HARM TO PLAINTIFF

A. THE MEDICAL BOARD OF CALIFORNIA HAS DETERMINED THAT UTILZATION REVIEW IN WORKERS COMPENSATION CASES IS THE PRACTICE OF MEDICINE

The MBC has determined that a doctor in California Workers Compensation cases making UR determinations is engaged in the practice of medicine and is subject to the MBC's jurisdiction.

This was first decided by the MBC on May 9, 1998 when it adopted a resolution declaring, among other things, that the making of a decision regarding the medical necessity or appropriateness in utilization review in Workers Compensation cases, for an individual patient, of any treatment or other medical service, constitutes the practice of medicine.

During the April 25-26, 2013 (see MBC Meeting Minutes on page 33 for the dates thereof) and October 29-30, 2015 (see MBC Meeting Minutes Agenda Item 21 on page 29 thereof) Quarterly Board Meetings, the MBC

reaffirmed that UR is the practice of medicine (see "Utilization Review is the Practice of Medicine by Kerrie Webb, Senior Staff Counsel of the MBC, MBC Newsletter Spring, 2016 on page 11; and for her materials see http://www.mbc.ca.gov/About_Us/Meetings/2015/Materials/materials_20151029_enf-4.pdf.

The MBC is vested with the authority to make this determination. There are a number of statutes and cases which grant it this authority. To begin with, it is a board under the Department of Consumer Affairs identified as such in Business and Professions Code §101 (b) and §2001.

The authority of a board such as MBC to use the state's police power to protect the public is set forth in §101.6 thereof as follows:

> "The boards, bureaus, and commissions in the department are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California."
>
> To this end, they establish minimum qualifications and levels of competency and license persons desiring to engage in the occupations they regulate upon determining that such persons possess the requisite skills and qualifications necessary to provide safe and effective services to the public, or register or otherwise certify persons in order to identify practitioners and ensure performance according to set and accepted professional standards. They provide a means for redress of grievances by investigating allegations of unprofessional conduct, incompetence, fraudulent action, or unlawful activity brought to their attention by members of the public and institute disciplinary action against persons licensed or registered under the provisions of this code when such action is warranted. In addition, they conduct periodic checks of licensees, registrants, or

> otherwise certified persons in order to ensure compliance with the relevant sections of this code."

This police power is restated in the Medical Practice Act (Business and Professions Code §2000 et seq.) in general and specifically in §2001.1, that the MBC must protect the public.

With such power, the MBC has the responsibility to review the quality of medical practice [§2004 (e)], and this includes the power to set standards as a function of a board (§108). By this, the MBC has the power under §2051 to grant certificates to practice medicine and under §2052 to regulate the practice of medicine and to engage in enforcement actions against anyone practicing without a "valid" license to practice medicine or otherwise who violates the Medical Practice Act.

§2052 covers "diagnosis" which is what the Defendant UR doctor performed and with that coupled with the other authorities, the MBC has the power and jurisdiction to regulate the practice of medicine and to determine that UR in Workers Compensation cases constitutes the practice of medicine.

Case law supports this authority as well. The U.S. Supreme Court held in *Dent v West Virginia* 129 U.S. 114 (1889) that states have the police power to regulate the practice of medicine, and this was affirmed in a California case by the U.S. Supreme Court in *McNaughton v Johnson* 242 U.S. 344 (1917).

California state courts follow this. In *Griffiths v Superior Court* 96 Cal. App. 4th 757 (2002) at 768-769, the Court held: "The Medical Board of California, through its Division of Medical Quality, has authority to investigate, to commence disciplinary actions, and to take disciplinary action against a physician's license based on unprofessional conduct as defined in the Medical Practice Act. (§ 2000 et seq.; Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 7, 56 Cal.Rptr.2d 706, 923 P.2d 1.) This authority to determine a

party's fitness to engage in a business or profession derives from the state's inherent power to regulate the use of property to preserve the public health, morals, comfort, order, and safety. (Arnett, at p. 7, 56 Cal.Rptr.2d 706, 923 P.2d 1; Hughes v. Board of Architectural Examiners, supra, 17 Cal.4th at p. 790, 72 Cal.Rptr.2d 624, 952 P.2d 641.) 'The right to continue to practice a licensed profession is not a fundamental right. See *Kenneally v Medical Board* 27 Cal. App. 4th 489 (1994).'"

By these statutes and case law, the MBC has the authority to decide that a UR doctor in Workers Compensation cases conducting a diagnosis and UR evaluation is practicing medicine.

The Respondent may contend that this determination has no legal effect on this case because the Defendant UR doctor did not meet face to face with the injured worker, was not directly employed by the Plaintiff, and there is no doctor-patient relationship between Plaintiff and the Defendant UR Doctor. In §2052, which prohibits the unauthorized practice of medicine, there is no requirement that the doctor meet with the patient face-to-face or be employed directly by him because §2052 includes anyone who renders a diagnosis as the Defendant UR doctor performed of the injured worker. It is not accurate to contend that if the Defendant UR doctor conducts an evaluation and provides a diagnosis there is no doctor-patient relationship.

B. THE MEDICAL BOARD OF CALIFORNIA HAS FILED AN ACCUSATION AGAINST DEFENDANT

Pursuant to its authority and jurisdiction set forth in Business and Professions Code §§2227 and 2234, the MBC filed an Accusation Case No. 04-2013-235458 on February 3, 2016 against Naresh D. Sharma M.D. whose Physician's and Surgeon's Certificate Number is A68991 upon two charges: (1) Gross Negligence; and (2) Repeated Negligent Acts. By this Accusation, the MBC seeks to revoke or suspend his Physician's and Surgeon's Certificate and to revoke, suspend, or deny his approval and authority to

supervise physician assistants under Business and Professions Code §3527, among other remedies, in connection with Plaintiff's matter[2]. (ARJN)

The MBC's Accusation alleges that the Defendant UR doctor's conduct is an "extreme departure of care."

The action taken by the MBC was done pursuant to its police power to protect the public, and supports at least some form of doctor-patient relationship between the Defendant UR doctor and the Plaintiff on which a duty of care can be found although as this ACB makes clear, whether there was one or not is not dispositive to a duty of care. The foreseeability of harm is the proper test to make this analysis.

C. UTILIZATION REVIEW DOCTOR'S DUTY OF CARE

The UR Doctor's duty of care is based on Civil Code §1714 and *Rowland v. Christian*, 69 Cal.2d 108 (1968) in which the California Supreme Court held that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct, and rejected the status of the tortfeasor as an invitee, licensee, and trespasser in making this ruling.

To determine whether there is a violation of this standard of care, *Rowland* supra at 112-113 set forth the following factors:

(a) the foreseeability of harm to the plaintiff;

(b) the degree of certainty the plaintiff suffered injury;

(c) the closeness of the connection between the defendant's conduct and the injury suffered;

(d) the moral blame attached to the defendant's conduct;

(e) the policy of preventing future harm;

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[2] CSIMS secured the permission of Appellant to disclose that he is the "K.K." identified by the Accusation pursuant to the "privacy rule" contained in 45 C.F.R. Part 160 and Subparts A and E of Part 164 of the Health Insurance Portability and Accountability Act (HIPAA) Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996.

(f) 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

(g) the availability, cost, and prevalence of insurance for the risk involved (Rowland v. Christian, supra, 69 Cal.2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561).

Courts have added other factors to the *Rowland* analysis: from *Biakanja v. Irving,* 49 Cal.2d 647 (1958) whether the act or omission was intended to affect the plaintiff and from *Parsons v Crown Disposal Co* 15 Cal. 4th 456 (1997) what was the social utility of the defendant's conduct in connection with the injury .

The Supreme Court emphasized in *Tarasoff v. Regents of the University of California* 17 Cal.3d 425 (1976) that foreseeability of harm is the "the most important ...consideration..." of these factors; see *Tarasoff* supra at 434.

Here is a factor by factor *Rowland* supra analysis:

Foreseeability of harm to the plaintiff:

In Merriam-Webster Dictionary, the word foreseen comes from the Old English or Anglo Saxon word *foreseon* which means to have a premonition. Broken down, *fore* means "before" and *seon* is "to see, see ahead."

That idea is in use by the Courts in the foreseeability analysis. The California Supreme Court held in *Kesner v Superior Court* 1 Cal. 5th 1132 (2016) that "[A]s to foreseeability, ... the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed....' " (Cabral, supra, 51 Cal.4th at p. 772, 122

Cal.Rptr.3d 313, 248 P.3d 1170; accord, Parsons v. Crown Disposal Co. (1997) 15 Cal.4th 456, 476, 63 Cal.Rptr.2d 291, 936 P.2d 70 (Parsons); Jackson v. Ryder Truck Rental, Inc. (1993) 16 Cal.App.4th 1830, 1839, 20 Cal.Rptr.2d 913.) For purposes of duty analysis, "'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' ... [I]t is settled that what is required to be foreseeable is the general character of the event or harm—e.g., being struck by a car while standing in a phone booth—not its precise nature or manner of occurrence." (Bigbee v. Pac. Tel. & Tel. Co. (1983) 34 Cal.3d 49, 57–58, 192 Cal. Rptr. 857, 665 P.2d 947 (Bigbee).)

There is nothing in the analysis of foreseeability of harm that requires the prediction of the exact details of the harm or foresight to a degree of near certainty or even probability.

The next consideration in this case is that the actor of the wrongful conduct is a health care professional licensed under the Medical Practice Act (Business and Professions Code §2000 et seq).

Health care professionals are heavily regulated by the Medical Practice Act and are subject to the jurisdiction of the MBC whose responsibility under Business and Professions Code §2000.1 is to protect the public. They too must protect the public as a consequence of their license to practice medicine.

It is commonly recognized that health care professionals have a duty of "nonmaleficence" which means a duty to refrain from harming the patient and a duty of "beneficence" which is a duty to do good. See Purtilo, Ruth et al; on pages 88-89, 265, 304, and 364 among others in Ethical Dimensions in the Health Professions 6th Edition.

By design and consistent with the Medical Practice Act, UR is intended to be of benefit to both the injured worker and the employer and

insurer, not more for one than the other. In *State Compensation Insurance Fund v WCAB (Sandhagen)* 44 Cal. 4th 230 (2008), the California Supreme Court stated that this benefit is to both at 243: "As discussed above, Senate Bill Nos. 228 and 899 were aimed at controlling skyrocketing costs while simultaneously ensuring workers' access to prompt, quality, standardized medical care." In accord is *Adventist Health v WCAB* 211 Cal. App. 4th 376 (2012) which held that Labor Code §4610 has the twin goals of prompt medical treatment and cost containment which benefit both the employee and the employer.

The UR doctor is not supposed to be adverse to either party and was not employed by the employer to protect or advocate its interests or come up with an opinion that advocates the injured worker's side. Rather, the UR doctor is intended to be neutral and objective and render a medical service for both sides, and those are the expectations of the parties. There is no assumption by either party that the UR doctor will be generous to either of them.

As a benefit to both, the medical diagnosis and determination of the UR doctor is intended to be relied on by both. Certainly, the Defendant UR doctor knew or should have known that his report was being relied on by both sides.

Moreover, the Defendant UR doctor was an anesthesiologist licensed by the state of California to practice medicine (Physician's and Surgeon's 24 Certificate Number A68991). (ARJN) As a medical doctor practicing in a subspecialty he had a higher standard of care and skill than a general practitioner. In addition, the Defendant UR doctor is working in the Workers Compensation system and knows that his determination or recommendation in UR to stop Klonopin without a period of weaning was a de facto abrupt cessation of coverage of this medication. The Defendant UR doctor cannot claim that he reasonably relied on the Workers Compensation primary

treating doctor to prevent the seizures since he knew that decertification meant that there would be no payment for this medication and that the primary treating doctor would not dispense it for free.

Added to this, he knew or should have known that for Klonopin, which is a "Schedule IV controlled substance" pursuant to Section 812 of the Controlled Substances Act 21 U.S.C. §801 et seq, the FDA issued the following warnings in its Medication Guide (see C.F.R. Title 21 Chapter 1 Part 208 Subpart B) about the immediate dangerous consequences of abrupt cessation without taking safeguards against seizures, and he failed to warn the Plaintiff, causing him great and foreseeable harm: "Stopping KLONOPIN suddenly can cause serious problems. Stopping KLONOPIN suddenly can cause seizures that will not stop (status epilepticus)" which is contained on page 21 of the FDA's Medication Guide (see C.F.R. Title 21 Chapter 1 Subchapter C Part 201 Subpart B §201.57 et seq) whose Reference ID is 4028890 and to the FDA's website which contains the FDA's Medication Guide:[3] http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/017533s046s048,020813s006s007MedGuide.pdf.[4]

The harm to the public is highly foreseeable, as the FDA's warning makes clear, when a doctor, regulated by the Medical Practice Act and subject to the foregoing duties, determines that Klonopin should be abruptly stopped without a safe and adequate period of weaning, and in fact such foreseeable harm did occur.

The Defendant UR doctor claims that the Plaintiff's recourse is to appeal the UR decision to an Independent medical reviewer (IMR) and implies that that is adequate and hence the injury is not foreseeable (see RB

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[3] See §§News Release Medication Guides dated on June 8, 2011 at 2011 WL 2307891 (MEDWATCH)

[4] The website http://www.accessdata.fda.gov is maintained by the FDA.

on page 23), but this is not true under the dangerous circumstances of abrupt cessation without weaning which caused immediate seizures.

In contrast to providing the Plaintiff with a warning pursuant to the FDA's Klonopin warning, which is easy to accomplish, can be done by a couple of keystrokes on the computer in copying and pasting this warning into the UR determination, and is burden free, an appeal is uncertain by its nature, is not free of doubt as to the result, and is time consuming, and there is no certainty of success that the Plaintiff will be protected from harm.

The timelines in Labor Code §4610.5 and §4610.6 are well beyond the few days from the abrupt cessation of Klonopin to the occurrence of the seizures, and an appeal of the UR decision would have done nothing to save the Plaintiff from injury.

Under §4610.5 in effect in 2013 enacted by Senate Bill 863 when the UR dispute occurred in this matter, the following subsection provides the timeline:

> "(h)(1)[5] The employee may submit a request for independent medical review to the division no later than 30 days after the service of the utilization review decision to the employee."

§4610.6[6] states:

> "(d) The organization shall complete its review and make its determination in writing, and in layperson's terms to the maximum extent practicable, within 30 days of the receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director."

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[5] The deadlines have been shortened in later amendments to §4610.5.
[6] The timeline has been shortened in a later amendment for appeals of determinations affecting loss of life and other serious conditions.

Even the shorter period of 5 working days for the IMR to decide under later enacted amendments to these subsections could not have saved the Plaintiff from the first seizure. "(Plaintiff) experiences sudden withdrawal, causing grand mal seizures 3 days after Respondents' denial;" see ARB on page 5.

Clearly, abrupt cessation of Klonopin causing the Plaintiff to have grand mal seizures shortly thereafter was a foreseeable harm. In the RB on page 23, the claim that it was not foreseeable to Defendant UR doctor because the Plaintiff could have pursued an appeal is hardly plausible. It does not employ the proper test of foreseeability of harm employed by *Rowland* supra, *Tarasoff* supra, and *Kesner* supra, and fails to admit that such an appeal is lengthy and uncertain to prevent harm caused by the abrupt cessation resulting in seizures within days, and is too long to wait, and thus was a foreseeable harm.

The degree of certainty the plaintiff suffered injury:

It was highly certain that abrupt cessation of Klonopin without weaning causes seizures as determined by the FDA in issuing its warning.

The closeness of the connection between the defendant's conduct and the injury suffered:

Abrupt cessation without tapering off took place one day and within very few days thereafter the Plaintiff suffered grand mal seizures. It was nearly simultaneous both in time and in space.

The moral blame attached to the defendant's conduct:

The MBC has filed an Accusation against the Defendant UR doctor requesting revocation or suspension of his license for gross negligence and repeated negligence as his conduct was an extreme departure from the standard of care.

The Defendant UR doctor's conduct is a violation of his most fundamental duties which are the duty to avoid harm to the patient and the

duty to do good.

As a consequence, there is much moral blame which must be assigned to the conduct of the Defendant UR doctor.

The policy of preventing future harm:

It is an essential public policy to prevent harm in health care by health professionals who are licensed and heavily regulated by the Medical Practice Act. Requiring a warning is in furtherance of this public policy.

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:

There is little if any burden to Defendant. He could have written words in the UR determination to the effect that "abrupt cessation of Klonopin without weaning is known to cause seizures per the FDA warnings" or copied and pasted them from the FDA's warnings with a couple of keystrokes. The community, which is composed of non-experts, must be protected from wrongful conduct by licensed health care professionals who have expert knowledge that this is dangerous and an extreme departure of care.

Against this, Defendant may claim that to make this ruling would force these UR doctors to give such warnings in every case or they would not know in which cases to give such a warning, and this is unduly burdensome.

However, as *Rowland* supra, *Tarasoff* supra, and *Kesner* supra make clear, foreseeability of harm is a case by case analysis, and a ruling against the Defendant UR doctor would not be a blanket ruling. In the case of Klonopin, such a warning is mandatory as supported by the FDA's warning, by the actual harm the failure to warn caused the Plaintiff, and by the Accusation filed by the MBC against Defendant for gross negligence and repeated negligence, and extreme departure of the standard of care.

The availability, cost, and prevalence of insurance for the risk involved:

Defendant claims that imposing liability would make insurance nearly unavailable. There is nothing in the AAO showing that there is a crisis in the medical malpractice insurance market and that insurance for this risk is not available or is too costly. There is nothing in the AAO to prove that the Defendant UR doctor had no malpractice insurance or if he had none could not get it for this type of risk or the market shrunk to make it unavailable or it was too expensive.

In *Lonely Maiden Productions LLC v Golden Tree Asset Management LP* 201 Cal. App. 4th 368 (2011) at 384 the Court held that "As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.' [Citations.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived.' [Citation.] (Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1115 [75 Cal.Rptr.2d 27].)" See also California Rules of Court Rule 8.204 (a) (1) (C). Wherever there is a reference to a matter in the appellate record in a brief filed in the Court of Appeal, the reference must be supported with a citation to the volume and page number of the record where the matter appears. See *Doppes v Bentley Motors Inc.* 174 Cal. App. 4th 967 (2009)

Whether the act or omission was intended to affect the plaintiff:

As *Sandhagen* supra makes clear, UR is intended to benefit both the injured worker and the employer and as such is intended to be relied on by both and in fact was intended to affect and did affect the Plaintiff.

What is the social utility of defendant's conduct involved in the injury:

The social utility of defendant's conduct is to prevent harm and to do good to the patient. There is no social utility in permitting a healthcare professional, the Defendant UR doctor, to commit an extreme departure from the standard of care because he knew or should have known that the FDA warns that the abrupt cessation of Klonopin without weaning would likely cause seizures, and in fact seizures did occur to the Plaintiff shortly after he stopped taking Klonopin without tapering off.

To refute this, Respondents contend at RB on pages 19-21 and 23 that there must be a doctor-patient relationship and that there was none between Plaintiff and the Defendant UR doctor with the result that there is no medical malpractice, and cite *Keene v Wiggins* 69 Cal. App. 3rd 308 (1977) and *Felton v Schaeffer* 229 Cal. App. 3rd 229 (1991).

In *Keene* supra, the employer in a Workers Compensation case hired a party advocate doctor to rate the disability and intended to use this party advocate doctor's report as its expert witness' report to promote its defense which was not evidence for use by the injured worker. The Court in *Felton* supra reviewed the circumstances of a doctor hired by the employer to perform a pre-employment physical which was only of benefit to the employer, as was the case in *Keene* supra, and which is unlike the Defendant UR doctor who according to *Sandhagen* supra performs a function and benefit for both.

These cases have not been followed in later cases in California and across the country. In *Mero v Sadoff* 31 Cal. App. 4th 1466 (1995), in which the Court of Appeals reversed an order granting summary judgment for an injury which occurred during an medical examination in a Workers Compensation case because there was no doctor-patient relationship, the Court held at 1477-1478:

"To determine whether California should, as other jurisdictions have, adopt the principles set forth in *Keene* and *Felton* as dicta, that in the absence of a physician-patient relationship a physician still owes an examinee the duty to conduct the examination in a manner which does not injure the examinee, the considerations set forth in Rowland v. Christian, supra, 69 Cal.2d at page 113, 70 Cal. Rptr. 97, 443 P.2d 561 provide guidance. (Keene v. Wiggins, supra, 69 Cal.App.3d at p. 312, 138 Cal. Rptr. 3.) These are: '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.' (Rowland, supra, 69 Cal.2d at p. 113, 70 Cal. Rptr. 97, 443 P.2d 561.)

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.
>
> All the Rowland considerations support the imposition of liability in the situation at issue. The old maxim, "[f]or every wrong there is a remedy" (Civ. Code, § 3523), also supports the imposition of liability. Accordingly, we hold that even in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself. (Felton v. Schaeffer, supra, 229 Cal.App.3d at p. 235, 279 Cal. Rptr. 713; Keene v. Wiggins, supra, 69 Cal.App.3d at p. 313, 138 Cal. Rptr. 3.)
>
> In the instant case, the trial court granted summary judgment, in part, on the ground there was no physician-patient relationship between defendant and plaintiff, so defendant could not be held liable for injuries incurred by plaintiff during his examination of her. This was error."

In *Mero* supra at 1472-1473, the Court also covered the question of whether *Keene* supra requires a doctor-patient relationship or that those statements in the case were mere dicta and if so whether they should be rejected and stated "(i)nasmuch as neither Keene nor Felton involved injuries incurred during the examination, as does the instant case, their statements

that a physician may be held liable for medical malpractice for such injuries to an examinee even in the absence of a physician-patient relationship are dicta, without force as precedent. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753–755.) As noted by Witkin, however, "[t]o say that dicta are not controlling ... does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed." (*Id.*, § 785, p. 756; accord, Smith v. County of Los Angeles (1989) 214 Cal.App.3d 266, 297, 262 Cal. Rptr. 754, review den. Dec. 13, 1989; Bunch v. Coachella Valley Water Dist. (1989) 214 Cal.App.3d 203, 212, 262 Cal. Rptr. 513, review den. Dec. 13, 1989.)"

In its ruling, the Court in *Mero* supra found a violation of the duty of care based on the *Rowland's* supra foreseeability of harm test and did not require a doctor-patient relationship.

The necessity of a doctor-patient relationship in order to support a duty of care was rejected in *Quisenberry v Compass Vision Inc.* 618 F. Supp. 2nd 1223 (2007) and again in *S.H. v U.S.* 32 F. Supp. 3rd 1111 (2014).

In *S.H.* supra, the Court held at 1132-1133:

> "The government argues that plaintiffs cannot establish the first element of their claim because Ms. Holt was not a patient of Dr. Stahlman, and therefore he did not owe her any duty. The government is correct that an 'essential element' of plaintiffs' lawsuit is 'the establishment of a duty owed to [Ms. Holt] by the physician.' Keene v. Wiggins, 69 Cal.App.3d 308, 312, 138 Cal. Rptr. 3 (4th Dist.1977). The government next argues that the only way to establish this duty in a medical malpractice case is through the physician-patient privilege, citing

Keene. *Keene* expressly does not stand for this proposition when it comes to California law:

> It is well established by authorities in *other states* the physician is liable for malpractice or negligence only where there is a relationship of physician-patient as a result of a contract, express or implied.
>
> Keene, 69 Cal.App.3d at 313, 138 Cal. Rptr. 3 (emphasis added). *Keene* goes on to state:
>
> In California, however, the courts have not used status alone as a means of determining liability.
>
> Keene, 69 Cal.App.3d at 313, 138 Cal. Rptr. 3. Rather, under California law:
>
> The fundamental principle is all persons are required to use ordinary care to prevent others being injured as a result of their conduct and any departure from this principle involves the balancing of a number of considerations, namely (the Rowland foreseeability of harm factors)....
>
> Keene, 69 Cal.App.3d at 312, 138 Cal. Rptr. 3 (citing Rowland v. Christian, 69 Cal.2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561 (1968)). A final factor to be considered is 'the extent to which the transaction was intended to affect the plaintiff.' Keene, 69 Cal.App.3d at 312, 138 Cal. Rptr. 3 (citing Biakanja v. Irving, 49 Cal.2d 647, 650, 320 P.2d 16 (1958))."

Finally, the Supreme Court of New Jersey reviewed the state of the law in different jurisdictions in an excellent and thorough rendition of them concerning whether a doctor-patient relationship was essential to maintain a duty of care in Reed v Bojarski 166 N.J. 89, 764 A. 2nd 433 (2001), and held it was not such a requirement but one factor to be used, and criticized Felton supra. The Court started the Opinion with this:

> "The requirement of a physician's examination as a condition of employment, often paid for by the prospective employer, is not uncommon. This case focuses on the

> responsibility of a physician in such circumstances. More particularly, we are confronted with the question whether a physician, performing a pre-employment screening, who determines that the patient has a potentially serious medical condition, can omit informing the patient and delegate by contract to the referring agency the responsibility of notification. The answer is no."

In *Reed* supra, the Court based its decision on the foreseeability of harm and the state's police power. It should be noted that in *Reed* supra there were regulations governing the Board of Medical Examiners requiring the medical doctors to inform the patients of any serious conditions.

But the Court did not limit its holding to this as its sole basis for its decision, and that should not serve to allege the case is distinguished from this one.

The Court ended by holding:

> *"Despite their ties to a third party, the responsibilities of [industry employed physicians] and [independent medical examiners] are in some basic respects very similar to those of other physicians.*
>
> ....
>
> *The physician has a responsibility to inform the patient about important health information abnormalities that he or she discovers during the course of the examination. In addition, the physician should ensure to the extent possible that the patient understands the problem or diagnosis. Furthermore, when appropriate, the physician should suggest that the patient seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care.*
>
> [Council on Ethical and Judicial Affairs, American Medical Association, Opinion E-10.03 (AMA opinion), *Patient-Physician Relationship in the Context of Work-Related and*

Independent Medical Examinations, Current Opinions, issued Dec. 1999, based on report *Patient Physician Relationship in the Context of Work-Related and Independent Medical Examinations,* adopted June 1999 (Emphasis added).]"

In summary, the question of whether a doctor-patient relationship was present and if not was the absence dispositive can be answered that in the case of the Defendant UR doctor (licensed in California as a medical doctor; performs a diagnosis of Plaintiff pursuant to Business and Professions Code §2052; certifies the abrupt cessation of Klonopin without a period of weaning and without warning of the serious and deadly consequences of such abrupt cessation; and which the MBC has decided constitutes the practice of medicine), there was a doctor-patient relationship and whether it was present or absent is but one factor in the foreseeability of harm and duty of care analysis.

II. THE EXCLUSIVE REMEDY OF WORKERS COMPENSATION DOES NOT BAR THIS MEDICAL MALPRACTICE ACTION AGAINST THE UTILIZATION REVIEW DOCTOR

Respondent's claims that the exclusive remedy applies in this case and thus bars recovery, contained in RB on pages 8-17, fails to employ the proper test and application of this test to the facts, and would result in terrible public policy of shifting the costs of the negligence of the Defendant UR doctor onto the Workers Compensation system which is already too burden as noted in *Sandhagen* supra for this unnecessary and inappropriate shifting to be absorbed.

The proper test of whether or not exclusivity bars recovery was decided by the Court of Appeals below in this case before the Supreme Court as follows: "Based on the [foregoing] statutory language, California courts have held workers' compensation proceedings to be the exclusive remedy for

certain ... claims deemed collateral to or derivative of the employee's injury." (Snyder v. Michael's Stores, Inc. (1997) 16 Cal.4th 991, 997, 68 Cal.Rptr.2d 476, 945 P.2d 781.)... However, if a new injury arises or the prior workplace injury is aggravated, then the exclusivity provisions do not necessarily apply. (Vacanti[7], supra, 24 Cal.4th at pp. 813–814, 102 Cal.Rptr.2d 562, 14 P.3d 234.)"

The Court then held that a duty to warn was not collateral to or derivative of the employee's injury.

It has long been the law in California that an injured worker can maintain a malpractice action against a physician, and breaching a duty to warn which constitutes an extreme departure from the standard of care falls within that cause of action. See Witkin, Summary of California Law Tenth Edition, Chapter III Workers' Compensation III. Exceptions, Distinctions, and Permissible Actions, D. Other Permissible Actions. 1. [§104] Action Against Physician for Malpractice.

These are the pertinent facts and factors supporting the duty to warn as not collateral to or derivative of the industrial injury. The failure to warn of the adverse and serious consequences of the abrupt cessation of Klonopin without weaning is not the same injury as the industrial injury in this case; it occurred years later and was an extreme departure from the standard of care which the Defendant UR doctor should not have done. The Defendant UR doctor was involved in the practice of medicine, as determined by the MBC, and evaluated and rendered a diagnosis of the Plaintiff in accordance with his license to practice medicine. The Defendant UR doctor is not a party to the WCAB case or a "party in interest" as a medical provider lien claimant under *Vacanti* supra nor is the Defendant UR doctor an agent or employee of

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[7] *Charles J. Vacanti M.D. Inc. v State Compensation Insurance Fund* 24 Cal. 4th 800 (2001)

the employer or the insurer (or its claims adjuster or third party administrator) or hired and paid as one or an alter ego of the employer or insurer or under the control or direction of the employer or insurer since under 8 CCR §9792.6-9792.15 the utilization review organization (URO) and the Defendant UR doctor are independent of the parties and under *Sandhagen* supra the Defendant UR doctor is supposed to provide a benefit to both and is thus neutral.

Respondent's other claim, appearing on RB on pages 16-17, is that the Defendant UR doctor is not a treating doctor and did not perform face-to-face evaluation. Supposedly this must imply that he is not practicing medicine in relation to the Plaintiff. That is not true. Under Business and Professions Code §2052, the practice of medicine includes "diagnosis" as was performed by the Defendant UR doctor, and on this and that UR constitutes the practice of medicine the MBC has filed an Accusation against the Defendant UR doctor for gross negligence and repeated negligence in the extreme departure from the standard of care.

Despite this, Respondents make the dubious argument that the Defendant UR doctor is considered a part of the employer in the wording of Labor Code §4610.5 and §4610.6 on pages 3 and 10 of the RB. Specifically, Respondent contends that under §4610.5 (c) (4) a utilization review organization is included within the definition of "employer."

However, that view is wrong and violates the plain meaning rule of statutory construction under *California Insurance Guarantee Association v WCAB (Oracle Imaging)* 203 Cal. App. 4th 1328 (2012) at 1338 because §4610.5 (c) (4) is specifically limited by its express terms to subsection (c) of §4610.5 which provides: "(f)or purposes of this section and Section 4610.6, the following definitions apply..." meaning to §4610.5 and to §4610.6 only without expanding this definition to include other sections of

the Labor Code or is for all purposes including for the purpose set forth in Labor Code §3600 et seq which is left out of this definition.

There is nothing about these words which is ambiguous or subject to more than one reasonable interpretation or taken out of context or violates public policy. On the contrary, adding a URO to the definition of "employer" would violate the fundamental public policy set forth in 8 CCR §9792.6-9792.15 that UR is supposed to be independent of the parties and stakeholders, and is not a party advocate.

The reality is far different from the claims made by Respondent. The UR standards are set forth in 8 CCR §9792.6-9792.15. Under these subsections, the claims adjuster contracts with a URO to perform UR and must file a UR plan which must be approved by Administrative Director (who is within the Division of Workers Compensation of the Department of Industrial Relations), with review and oversight by the Medical Director who works under the Administrative Director. See §9792.7 (c). Recently and in response to claims that there were improper referrals of medical business, Senate Bill 1160 which was enacted into law prohibits any referrals because of UR. Thus the URO was and still is intended to be neutral and not operate as an agent or employee or part of any party in the Workers Compensation system.

Thus, the exclusive remedy does not bar recovery.

CONCLUSION

It is respectfully requested that the Supreme Court grant Appellant's Appeal.

Dated: February 24, 2017

Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK

By: _____

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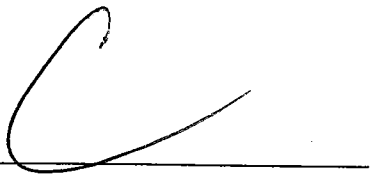
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of *Amicus Curiae* is produced using Roman type including footnotes and contains 7176 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 24, 2017

By: 

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PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the State of New York, County of New York. I am over the age of 18 and not a party to the within action. My business address is 7 West 36th Street, New York, New York 10018.

On February 24, 2017 I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and [PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY, INC. IN SUPPORT OF PLAINTIFFS AND APPELLANTS KIRK KING and SARA KING** on the interested parties in this action

I caused the above document(s) to be served on each person on the attached list by the following means:

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Alina Tsesarsky

Alina Tsesarsky

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