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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAFEWAY, INC.,

Petitioner and Defendant,

v.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

KATHLEEN HARDIN and DANE HARDIN,

Real Parties in Interest and Plaintiffs

REAL PARTIES IN INTEREST KATHLEEN HARDIN'S AND DANE HARDIN'S PETITION FOR REVIEW

After a Decision by the Court of Appeal,
First Appellate District, Division Three
Case No. A141505

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ISSUE PRESENTED

Whether the court may consider the purpose of a health care provider's alleged act or omission in distinguishing ordinary negligence from an injury that is "directly related to the professional services provided by a health care provider acting in its capacity as such." (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal. 4th 181, 191, 192.)

STATEMENT OF THE CASE

This case involves a corporate policy adopted by a nationwide grocery and pharmacy chain for the purpose of reducing costs by limiting to one page the prescription drug warnings given to all consumers about all medications. The Court of Appeal held that the action against Safeway, Inc. asserted only professional negligence and was therefore barred by the statute of limitations set out in Code of Civil Procedure section 340.5,

enacted as part of the Medical Injury Compensation Reform Act of 1975 ("MICRA").

Plaintiff and Real Party in Interest Kathleen Hardin suffered serious and permanent injuries from burn-like rashes after she took the prescription drug Lamotrigine. Mrs. Hardin received an abbreviated one-page monograph from Safeway, Inc. that listed apparently benign side effects but failed to warn of serious, fatal or life-threatening rashes. In the trial court, rather than defend this conduct, Safeway, Inc. moved for summary judgment based on the statute of limitations. The trial court denied Safeway, Inc.'s motion based on this Court's decision in *Central Pathology, supra.*

The Court of Appeal in an unpublished decision issued June 19, 2014 reversed, holding that "Safeway's corporate decision-making" was professional negligence subject to MICRA protections. In the same unpublished decision, the Court of Appeal held that the professional negligence claims against Safeway, Inc. and Mrs. Hardin's physician and medical group were not timely under the delayed discovery provision of Code of Civil Procedure section 340.5. Plaintiffs do not seek review of the rulings as to delayed discovery. No petition for rehearing was filed.

On June 19, 2014, the Court of Appeal also issued a published decision in the same case, *Hardin v. PDX, Inc.* (2014) 227 Cal. App. 4th 159 (hereinafter, "*PDX*"), which affirmed the trial court's denial of an anti-SLAPP special motion to strike. This petition refers to the *PDX* decision because the factual background of that appeal and this petition overlap.

WHY REVIEW SHOULD BE GRANTED

This case presents a new twist on a question that courts have grappled with since MICRA was enacted: Where does the boundary lie between ordinary and professional negligence for purposes of applying the provisions of MICRA? The same question is before the Court in *Flores v. Presbyterian Intercommunity Hospital*, Case No. S209836, where the issue is whether an injury caused by negligent maintenance of a hospital bed is ordinary or professional negligence for purposes of MICRA. More particularly, the present case poses the question: in what circumstances would the purpose of the negligent act or omission be relevant to determining that boundary?

This Court in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal. 4th 181 explained that if a claim is

> for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, then the action is one "arising out of the professional negligence of a health care provider[.]"

(*Id.* at pp. 191-192.) Similarly, the Court in *Central Pathology* quoted the statutory definition used in several MICRA provisions:

> "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, . . . provided that such services are within the scope of services for which the provider is licensed . . . .

(*Id.* at 187 [quoting Civil Code § 3333.2, subd. (c)(2)].)

Based on this judicial and statutory language, some appellate courts (as well as the trial court in this case) have held that the purpose of a defendant's conduct was relevant to determining whether the cause of

action was subject to MICRA's provisions. For example, in *So v. Shin* (2013) 212 Cal. App. 4th 652, 667, the court held that the doctor's misconduct was not professional negligence as defined by MICRA because the doctor "acted for her own benefit, to forestall an embarrassing report that might damage her professional reputation—not for the benefit of her patient." Similarly, the trial court in this case concluded that there was a triable issue of fact as to whether the decision to limit the length of drug warnings "was a business decision completely unrelated to providing professional services as a health care provider." (Safeway Exs., vol. 3, 674; *Safeway, Inc. v. Superior Court*, Case No. A141505, [hereinafter "*Slip op.*"] at p. 7.)

The Court of Appeal in this case concluded that the purpose of the conduct was irrelevant and that the "failure to warn Hardin of the dangers associated with Lamotrigine cannot be fairly characterized as anything other than professional negligence." (*Slip op.* at p.15.) The Court of Appeal rejected the trial court's "bifurcation of the claims against Safeway into claims of professional negligence rooted in malpractice and ordinary negligence, rooted in Safeway's corporate decision-making." (*Slip op.* at p. 14.) The appellate court relied on cases in which the asserted negligence occurred in a hospital or doctor's office during the course of treatment of plaintiff. Such cases are fundamentally different from the facts of this case. Here, the alleged negligence did not occur at a health care facility. It occurred at Safeway, Inc.'s corporate headquarters long before Mrs. Hardin was injured and far from her local pharmacy.

The evidence in the trial court showed that the pharmacist who filled Mrs. Hardin's prescription had no role in deciding the content of the

monograph. It was undisputed that the pharmacist's role was limited to pushing a button that caused the monograph to print. The content of the monograph – and of importance here, what it omitted – was dictated by a corporate policy to use less paper and shorten monographs. This decision was made by executives who had no role in dispensing Mrs. Hardin's prescription and were unaware of the contents of the Lamotrigine monograph until this lawsuit was filed.

As a result of the appellate decisions in this case, the software company, PDX, Inc., may be held liable for its alleged negligence in modifying its software (at the request of Safeway, Inc.) to produce only abbreviated drug monographs. Safeway, Inc., however, may not be held liable for its own similar conduct, namely using PDX's software that it knew and intended would produce monographs that omitted drug warnings for all of its pharmacy customers nationwide.

This Court should grant review to provide guidance as to whether the purpose of the conduct – whether to deter a patient from complaining about care (as in *So*, *supra*) or to improve profits (as in this case) – may be relevant and important to the determination of whether negligent conduct was "directly related to the professional services provided by the health care provider acting in its capacity as such."

BACKGROUND

A. The Drug Information that Safeway, Inc. Provided to Mrs. Hardin Did Not Warn Her of the Serious Risks Associated with Lamotrigine.

Plaintiff Kathleen Hardin worked full-time as the librarian in charge of the slide collection at the University of California, Santa Cruz until she was stricken by the disabling and disfiguring injuries that are the subject of this litigation. (Safeway Exs., vol. 2, 225.) On March 31, 2010, Mrs.

Hardin's primary care physician prescribed a new medication, Lamotrigine, for depression. (Safeway Exs., vol. 2, 228-229, 287.) Her doctor did not tell Mrs. Hardin about the potential risks or side effects associated with the drug. (Safeway Exs., vol. 2, 231-232, 251, 439-441.)

After her check-up, Mrs. Hardin went to a Safeway Pharmacy in Santa Cruz to fill the Lamotrigine prescription. (Safeway Exs., vol. 2, 235, 306; Safeway Pet. ¶ 6.) With her prescription she received a one-page computer print-out (referred to as a monograph) that had the Safeway, Inc. name and logo and that also included her name and other personal information. She received no other written material about the prescription, and the Safeway pharmacist did not orally provide any information or warnings about Lamotrigine. (Safeway Exs., vol. 2, 235, 237, 263, 270, 306.)

Before taking Lamotrigine, Mrs. Hardin read the monograph and believed it contained the information she needed to know about the drug. (Safeway Exs., vol. 2, 237-239, 265-266.) The monograph that Safeway printed for Mrs. Hardin mentioned some side effects, such as allergic reactions, that sounded "benign" to Mrs. Hardin. (Safeway Exs., vol. 2, 306; Safeway Pet. ¶ 9.) The monograph she received did not mention Stevens-Johnson Syndrome (SJS), Toxic Epidermal Necrolysis (TENs), serious rashes, fatal rashes, or rashes that could become life threatening even if the medication were stopped. (Safeway Exs., vol. 2, 306, Safeway Pet. ¶ 10.) Mrs. Hardin began taking Lamotrigine on April 2, 2010. (Safeway Exs., vol. 2, 242, 288.)

B. Three Weeks After Starting the Drug, Mrs. Hardin Was Hospitalized with a Severe Case of Stevens-Johnson Syndrome Caused by Lamotrigine.

On April 25, 2010, Mrs. Hardin began to experience a general feeling of malaise. (Safeway Exs., vol. 2, 311.) The next day, Mrs. Hardin remembered calling in to tell work she was not feeling well. The next thing she remembered was waking up in the hospital in June 2010. (Safeway Exs., vol. 2, 275, 285-286.) She had been diagnosed with SJS and TENs and had spent more than a month in a coma while these conditions caused her internal organs to fail. (Safeway Exs., vol. 2, 275.) When Mrs. Hardin came out of the coma, she underwent rehabilitation, including speech therapy, physical therapy, occupational therapy and wound treatment. (Safeway Exs., vol. 2, 255.) She remained hospitalized until July 16, 2010. (Safeway Exs., vol. 2, 256.) Due to severe scar damage to her eyes, including perforation and melting of her cornea, she could only sense lightness and darkness. (Safeway Exs., vol. 2, 254, 258.)

C. Safeway, Inc. Corporate Headquarters Decided to Modify Its Software so that the Safeway Pharmacies Would Only Print Abbreviated Monographs.

Drug monographs "are produced as part of a self-regulating action plan required under public law as approved by the Secretary of the United States Department of Health and Human Services." (*PDX, supra,* 227 Cal. App. 4th at p.162.) After this statute[1] was enacted, a committee of pharmacists, physicians, pharmaceutical companies, industry associations and consumer advocates drafted and issued the "Action Plan for the Provision of Useful Prescription Medicine Information" ("Action Plan" or "Keystone Criteria"). (Safeway Exs., vol. 2, 447-478.) "The goals [of the

[1] Pub. L. No. 104-180 (Aug. 6, 1996) 110 Stat. 1593.

Keystone Criteria] were to improve the quality of information, and ***thereby reduce injury***." (Safeway Exs., vol. 2, 391.)

The monograph for each drug was divided into standardized sections. (Safeway Exs., vol. 2, 389-390.) In 1997, three additional sections were added to the five standard sections previously included in each drug monograph. The three new sections had the headings: "Before Using This Medicine," "Overdose," and "Additional Information." (Safeway Exs., vol. 2, 390.) "The 'Before Using This Medication' section contains warnings about taking the drug that may include warnings about drug interactions or complications due to coexisting medical conditions." (*PDX, supra,* 227 Cal. App. 4th at p.163.)

Safeway, Inc. used software created by PDX, Inc. to assemble and automatically print monographs and labels for pharmacy customers throughout North America. (*Id.* at pp.162-163.) When any Safeway Pharmacy filled a prescription, the pharmacist would hit a button and the PDX software automatically printed the monograph attached to a label with the customer's personal information. (Safeway Exs., vol. 2, 323-325.) The monograph was given to the customer along with his or her prescription. (Safeway Exs., vol. 2, 323.)

From 1997 until 2005, PDX software allowed Safeway, Inc. the option of printing an abbreviated version of the drug monograph that omitted the three sections that had been added in 1997, including the "Before Using This Medicine" section. (*Ibid.*) In June 2004, PDX urged its customers (including Safeway, Inc.) to "PRINT ALL MONOGRAPH SECTIONS" in order to comply with the Keystone Criteria. (Safeway Exs., vol. 2, 403). On December 17, 2004, PDX sent its customers (including

Safeway, Inc.) a memorandum stating that in order to comply with the Action Plan, PDX was going to eliminate the option of printing abbreviated monographs. With the new version of the software, the complete eight-section monograph "will always print." (Safeway Exs., vol. 2, 391, 405.)

PDX informed Safeway and other customers: "Using the abbreviated option does not comply with the content requirements of the Keystone Criteria." (Safeway Exs., vol. 2, 405.) At the same time, PDX warned "this will require additional space for the monographs being printed and may result in a higher incidence of two page monographs." (*Ibid.*) In 2005, the PDX software update took effect and Safeway, Inc. was temporarily compelled to print complete monographs for all drugs and all customers. (Safeway Exs., vol. 2, 391.)

In 2006, after PDX made printing all eight sections mandatory, a corporate representative of Safeway contacted PDX to request that the company revise the software so that Safeway could again print the five section monographs as before. (*PDX*, *supra*, 227 Cal. App. 4th at p. 163.) PDX and Safeway, Inc. entered into a written contract on November 29, 2006, providing that PDX would modify the software for Safeway, Inc. to print the abbreviated five-section monographs for all medications and all customers. (Safeway Exs., vol. 2, 392, 407-410.) As stated by Safeway, Inc.'s Manager of Business Applications, Spencer Dowell (who signed the contract with PDX): the software company "provided a solution" to the problem of longer monographs. (Safeway Exs., vol. 2, 326.)

The contract between PDX and Safeway, Inc. acknowledged that PDX had updated its software in 2005 to print only eight-section monographs "to assist in complying with [the] requirements" of the Action

Plan. (Safeway Exs., vol. 2, 407.) In addition, PDX and Safeway, Inc. agreed that the purpose of the Action Plan was to provide information to consumers to enable them "to use the medication properly and appropriately, receive the maximum benefit ***and avoid harm.***" (*Ibid.*) The contract also included a provision by which Safeway, Inc. agreed to indemnify PDX for any claims that might arise from the shortening of any monograph. (*PDX, supra,* 227 Cal. App. 4th at p.163.)

Lamotrigine had a known risk of SJS, TENs, and fatal rashes, but the "abbreviated warning utilized by Safeway and provided to Hardin omitted what is referred to as the 'Black Box' warning . . . that stated: 'SERIOUS AND SOMETIMES FATAL RASHES HAVE OCCURRED RARELY WITH THE USE OF THIS MEDICINE.'" (*PDX, supra*, 227 Cal. App. 4th at p.163.) A black box warning (also called a "boxed warning") was the strongest warning that the FDA could require. It meant that medical studies showed a significant risk of serious or life-threatening adverse effects from the drug. (21 C.F.R. § 201.57 (c)(1).)

D. The Decision to Use Abbreviated Monographs Was Made by the Safeway, Inc. Corporate Executive Responsible for the Profitability of the Pharmacies Nationwide.

Safeway, Inc. conceded that the decision to shorten the monographs was made in 2006 by David Fong at Safeway, Inc.'s corporate office. (Safeway Exs., vol. 1, 36; Safeway Exs., vol. 2, 332.) From 2005 to 2010, Mr. Fong held the titles of "Senior Vice President and GM, Pharmacy, Health and Wellness" and "Senior Vice President of Pharmacy." (Safeway Exs., vol. 2, 371.) He oversaw 1,200 pharmacies in the U.S. and Canada. (Safeway Exs., vol. 2, 348.)

Mr. Fong was responsible for the profitability of the business unit called "Pharmacy." (Safeway Exs., vol. 2, 345.) A written job description stated that the Safeway, Inc. senior VP/GM of pharmacy was "responsible for increasing shareholder value," and the incumbent should "[c]ontinually develop ways to measure, define, interpret, and report on department metrics including wage controls, sales margin, department net gain and work to optimize program efficiencies (Six Sigma Lean certification) and increased performance." (Safeway Exs. vol. 2, at 384.) He reviewed financial statements to identify contributors to the overall profitability of the pharmacy business unit, and determine where Safeway, Inc. could "optimize" sales and/or reduce costs. (Safeway Exs., vol. 2, 345-347, 356.) He tracked expenditures on accounting reports. (Safeway Exs., vol. 2, 366.) In order to increase profits, Mr. Fong considered expenditures such as salaries of pharmacy personnel, lights in the building, technology, and importantly, supplies, which included vials, prescription labels, and printer paper. (Safeway Exs., vol. 2, 358-359.)

Mr. Fong never worked filling prescriptions behind the counter at a Safeway Pharmacy. (Safeway Exs., vol. 2, 360, 349.) Mr. Fong did not dispense medications, medication labels, or product information to customers. (Safeway Exs., vol. 2, 344, 349.) Nor did Mr. Fong perform any other work of a pharmacist, and his position did not require him to be a licensed pharmacist (although he was one). (Safeway Exs., vol. 2, 331, 333, 378.)

Mr. Fong also did not oversee how the Safeway pharmacies provided information to customers or attempt to ensure that information provided to customers was complete and accurate. He relied on

manufacturers to do so. He never read any of the monographs printed for Safeway customers using PDX software. (Safeway Exs., vol. 2, 363-365.) He also did not recall ever having gone to a pharmacy to have someone show him how the PDX software worked. (Safeway Exs., vol. 2, 353-354.) After leaving his position at Safeway, Inc., Mr. Fong eventually went to work for PDX. (Safeway Exs., vol. 2, 371.)

Spencer Dowell, Safeway, Inc.'s Manager of Business Applications, implemented the decision by Mr. Fong to shorten all drug monographs. Before this lawsuit was filed, Mr. Dowell had never reviewed a Lamotrigine monograph. (Safeway Exs., vol. 2, 323.)

In the trial court, Safeway, Inc. provided no evidence in its moving papers that the decision by Mr. Fong to modify the PDX software and shorten all monographs for all drugs was based on any consideration related to the rendering of healthcare services to pharmacy customers. Safeway, Inc., merely contended that the 2006 policy decision "to use the form of monograph received by Plaintiff Kathleen Hardin was made by two licensed Safeway pharmacists [Mr. Fong and Mr. Dowell] within Safeway's Pharmacy Division" (Safeway Exs., vol. 1, 206.)

LEGAL DISCUSSION

THE PURPOSE OF A HEALTH CARE PROVIDER'S ACT OR OMISSION MAY BE HIGHLY RELEVANT TO WHETHER THE CONDUCT WAS ORDINARY OR PROFESSIONAL NEGLIGENCE.

The trial court in this case held that there were disputed facts as to whether the MICRA statute of limitations applied to Safeway, Inc.'s omission of FDA-approved warnings from its Lamotrigine monograph. As the trial court ruled, a pharmacy "might be considered a health care provider pursuant to MICRA in some circumstances [but] the court does not find that [Safeway, Inc.] is a health care provider for purposes of

MICRA under all circumstances." (Safeway Exs., vol. 3, 673.) In other words, "not every act of negligence by a professional is an act of professional negligence, even where the victim is a client[.]" (*Bellamy v. Appellate Dep't* (1996) 50 Cal. App. 4th 797, 803 [quoting *Murillo v. Good Samaritan Hospital* (1979) 99 Cal. App. 3d 50, 56].)

The Court of Appeal did not conclude that a negligent act that injured a patient must necessarily be professional negligence. But it held that the trial court had erred in considering the reason for the conduct, whether based on business or medical concerns. The appellate court analogized Mrs. Hardin's claim to cases involving negligent or unintentional conduct during treatment, such as the hypothetical "bump of a janitor's broom" that may have disconnected a hospital ventilator[2] or the failure to secure a patient to a bed while taking an x-ray.[3] In these cases, it was fairly obvious that the defendants were rendering *some* service to plaintiff at the time of the injury. But were they *professional* services? The courts in those cases decided that they were.

The claim against Safeway, Inc. is different. In this case, the negligent conduct – adopting a policy (implemented with the participation of PDX, Inc.) to reduce paper use by printing only five-out-of-eight monograph sections – occurred years before plaintiff's injury, in a different location, and involved actors who had no knowledge of Mrs. Hardin or Lamotrigine before this lawsuit. When he made the decision in 2006, Mr. Fong was not providing services to any pharmacy customer. To determine

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[2] *Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1432.

[3] *Bellamy*, *supra*, 50 Cal. App 4th at 808.

whether this decision related to the "rendering of professional services," it is logical and necessary to consider the purpose of the underlying conduct.

As the trial court ruled, Safeway's motion failed because "triable issues of fact exist as to whether these actions were 'directly related to the professional services provided by a health care provider acting in its capacity as such.'" (Safeway Exs., vol. 3, 674 [quoting *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal. 4th 181, 191].)

Other cases have considered purpose or motive to decide this question. For example, when an anesthesiologist, motivated by her self-interest, threatened a patient to deter her from reporting negligent medical care, the doctor was not "rendering professional services" that were subject to MICRA. (*So v. Shin* (2013) 212 Cal. App. 4th 652.) Similarly, when a doctor motivated by his own gratification had sexual relations with a patient during treatment, that was not deemed the rendering of professional services and did not give rise to a claim for professional negligence. (*Atienza v. Taub* (1987) 194 Cal.App.3d 388, 392-394.)

In this case there are triable issues of fact as to whether Safeway, Inc. modified its software for the purpose of rendering professional services or to improve its bottom line by using less printer paper.

A. Safeway, Inc. Failed to Establish as a Matter of Law an Essential Element of its Statute of Limitations Defense.

The MICRA statute of limitations under Code of Civil Procedure section 340.5 applies if the claim is for the "rendering of professional services . . . for which the provider is licensed." (Code Civ. Proc. § 340.5.) Safeway, Inc. did not carry its burden of establishing this element. Safeway, Inc. did not modify its software to omit important drug warnings in the "rendering of professional services . . . for which [it] is licensed." To

the contrary, the record suggests that Safeway, Inc.'s purpose in omitting the warnings and printing shorter monographs was to improve profits.[4]

B. *So v. Shin* Recognized that the Purpose Underlying a Health Care Provider's Conduct Was Relevant to Determining Whether the Claim Involved Ordinary vs. Professional Negligence.

Case law has recognized that misconduct by a health care provider is not necessarily professional negligence, even when the misconduct occurs over the same period of time that medical services are provided. Rather, professional negligence may only arise from conduct that is "for the purpose of delivering medical care to a patient." (*So v. Shin* (2013) 212 Cal. App. 4th 652, 666-67.) "[T]ortious actions undertaken for a different purpose . . . are not" professional negligence. (*Id.*) In this case, too, considering the reason for the software modification would be relevant to determining whether the conduct was for the purpose of rendering professional services or was an ordinary and usual part of a pharmacist's services.

In *So*, the defendant administered anesthesia to plaintiff during a dilation and curettage procedure. As a result of insufficient anesthesia, plaintiff woke up with pain and discomfort during the procedure. (*Id.* at p.657.) After the procedure, while still in the recovery room, plaintiff asked Dr. Shin why she had woken up during the procedure. Dr. Shin became upset, shoved a container holding plaintiff's blood and tissue at her, and told her not to tell anyone that she had woken up. (*Id.* at p.657-658.)

[4] Section 340.5 also requires that the defendant be a "health care provider" licensed or certified under California law. Safeway, Inc. also failed to produce uncontested evidence that its corporate headquarters was – or under the law, could be – licensed by the State Board of Pharmacy.

In considering whether plaintiff's claim against the anesthesiologist was "professional negligence" for purposes of the statute of limitations, the court in *So* stated that physician misconduct is "not necessarily professional negligence—even where, as here, the misconduct occurs 'over the same period of time' that medical services are provided." (*Id.* at p.666.)

> Rather, professional negligence is only that negligent conduct engaged in for the purpose of (or the purported purpose of) delivering health care to a patient—or, in the words of our Supreme Court in *Central Pathology*, conduct "directly related to the professional services provided by a health care provider acting in its capacity as such" and that "is an ordinary and usual part of medical professional services." (*Id.* at pp.666-667.)

For example, the Court noted, "tortious actions undertaken . . . for the physician's sexual gratification—are not" acts for the purpose of delivering health care. (*Id.* at pp.667-668 [citing *Atienza v. Taub* (1987) 194 Cal.App.3d 388].) Similarly, the *So* Court concluded that Dr. Shin's conduct was not for the purpose of rendering health care:

> In the present case, plaintiff alleges that Dr. Shin engaged in the alleged tortious conduct for the purpose of persuading plaintiff not to report to the hospital or medical group that plaintiff had awakened during surgery. In other words, plaintiff alleges that Dr. Shin acted for her own benefit, to forestall an embarrassing report that might damage her professional reputation — *not* for the benefit of her patient. (*Id.* at p.667.)

The only evidence Safeway submitted with its moving papers in support of its contention that the software modification was for the purpose of rendering professional services was the fact that Mr. Fong was a licensed pharmacist. (Safeway Exs., vol. 1, 206.) That is irrelevant. Mr. Fong's position as the executive overseeing all Safeway pharmacies did not require a pharmacist license. More importantly, as *So* held, the purpose of the

conduct was determinative, not the defendant's licensure. (*So, supra,* 212 Cal. App. 4th at pp.666-667.)

Similarly, *Flores v. Natividad Medical Center* (1987) 192 Cal. App. 3d 1106 held that the licensure of the actor does not determine whether the conduct was professional negligence. *Natividad* involved both negligence claims against individual physicians and a claim under Government Code section 845.6 based on the failure by state employees – some of whom were physicians – to summon medical care. *Natividad* held that MICRA did not apply to the failure-to-summon claim because "the true nature of the action against the State" was not "one for professional negligence" simply because "fortuitously, the employees who failed to summon assistance were doctors." (*Id.* at pp. 1116-1117.) Nor was the state operating as a "health care provider" as defined in MICRA. (*Ibid.*)

It is telling that in its motion for summary judgment, Safeway presented no evidence that it considered any reason founded in medicine or patient care for this decision. It is hard to imagine that a pharmacist involved in rendering professional services to a patient would omit FDA-approved warnings of "serious and sometimes fatal rashes" from a monograph – while nonetheless providing information about less serious side effects, such as allergic reactions. As the trial court ruled: "Logically, the decision [to modify the software] does not appear to have been directly related" to the rendering of professional services. (Safeway Exs., vol. 3, 674.)

C. The Court of Appeal Relied on Factually Inapposite Cases Involving Unintentional or Accidental Conduct in the Course of Professional Treatment.

The Court of Appeal inaptly analogized Safeway's decision to modify software across its North American pharmacy business to cases involving accidental occurrences during the immediate and direct provision of health care. It did not matter in these cases whether the negligent conduct involved skilled or unskilled services or were rendered by licensed or unlicensed personnel – it was all deemed professional negligence. In those cases, the conduct was closely related – in time, place and purpose – to the provision of services to a specific plaintiff.

The cases on which the Court of Appeal relied explain that in the course of medical treatment, doctors and other professionals "perform a variety of tasks" and "[s]ome of those tasks may require a high degree of skill and judgment, but others do not." (*Bellamy, supra,* 50 Cal. App. 4th at 808.) "Each, however, is an integral part of the professional service being rendered." (*Ibid.*) Similarly, in another case the court cited, a government hospital "had a professional duty to prevent Taylor's husband from becoming separated from his ventilator, regardless of whether separation was caused by the ill-considered decision of a physician or the accidental bump of a janitor's broom." (*Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, 1432.)

These cases, however, do not resolve the issue of whether Safeway, Inc.'s corporate decision to reduce the amount of paper it used was ordinary or professional negligence. In this case, the evidence showed that the Santa Cruz Safeway Pharmacy (where Mrs. Hardin filled her prescription) and the pharmacists who worked there had no role in deciding the content of the monographs. Safeway, Inc. did not dispute that the local pharmacist's role

in producing the monograph was limited to pushing a button that caused the document to print. The content of the monograph – and of importance here, what it omitted – was dictated by a corporate policy to shorten all monographs and thereby use less paper.

It is clear that the failure to warn Mrs. Hardin was no accident. It was the result of a deliberate decision that affected customers at all 1,200 Safeway, Inc. pharmacies in North America. The appellate court decision identified nothing in the record linking this decision to the rendering of professional services to Mrs. Hardin. In order to conclude that this conduct was "inextricably interwoven" with delivering competent medical care to a patient,[5] the court in a case such as this one should consider the reason for the conduct.

D. The Court of Appeal's Reliance on *Flowers* Was Misplaced.

The Court of Appeal stated that there can be only one standard of care, and therefore Safeway cannot be liable both for ordinary negligence (based on its corporate decision to modify the software) *and* for professional negligence (based on the failure of its pharmacists to counsel and provide information to Mrs. Hardin). That is not true. As this Court has recognized, "many malpractice actions will be pursued both on MICRA and non-MICRA theories." (*Waters v. Bourhis* (1985) 40 Cal. 3d 424, 437 fn. 13.) *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992 – cited by the Court of Appeal at page 15 of the slip opinion – does not hold otherwise. In *Flowers*, the plaintiff alleged both ordinary and

[5] *See Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal. App. 3d 1034, 1051.

professional negligence based on a single omission: the failure to raise a safety rail that allowed plaintiff to fall off a gurney. The Court held that this conduct must be judged by a single legal standard. That holding has no bearing on the multiple claims in this lawsuit, which are based on distinct conduct that occurred years apart, was carried out by different Safeway employees, in different locations, and for different reasons.

E. Safeway, Inc. Had the Burden of Proof to Establish the Affirmative Defense of Statute of Limitations.

The Court of Appeal in finding that the MICRA statute of limitations barred the action erroneously applied the rule that for purposes of summary judgment, "the pleadings set the boundaries of the dispute." (*Slip op.* at p. 14.) This rule applies when the moving party seeks summary judgment on the ground that "plaintiff cannot establish at least one element of the cause of action." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853–854.) As the opposing party, the plaintiff must direct any opposition evidence toward the issues raised by the pleadings. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265.) "It is not appropriate, at that time, to raise new legal theories or claims not yet pleaded, if there has been no request for leave to amend accordingly, prior to the summary judgment proceedings." (*Ibid.*)

Safeway, Inc. did not attempt to show that the Mrs. Hardin was not injured by the negligent failure to warn her of the known risks of Lamotrigine. Instead, the motion was based on the affirmative defense of statutes of limitations. When the defendant moves for summary judgment on this basis, the defendant bears both the initial burden of production and the burden of persuasion that the limitations period has expired. (Code Civ. Proc., § 437c, subd. (p)(2).) The "initial burden of production [requires the

defendant] to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar, supra,* 25 Cal.4th at p. 850.)

The ultimate burden here was on Safeway, Inc. to show based on undisputed evidence that Code of Civil Procedure section 340.5 barred the negligence cause of action. First, however, Safeway, Inc. had to make a *prima facie* showing that the cause of action was based on the "rendering of professional services . . . for which the provider is licensed." (Code Civ. Proc. § 340.5.)

The only undisputed evidence in the record relevant to Safeway, Inc.'s affirmative defense was that (1) Mr. Fong, who happened to be a licensed pharmacist, was responsible for the corporate policy of using abbreviated monographs; and (2) the local pharmacy and pharmacist who dispensed Lamotrigine to Mrs. Hardin were also licensed. Based on the complete record, the trial court found that Safeway, Inc. had failed to meet its burden of showing through undisputed evidence that the MICRA statute of limitations applied.

CONCLUSION

This case raises issues that are important to both health care providers and patients. The Court should clarify when and how evidence of the purpose of the conduct may be relevant to distinguishing professional from ordinary negligence. This is a recurrent challenge for courts, as shown by *Flores v. Presbyterian Intercommunity Hospital,* another case now pending in this Court. For this reason, the Court should grant review of this case.

Dated: July 29, 2014

Respectfully submitted,

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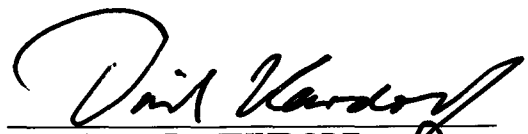
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify based on the "Word Count" feature in my Microsoft Word 2007 software, this brief contains 6,828 words including footnotes.

July 29, 2014.



DAVID B. NEWDORF

PROOF OF SERVICE

I, **RYE P. MURPHY**, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at Newdorf Legal, 220 Montgomery Street, Suite 1850, San Francisco, California 94104.

On July 29, 2014, I served the attached:

REAL PARTIES IN INTEREST KATHLEEN HARDIN'S AND DANE HARDIN'S PETITION FOR REVIEW

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

and served the named document in the manner indicated below:

☒ **BY MAIL**: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) First Class postage prepaid and addressed to the addressee(s), for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

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

Executed July 29, 2014 at San Francisco, California.

RYE P. MURPHY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SAFEWAY, INC., Petitioner, v. SUPERIOR COURT FOR THE COUNTY OF ALAMEDA, Respondent; KATHLEEN HARDIN and DANE HARDIN, Real Parties in Interest.	A141505 (Alameda County Super. Ct. No. RG11600291)
PALO ALTO FOUNDATION MEDICAL GROUP, INC., Petitioner, v. SUPERIOR COURT FOR THE COUNTY OF ALAMEDA, Respondent; KATHLEEN HARDIN and DANE HARDIN, Real Parties in Interest.	A141513 (Alameda County Super. Ct. No. RG11600291)
SHARON S. JAMIESON, M.D., Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent;	A141514 (Alameda County Super. Ct. No. RG11600291)

KATHLEEN HARDIN and DANE HARDIN,

Real Parties in Interest.

Due to side effects of a drug prescribed by her physician, real party Kathleen Hardin sustained severe and debilitating injuries. She alleged she was not warned of these potential, serious side effects of the medication by her doctor, petitioner Sharon S. Jamieson, M.D., the medical practice that employs Jamieson—petitioner Palo Alto Foundation Medical Group, Inc. [Medical Group], or by the dispensing pharmacy, petitioner Safeway, Inc. Hardin, together with her husband, real party Dane Hardin (Dane),[1] sued various defendants, including petitioners, for negligence and loss of consortium. Petitioners brought separate motions for summary judgment, based on their contention that the complaint was untimely. The superior court denied Jamieson's and the Medical Group's summary judgment motions, finding there were triable issues of fact regarding the delayed discovery by Hardin of the cause of her injuries. The court also denied Safeway's motion for summary judgment, in part, due to Hardin's delayed discovery of the cause of her injuries and, in part, because it was not established that in all relevant respects, Safeway was a health care provider pursuant to the Medical Injury Compensation Reform Act [MICRA] entitled to protection of the statute of limitations for professional negligence.

Petitioners each filed timely petitions for writ of mandate in this court. For purposes of this decision only, we consolidate these petitions because they are based on a common set of facts. There are no material disputed facts concerning the applicability of the statute of limitations. We conclude that Hardin and her

[1]For ease of reference and to avoid confusion, we will refer to Mr. Hardin by his first name. We intend no disrespect.

husband knew her injuries were caused by her adverse reaction to medication in June 2010. Her complaint was not filed within one year of her discovery and is barred by Code of Civil Procedure section 340.5. We also conclude that Safeway was acting as a health care provider in the events alleged in Hardin's complaint and entitled to the limitations period in section 340.5. We direct the superior court to vacate its orders denying summary judgment and to issue new and different orders granting the summary judgment motions in favor of each petitioner.

FACTUAL AND PROCEDURAL BACKGROUND

Hardin was generally under the care of Jamieson, her primary care physician, from sometime in 2002 through June 29, 2011. On March 31, 2010 Jamieson prescribed a new medication, Lamictal, for Hardin without discussing any of the potential risks or side effects associated with the drug. Hardin filled the prescription with Lamotrigine, the generic form of Lamictal, at a Safeway pharmacy in Santa Cruz. She received a one-page computer print-out at the pharmacy which discussed some possible side effects of the drug such as allergic reactions. The print-out did not mention Stevens-Johnson Syndrome (SJS), Toxic Epidermal Necrolysis (TENs) or other serious or life-threatening risks. The pharmacist gave Hardin no verbal or supplemental warnings other than the computer print-out. Hardin began taking 25 milligrams per day on April 2, 2010, and gradually increased the dosage. On April 21, 2010, Jamieson wrote her a new prescription for 100-milligram tablets. When Hardin filled this second prescription she received from Safeway an identical print-out concerning Lamotrigine that she had previously received. Again she received no verbal or supplemental warnings.

On April 25 Hardin began to experience a sense of malaise. The next day she called her work to inform them that she was not well. She has no further memories of what happened until she awoke in the hospital in June 2010. The day

after Hardin remembers calling work, her husband, Dane, took her to urgent care in Santa Cruz because her condition seemed to be deteriorating. She had small blotches on her face and chest, and her eyes were bloodshot. The next day she was hospitalized at Dominican Hospital, where she went into a coma. She was diagnosed with SJS, a condition that causes internal and external burn-like rashes. On April 28, 2010 she was transferred to the burn unit of the Santa Clara Valley Medical Center, where she was in a coma from April 28 until sometime in June 2010, while SJS and TENs[2] caused organ failure. On July 16, 2010, when discharged from the hospital in Santa Clara, Hardin still had open wounds and was virtually blind, able only to sense light and dark.

Hardin testified that once she awoke from the coma she was told in June 2010 that she had SJS and TENs and that those conditions were caused by Lamotrigine. She did not know, however, whether the conditions were common complications from Lamotrigine or had been reported in the literature. Dane, on the other hand, had researched the side effects of Lamotrigine and learned on April 27, 2010, that SJS was a potential side effect, after his wife was seen in the Urgent Care Clinic and was instructed to stop taking the medication immediately. Also, in April 2010 Dr. Berger, a physician at the Santa Clara Valley Medical Center, informed Dane that his wife's SJS was due to Lamotrigine. In June 2010 Dane told his wife that she had developed SJS due to the Lamotrigine.

On July 19, 2011 the Hardins consulted an attorney to find out if pharmaceutical companies had a fund to pay for medical expenses related to adverse drug reactions. The attorney informed them that he was unaware of any such fund, but suggested they consult other counsel to investigate whether they had a viable claim of medical malpractice. It was only after this meeting that Hardin

[2]TENs is a life-threatening skin condition in which the top layer of skin, the epidermis, detaches from the lower layers, dermis, all over the body.

learned that SJS, TENs and serious and fatal rashes were known risks associated with Lamotrigine. Indeed, she learned sometime after July 2011 that the Food and Drug Administration required "boxed warnings" for Lamotrigine concerning the possibility that SJS and "life threatening rashes" might be caused by the drug. A "boxed warning" is the strongest warning the FDA can require and signifies that studies show a significant risk of serious or life-threatening adverse effects from taking the drug. (21 C.F.R. § 201.57(c)(1).) Boxed warnings were omitted from the print-outs Hardin had been provided by Safeway.

The printouts Safeway provided were products of software created by PDX, Inc., which Safeway used to provide patients with monographs containing useful, accurate, and comprehensive information about prescription drugs, including the appropriate warnings. Prior to 2005, PDX's software enabled its licensees to print out either the long (eight-section) or short (five section) version of the monograph for any given drug. The short version excluded sections under the headings "Before Using This Medication," "Overdose," and "Additional Information." The "Before Using This Medication" section contained warnings about taking the drug that may include warnings about drug interactions or complications due to coexisting medical conditions. In 2005, in response to regulatory guidelines, PDX revised its software so that it would no longer print the abbreviated monographs. For reasons not clear from the record, Safeway did not want to utilize the full eight-section monographs and asked PDX to revise its software so that Safeway could continue to print only the five-section versions. PDX complied with that request after it obtained a release of liability and indemnity agreement from Safeway. Safeway's decision to use the abbreviated monographs was made by

David Fong, Safeway's senior vice president of pharmacy, who oversaw 1,200 Safeway pharmacies and was responsible for their profitability.[3]

When it denied the Medical Group's and Jamieson's summary judgment motions the court wrote, in part:

> "Plaintiffs have raised triable issues of fact as to whether they are entitled to apply the 'discovery rule' for delayed accrual of the claims as to Defendant. 'The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause.' (*Jolly v. Eli Lilly & Co.* (1998) 44 Cal.3d 1103, 1109.)
>
> While it is undisputed that Plaintiffs were aware that Kathleen's injuries were caused by Lamotrigine, it does not appear that they suspected that Dr. Jamieson, or Palo Alto Foundation Medical Group . . . contributed to the injuries she sustained in early 2010. Indeed, Sharon S. Jamieson, M.D. was Kathleen's primary care physician from 2002 until June 2011. . . . The fact that Plaintiffs continued to trust Kathleen's medical care to Dr. Jamieson and PAFMG strongly suggests a level of trust that indicates Plaintiffs had no idea that either defendant may have contributed to her injury or that her injury was caused by wrongdoing. Triable issues of fact exist as to whether the confidential and fiduciary relationship of physician and patient excused Plaintiffs from greater diligence in determining the cause of Kathleen's injury. . . .
>
> Still further, triable issues of fact exist as to whether a reasonable person would have suspected the injury was caused by wrongdoing. It cannot be determined as a matter of law when the limitations period began to run by the evidence presented. Accordingly, summary judgment must be denied."

When it denied Safeway's summary judgment motion, the trial court wrote:

> "While Defendant might be considered a health care provider pursuant to MICRA in some circumstances, the court does not find

[3]Fong was a licensed pharmacist, although being licensed was not a requirement of his position.

> that Defendant is a health care provider for purposes of MICRA under all circumstances.
>
> As to the claims that Defendant failed to provide a medication guide and consultation, MICRA applies because these claims are 'directly related to the professional services provided by a health care provider acting in its capacity as such.' [Citation.] Plaintiffs concede this in arguing that the one year statute of limitations does not bar their claims. In opposition, Plaintiffs have raised triable issues of fact as to whether they are entitled to apply the 'discovery rule' for delayed accrual of the claims as to Defendant. 'The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause.' (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.)
>
> As to claims arising from Defendant's corporate decision to provide all patients a five paragraph 'short form' monograph, rather than an eight paragraph 'long form' monograph, thereby omitting warnings regarding medications, the court finds that Defendant has not established that MICRA applies.
>
> The court finds that triable issues of fact exist as to whether these actions were 'directly related to the professional services provided by a health care provider acting in its capacity as such.' [Citation.] Logically, the decision does not appear to have been directly related. Further, Plaintiffs have submitted evidence that raises triable issues of fact as to whether this was a business decision completely unrelated to providing professional services as a health care provider."

Petitioners challenged the denial of their respective summary judgment motions with the petitions for writ of mandate pending before this court.[4] On April 17, 2014 we requested informal opposition and notified the parties that we were considering the issuance of a peremptory writ in the first instance, pursuant to Code of Civil Procedure section 1088 and *Palma v. Industrial Fasteners, Inc.*

[4]Not directly related to the issues raised by these petitions, defendants, PDX, Inc. filed an appeal of the denial of an anti-SLAPP motion. (See *Hardin v. PDX, Inc.* (A137035).)

(1984) 36 Cal.3d 171. Having carefully reviewed the informal briefing, for the reasons stated below, we now issue a peremptory writ directing the trial court to grant petitioners' motions for summary judgment.

DISCUSSION

I. WRIT RELIEF IS APPROPRIATE IN THIS CASE.

A trial court's decision denying a motion for summary judgment is properly reviewed by a timely petition for a writ of mandate. (Code Civ. Proc. § 437c, subd. (m)(1); *American Internat. Underwriters Agency Corp. v. Superior Court* (1989) 208 Cal.App.3d 1357, 1362.) Writ review of a superior court order is appropriate under various criteria, including situations where, as here, the lower court's order is both clearly erroneous and substantially prejudices the petitioner's case. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273–1274.) In this case, petitioners would be substantially prejudiced if compelled to go through trial when the statute of limitations bars the suit against them. Our review is de novo. (*Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1385.)

II. THE "DELAYED DISCOVERY" RULE DOES NOT OPERATE TO MAKE THE COMPLAINT AGAINST JAMIESON OR PAFMG TIMELY.

Section 340.5 of the Code of Civil Procedure provides that an action for professional negligence against a health care provider must be brought no later than the earlier of (1) three years from the date of injury or (2) one year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury. (Code Civ. Pro., § 340.5.) Thus, we must consider how soon after awakening from her coma should Hardin have known she was injured by her use of Lamotrigine.

As explained by the California Supreme Court, a "plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal

theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects . . . that someone has done something wrong' to him . . . 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' . . . He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. . . . He has reason to suspect when he has ' " ' "notice or information of circumstances to put a reasonable person *on inquiry*" ' " ' (. . . italics in original); he need not know the 'specific 'facts' necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place — he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 (citations and footnotes omitted).) "The test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation. (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.) Being put on notice does not mean necessarily that the plaintiff has complete information; rather there must simply be "a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter." (*West v. Great Western Power Co. of California* (1940) 36 Cal.App.2d 403, 407.)

A. Claims Brought by Hardin

In June 2010 when she awoke from her coma, Hardin was informed that she had SJS and TENs, which had been caused by the Lamotrigine. She also knew at that time that she had not been warned about those or similarly severe side effects of the medication when it was prescribed or provided to her. Her husband, both

from his own research and from his discussion with Dr. Berger, learned in April 2010 that the drug likely caused his wife's injuries. In other words, as of April 2010 Dane knew that his wife's conditions had been reported as adverse reactions to Lamotrigine, and in June 2010, Hardin knew her injuries were caused by the drug.

On these facts, we can only conclude that by July 2010 a reasonable person would have been put on notice to investigate the situation further. To be certain—in April 2010—one reasonable person, Dane, did so.[5] But more importantly, by June 2010 Hardin had information that Lamotrigine caused her condition that should have led naturally and directly to her asking about what was known concerning these adverse reactions. The urgent care doctor, whom she saw when she began to experience symptoms, told her to stop taking the Lamotrigine immediately. This strongly suggests the doctor was aware of a possible link between Lamotrigine and the types of symptoms Hardin was experiencing. Furthermore, when a reasonable person awakens from a coma and learns that a medication caused her condition, one would expect her to inquire whether the side effects of the medication were common or previously known.

This case is analogous to *Christ v. Lipsitz* (1979) 99 Cal.App.3d 894, 898 where a wife's pregnancy did not conclusively prove that a man's vasectomy had been ineffective, but suggested the possibility, thereby triggering the duty to investigate. Just as the Christs' case was barred because of their failure promptly to investigate the effectiveness of the husband's vasectomy once there was a

[5]In reviewing the denial of a summary judgment motion we do not make credibility determinations such as whether it is plausible, as stated by Hardin, for her to have suffered a debilitating effect of a medication, for her husband to know that it was a reported adverse effect, for them to have discussed her condition when she awoke from a coma, and for him *not* to have told her that she suffered known adverse reactions. Accepting those facts to be true, however, we view them as evidence that at the very least, Hardin made an unreasonably limited inquiry into her situation.

reason to believe he fathered a child after his vasectomy, so too is Hardin's case barred by her failure to investigate the possibility that the adverse effects she suffered from Lamotrigine were generally known in the medical community once she was aware the medicine caused her condition.

1. The "Continuous Treatment" Rule Does Not Make Hardin's Claims Timely.

When a patient continues to receive care from a doctor after the date of the alleged malpractice, the patient is generally excused from diligently determining the cause of his or her injury. (See e.g., *Stafford v. Shultz* (1954) 42 Cal.2d 767, 777–778.) This rule is premised upon the doctor's continuing duty to disclose the full extent of a patient's injuries and any likely future disability. Anything the doctor does to conceal those facts and prevent the patient from consulting other doctors is deemed to be a fraud perpetrated by the doctor against the patient and excuses a lack of diligence on the part of the patient. There are two reasons, however, why this rule does not apply here to excuse Hardin's lack of diligence.

First, in construing a prior version of section 340.5 of the Code of Civil Procedure, our Supreme Court held that the provision excusing a lack of diligence during nondisclosure by the health care provider applied only to the limitations period triggered by the date of injury and not to the one-year period triggered by the discovery of the alleged malpractice or when it should have been discovered had the plaintiff used reasonable diligence. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93.) The Court emphasized that applying the continuous treatment exception to the period triggered by the actual discovery of the malpractice or its discovery through reasonable diligence would unreasonably, but indefinitely, suspend the limitations period even in cases where the plaintiff actually discovered or should have discovered the basis of a potential suit. The Court considered such a result "seemingly at odds with common sense" and

concluded that "[t]he mere statement of [the result] argues against its acceptance." (*Id*. at 98.) Although the *Sanchez* court was interpreting a pre-1975 version of section 340.5, its logic remains valid. Thus, we decline to hold that the "continuous treatment" rule saves Hardin's causes of action for professional medical negligence.

2. Hardin Was Not Continuously Under Jamieson's Care

In addition, from April 27, 2010 through July 16, 2010, Hardin's condition was not diagnosed and treated by Jamieson, but by doctors at the Urgent Care Center in Santa Cruz, Dominican Hospital, and Santa Clara Valley Medical Center. Although Hardin continued under Jamieson's care after July 16, 2010, she had ample opportunity to discuss her condition with other physicians, including Dr. Berger, who had initially instructed her to stop taking the Lamotrigine and who directly told Dane that his wife's SJS was caused by the Lamotrigine. After coming out of her coma in June 2010 Hardin remained hospitalized, i.e., under the care of other doctors, until July 16, 2010, giving her ample opportunity to discuss her situation with them. Notwithstanding the fact that Hardin resumed receiving medical care from Jamieson after her hospitalization, she was not precluded in any way from obtaining the relevant information directly from the doctors who treated her in the Santa Cruz Urgent Care Center, Dominican Hospital, and/or Santa Clara Valley Medical Center. Thus, the level of diligence she should have shown in reasonably pursuing her claim should not be excused because she returned to Jamieson's care after her hospitalization.

Accordingly, the statute of limitations, Code of Civil Procedure section 340.5, bars Hardin's claims against both Jamieson and the Medical Group. Hardin's complaint was not filed until October 18, 2011, more than a year from the latest possible date in June 2010 when she knew or should have known of her

injuries from Lamotrigine. Thus, her claims for professional negligence were not timely.

B. Dane's Claims Are Also Untimely**.**

Dane, of course, was on inquiry notice as of April 27, 2010, because he discovered the facts concerning his wife's injuries as of that date. His complaint, also was not filed until October 18, 2011. He cites *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067, for the proposition that notwithstanding the one-year limitations period his loss of consortium claim is timely because it is derivative of his wife's claims. *Blain*, however, simply stands for the proposition that where a plaintiff who suffered the primary injury cannot state a valid tort claim, his or her spouse cannot claim loss of consortium. (*Ibid.*) Admittedly, Dane's loss of consortium claim is derivative of Hardin's in the sense that it arises out of her injuries. However, it is an independent legal claim. (See *Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274, 1279–1280 ["While joinder of a loss of consortium claim with the injured spouse's personal injury claim is encouraged, it is not mandatory and a loss of consortium claim may be maintained independently."].) Because Dane's loss of consortium claim is separate and distinct from his Hardin's, the time period for him to have brought his claim began accruing April 27, 2010. Thus the October 18, 2011 complaint was untimely as to Dane as well.[6]

[6]Even if we accepted Dane's theory—which we reject—his claims would still be untimely because it is premised on the notion that a loss of consortium claim is timely when the underlying tort claim is timely. Here, as discussed above, Hardin's underlying claim is untimely.

III. ALL THE ALLEGATIONS AGAINST SAFEWAY FALL WITHIN THE SCOPE OF PROFESSIONAL NEGLIGENCE AND ARE, THUS, BARRED BY SECTION 340.5'S ONE-YEAR STATUTE OF LIMITATIONS.

In denying Safeway's summary judgment motion, the trial court divided the claims against Safeway into those based on conduct which occurred in the course of Safeway's capacity as a health care provider, such as not providing an adequate medication guide and consultation, and acts and decisions which were made in Safeway's corporate capacity, such as the decision to provide patients with an abbreviated monograph. With respect to the former, the court found that the Hardins raised triable issues of fact concerning the applicability of the delayed discovery rule. We reject application of the delayed discovery rule to Safeway's conduct for the same reasons we have rejected the claims against the Medical Group and Jamieson. The Hardins' delay in investigating the potential claims or filing suit was unreasonable. Thus the delayed discovery rule does not apply to toll the limitations period.

We also must reject the superior court's bifurcation of the claims against Safeway into claims of professional negligence rooted in malpractice and ordinary negligence, rooted in Safeway's corporate decision-making.[7] For purposes of deciding a summary judgment motion, the pleadings set the boundaries of the dispute. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499.) Paragraphs 26 through 28 of the complaint allege the Hardins' negligence claim against Safeway. The thrust of paragraph 27 accuses Safeway of providing Hardin with a dangerous drug without warning her about Lamotrigine and the risks associated with taking Lamotrigine and Effexor simultaneously. These allegations fall squarely within section 340.5's definition of professional negligence, i.e., "a

[7]If the statute of limitations for ordinary negligence were to apply, the Hardins would have two years to bring this claim. (Code Civ. Proc. § 335.1.)

negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Code Civ. Proc. § 340.5, subd. (2).)

The closest the complaint comes to mentioning any "corporate" act by Safeway is the allegation that Safeway was negligent by "hiring, buying, purchasing drug literature from Defendant Wolters Kluwer, Inc. to be provided to Safeway customers without reviewing, supervising, correcting, and/or determining whether or not the said literature was accurate and contained all warnings that should have been given to customers when the said drug was dispensed . . . ." However, this allegation does not reflect the record before us on summary judgment. Safeway contracted with PDX to use the abbreviated monograph. If anything, this was as a means to save money or employee time. But this decision was, at most, a contributing factor to the failure of Safeway to provide Hardin adequate warnings when her prescriptions were filled by Safeway pharmacies. This resulting failure to warn Hardin of the dangers associated with Lamotrigine cannot be fairly characterized as anything other than professional negligence.

A defendant's actions towards a plaintiff are measured by one standard of care, even if the plaintiff attempts to articulate multiple theories of liability. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 995, 998 [pleadings stated causes of action for both ordinary and professional negligence, where a patient fell off a gurney that did not have its rails raised, reversed because a defendant is only subject to a single standard of care.].) In *Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797 a patient fell when she was left unattended and unsecured on an X-ray table. The hospital claimed

that the action was barred by the limitations period for personal injury. (*Id*. at 799.) The court of appeal, however, held that the complaint alleged professional negligence, bringing it within the purview of MICRA because the fall occurred in the course of the hospital's rendering professional services. (*Id*. at 806.) The hospital's professional duty encompassed mundane acts such as securing the patient while on the x-ray table. So too, here.

Safeway cites persuasive authority, *Taylor v. United States* (9th Cir. 1987) 821 F.2d 1428, interpreting California law. There a hospital patient suffered permanent brain damage when his ventilator was disconnected for an undisclosed reason. The Ninth Circuit determined that MICRA applied even if the ventilator was disconnected as a result of such non-treatment-related causes as a janitor bumping a broom into the patient's bed. (*Id*. at 1432.) It was the hospital's professional duty to prevent the patient from becoming separated from the ventilator, and that duty was breached regardless of the reason the ventilator detached from the patient.

The Hardins rely on *So v. Shin* (2013) 212 Cal.App.4th 652, and *Atienza v. Taub* (1987) 194 Cal.App.3d 388, to argue that conduct furthering a health care provider's self-interest, such as Safeway's profit motive here, does not fall within the scope of rendering professional services. Both cases are readily distinguishable from this one. In *So*, an angry doctor was sued after she tried to intimidate a patient by shoving a vial containing the patient's blood and tissue at her, and then demanded that the patient not tell anyone about it. The patient sued for negligence, intentional infliction of emotional distress and assault and battery. In these circumstances, the appellate court held the doctor was being sued for acts that were outside the scope of rendering professional services. Thus, her complaint was not time barred under section 340.5. (*So v. Shin, supra,* 212 Cal.App.4th at pp. 662–673.)

In *Atienza v. Taub, supra,* 194 Cal.App.3d 388, a patient sued a doctor after she had an illicit affair with him. The court concluded she had no cause of action for professional negligence where the facts demonstrated that the doctor's seduction of the patient had nothing to do with his rendering medical treatment. Thus, in both cases relied upon by the Hardins the wrongdoing by health care providers occurred outside the scope of the provision of professional services. The Hardins' claim against Safeway is different. Whatever may have been Safeway's motive in using the abbreviated monograph, the Hardins are suing Safeway for the omission of information that should have been provided them when Safeway dispensed the prescribed medication. In other words, Safeway is being sued for deficiencies within the scope of its professional responsibilities as a pharmacy.

Thus, the allegations against Safeway all fall within MICRA's purview. Because the complaint alleges professional negligence against Safeway, it is subject to the limitations period described in section 340.5, and is untimely for the same reasons as the Hardins' claims against the Medical Group and Jamieson.

CONCLUSION

Where "petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue," the accelerated *Palma* procedure is appropriate. (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; *Palma, supra* 36 Cal.3d 171.) As the Hardins point out, "[t]hese petitions do not involve a novel issue." We agree. After applying long-established principles to undisputed facts, the issuance of a peremptory writ in the first instance is appropriate.

Let a peremptory writ of mandate issue remanding this matter to the respondent superior court and directing the superior court to vacate its orders denying the summary judgment motions of petitioners Safeway, Inc., Palo Alto Foundation Medical Group, and Sharon S. Jamieson, M.D., dated March 14, 2014, and to issue new orders granting those motions.

All parties shall bear their own costs.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Pollak, J.