2d Civil No. B 073686

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

DIOMEDES COLOME,

Plaintiffs/Respondents,

vs.

STATE ATHLETIC COMMISSION OF CALIFORNIA, et al.,

Defendants/Appellants.

Appeal from the Superior Court of the County of Los Angeles
Honorable Ernest George Williams, Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

"I could have been a contender." That was the theory underlying this lawsuit by boxing hopeful Diomedes Colome and his manager, Jimmy Montoya, against the State Athletic Commission ("the Commission") and numerous others, including Dr. Kimberly Kelly, a UCLA neurologist and Dr. Armando Morales, who held a Ph.D. in social work and who also practiced at UCLA. Dr. Kelly and Dr. Morales gave Colome a neurological examination, which is statutorily required before a boxer can receive his license to box, and when they determined that he failed, they set in motion the chain of events that led to these judgments. The Commission denied Colome his license, which prevented him from participating in the semi-finals of the Stroh's boxing tournament being held at the Forum. Frustrated with this turn of events, Colome smashed his fist into a door, resulting in what he claimed to be permanent damage to his hand and, consequently, his career. On the premise that he would have won the semi-final and final bouts and become the tournament champion, and would have parlayed that title into a lucrative career, the jury awarded Colome damages of $1,253,500 and Montoya damages of $200,000 against Dr. Kelly and Dr. Morales.

The speculative nature of those damages are readily apparent, but this court need never even reach that issue, although we present it here. Instead, the immunity granted by the Government Tort Claims Act to these two public employees (the jury found Dr. Kelly was an employee of the Commission, an arm of the state, and Dr. Morales was an employee of UCLA whose directors, the Regents of the University of California, are also a public entity) requires reversal with directions to enter judgment in favor of these defendants. Even if that were not the case, Montoya's judgment would founder because of the lack of any cognizable duty on the part of Dr. Kelly and Dr. Morales toward him. At the very least, highly prejudicial jury instruction error and numerous shortcomings in every element of the damages awarded would compel the granting of a new trial.

What could have been, might have been, should have been, is simply not enough to support the million dollar judgment rendered here, particularly under the theories these plaintiffs proffered. The judgments must be reversed.

STATEMENT OF FACTS

A. The Legislature Passes Business and Professions Code Section 18711 And The Commission Creates A Neurological Examination To Comply With The Statute.

The California State Athletic Commission regulates amateur and professional boxing in California, including licensure of boxers, managers, referees and others connected with the sport. (RT 43.)[1/] In 1985, Kenneth Gray was the executive athletic director of the Commission; his duties included establishing procedures for licensing. (RT 45.)

That year, the Legislature passed Business and Professions Code section 18711, requiring boxers to pass a neurological examination given by a "physician and surgeon who specializes in neurology or neurosurgery" as a condition of licensure. (RT 51, 1800.) The Commission's medical advisory committee, headed by Dr. Fredrick Flynn, developed an exam to be given to license applicants pursuant to the new statute; a portion of it--the mental status examination[2/]--was pieced together from existing, standard examinations but the sub-tests selected were geared specifically toward boxers themselves and the types of injuries they can suffer. (RT 583, 606-607, 1862-1865, 1871-1878.) The Commission then solicited bids from neurologists and neurosurgeons for performing the exams. (RT 53, 57.)

1/ We use the following abbreviations throughout "RT," reporter's transcript; "CT," clerk's transcript.

Some pages of the reporter's transcript have page numbers in both the upper and lower corners; our page citations are to the numbers shown in the upper corners.

2/ A mental status examination is simply a series of questions asked of the patient to assist the mental health practitioner in determining the patient's mental functioning; psychometric tests are formal, standardized tests that are sometimes, but not always, part of the mental status exams. (RT 79, 715-718.) The complete examination given to Colome can be found in the clerk's transcript at pages 2824-2853. (RT 442; CT 2824-2834 [physical]; CT 2835-2853 [mental status and psychometric].)

B. Dr. Kelly Contracts With The Commission To Administer The Exam.

In 1987, the second year of testing, defendant Dr. Kimberly Kelly, a neurologist who practiced at UCLA, submitted a bid in conjunction with another UCLA neurologist, Dr. Susan Perlman, to perform boxers' neurological exams. (RT 396, 398-399, 1800-1802.) A neurologist is a physician who specializes in neurology, the diagnosis and treatment of diseases of the nervous system. (RT 397.) Dr. Kelly believed she would be particularly well equipped to perform the exams because many of the boxers were non-English speaking and she had access to the translator service at UCLA. (RT 400-402, 626.)[3/] Dr. Kelly's bid was accepted and she and the Commission entered into a contract that stated in part: "All examinations shall be personally performed by the physician who is certified in neurology. . . . The mental status portion of the exams may be performed by a licensed neuropsychologist." (RT 174; CT 2871-2872.)[4/]

C. Dr. Morales Is Selected To Administer A Portion Of The Exam.

Sometime after Dr. Kelly and the Commission signed the contract, Dr. Kelly met Armando Morales, the director of Clinical Social Work and a professor of psychiatry at UCLA. (RT 71.) Dr. Morales was not a psychologist or neurologist; instead, he held a Ph.D. in social work. (RT 71, 606.) Dr. Kelly believed Dr. Morales would be ideal for working with the boxers because he was Mexican, spoke Spanish, understood the Spanish-speaking cultures many of the boxers came from and was a former amateur boxer himself.

3/ Much of the evidence at trial focused on alleged cultural and language bias in the test, the basis for Colome's civil rights cause of action. The jury found no such bias existed (CT 1839) and Colome has not cross-appealed from that finding; thus, we will not discuss the language and cultural bias evidence.

4/ Undisputed testimony at trial established there is no such thing as a "licensed neuropsychologist." (RT 2605.) A neuropsychologist is a clinical psychologist with a Ph.D. who has concentrated in neuropsychology, but no special license is given in neuropsychology. (RT 2605-2606.)

(RT 72, 415, 2118.) Dr. Kelly sent Dr. Morales's resume to the Commission and discussed with Dr. Flynn her plan to use him for part of the examination. (RT 414-417, 641-642.) Several training sessions were then held. (RT 91.) Dr. Morales and Dr. Kelly, Chris Donovan, a licensed clinical social worker, and Dr. Flynn attended some or all of the sessions. (RT 91-92, 504.)

D. Colome Contracts To Box In The Stroh's Tournament And Is Notified He Must Take A Neurological Exam.

In January, 1988, Colome signed a contract with Forum Boxing, Inc., agreeing to fight Felipe Canela in the welterweight semi-final bout of the Stroh's boxing tournament. (RT 234-235; CT 2951.) The winner of the bout would receive $13,000 (the loser would receive $4,500) and the winner would then fight Derrick Kelly in the final bout for a $100,000 purse. (RT 191, 322.) Montoya, Colome's manager, also signed the contract; under his manager's contract, he received 33 1/3% of Colome's earnings. (RT 229-230; CT 2946-2947.)

E. Colome Takes The Neurological Exam.

Around the same time, Montoya applied with the Commission to renew Colome's boxing license. (RT 1634-1635.) An employee told Montoya that Colome had to take a neurological exam, even though Colome had taken and passed the exam in September 1987. (RT 1634-1636.) Thus, on February 2, 1988, Colome went to UCLA for the examination. (RT 87.) Dr. Kelly performed the physical portion of the exam--referred to as the standard or general neurological exam--using a translator because Colome spoke little English; all results were normal. (RT 410, 460-466, 543, 561, 697.) Dr. Morales administered the mental status portion of the neurological exam in Spanish, without using a translator. (RT 71.)

The mental status examination Dr. Morales gave Colome contained various psychometric tests such as the "Trails A" test, which was a "connect the dot" numbers test (RT 511), the "Trails B" test, which alternated numbers and letters (RT 519), the "symbol digits modalities" test, where the examinee paired a symbol to a letter by referring to a legend equating the two (RT 520-521), and the verbal memory test, where the examinee chose four words--a city, an animal, a number and a color--and was asked to repeat them later during the test (RT 522).

Dr. Kelly scored the examination and determined that Colome had failed. (RT 581, 448-449.) She notified the Commission. (RT 670.) Martin Denkin, a Commission officer, advised the Stroh's tournament officials and asked them to notify Colome and Montoya. (RT 291-293.)

F. Colome Is Told He Failed The Exam And Smashes His Fist Into A Door.

On February 8, 1988, Colome reported to the Forum for the weigh-in for his fight with Canela. (RT 1528-1529, 1572-1573.) Denkin, Grey, Montoya, tournament officials and others discussed Colome's failure of the neurological exam and the Commission decided Colome would not be allowed to fight. (RT 294-298.) Montoya assured Colome he would do everything he could to have that decision altered; however, he was unsuccessful and that night, he told Colome the decision barring Colome from the tournament was final. (RT 1530-1531, 1572-1573.) Colome became so upset that he smashed his fist into a door. (RT 1531, 1573.) Because Colome could not fight, Canela received "basically a walkover to the finals of the Stroh's tournament," where he was defeated by Derrick Kelly. (RT 225-226, 322-323, 352-353.)

G. Colome Retakes The Exam And His License Is Reinstated.

The oral notification to Colome that he had failed the neurological exam was followed by a letter from the Commission which stated that the results of Colome's examination showed early signs of neurological impairment. (RT 210-211; CT 2862.)

Colome then sought a second opinion from Dr. Carlos Saucedo, who was a psychologist, not a neurologist, neurosurgeon or physician. (RT 1116-1117, 1394-1395.) Dr. Saucedo gave Colome a comprehensive mental status examination which included some of the same psychometric sub-tests that were contained in the Commission's exam, but which included additional tests, such as an intelligence test, that were not part of the Commission's exam. (RT 1163-1166.) In scoring the exam, Dr. Saucedo relied on studies that showed Spanish-speaking boxers generally scored lower on such tests than English speaking boxers; thus, he rated Colome "normal" on several sections based on lower norms for non-English speaking testees. (RT 1319-1320, 1375, 1437-1438.) This time Colome passed and Dr. Saucedo's report was forwarded to the Commission. (RT 216, 677-678.) Dr. Drew, who was a consultant to the Commission and who had been retained to review the mental status portion of examinations taken by boxers (RT 873, 880) and Dr. Flynn reviewed the report and both recommended Colome be licensed. (RT 216-217, 924-925, 2022.) Gray then sent Colome a letter dated May 12, 1988, granting Colome his boxing license. (RT 220-221.)

H. The Damages Testimony.

At trial, Steven Eisner, a boxing promoter and matchmaker,[5/] testified he had an oral agreement with Montoya to pay Colome $100,000 for the right to promote Colome if Colome won the Stroh's tournament. (RT 813, 853.) Another promoter, Elbert Durden,

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5/ A matchmaker matches boxers for particular fights, while a promoter hires the matchmaker, selects the fight location, advertises the match and pays the fighters. (RT 813-814.)

testified he told Montoya that if Colome won the Stroh's tournament, he could get between $150,000 and $200,000 for a bout for the welterweight title. (RT 1296.) Montoya testified Colome also would have received a promotional contract worth $350,000, with a $50,000 signing bonus, under an oral agreement with another promoter, Dan Duva, and that pursuant to telephone conversations with Sugar Ray Leonard's "people," Colome would have been paid $32,000 to $37,000 to be Leonard's sparring partner. (RT 1644-1647, 1649, 1688-1689.) According to Montoya, Hector "Macho" Camacho was also going to give Colome $150,000 to $200,000 to fight him. (RT 1648, 1689.) Montoya believed that if Colome had won the Stroh's tournament, his earning potential would have been "in the million dollar bracket,"[6/] but because he failed the neurological exam and was not permitted to fight in the Stroh's tournament, he lost that opportunity. (RT 1784-1785.)

Montoya also testified that after it became known that Colome had failed his neurological examination and was barred from participation in the Stroh's tournament, his own business as a boxing manager suffered. (RT 1663.) His earnings at the Forum were only $27,000 in 1988, compared to $40,000 in 1987, and his telephone calls to promoters were not answered as quickly as before. (RT 1667-1668.) He claimed that if Colome had become a champion, "it would have been a different ballgame." (RT 1673.)

Other facts will be discussed as they relate to particular issues.

6/ The actual winner of the Stroh's tournament--Derrick Kelly--was not offered any promotional contracts or title fights after his win and the largest purse he fought for as the Stroh's champion was $12,000. (RT 2503-2504.)

STATEMENT OF THE CASE

A. The Complaints.

In January, 1989 Colome filed his original complaint against the Commission, Kenneth Gray, Dr. Drew, Dr. Flynn, Dr. Kelly, Dr. Morales and numerous others. (CT 1.) Montoya later filed his own complaint against the same defendants. (CT 182.) Eventually, Colome went to trial on his third amended complaint, which included causes of action for breach of statutory duty based on Business and Professions Code section 18711 (CT 571), negligent hiring, negligent supervision and deprivation of civil rights. (CT 547-638.)[7/] Montoya went to trial on his second amended complaint, which included claims for breach of statutory duty and negligent interference with contractual relationship against Dr. Kelly and Dr. Morales. (CT 805.)

B. The Special Verdict.

After a seven week trial, the case was submitted to the jury through a special verdict. (CT 1839-1858.) The jury found all defendants breached Business and Professions Code section 18711, subdivision (a), (CT 1842-1844), Dr. Kelly was 45% and Dr. Morales was 5% liable for that breach (CT 1844), and the breach caused damage to Colome "as it affected his participation in the Stroh's Boxing Tournament" and "as it affected his overall boxing career, separate from his participation in the Stroh's Boxing Tournament." (CT 1846.)

The jury also found Dr. Kelly negligently hired and supervised Dr. Morales (CT 1847-1850), and that she was an employee of the Commission, while Dr. Morales was an employee of UCLA. (CT 1852-1853.)

7/ Throughout this recitation, we discuss only the defendants who are parties to this appeal and the theories that actually were submitted to the jury.

Finally, the jury found Colome injured his hand on the door when he learned he would not be allowed to fight Canela (CT 1851), it was foreseeable he would do so (ibid.), striking the door damaged Colome's earnings and earning capacity in his overall career (ibid.) but did not cause noneconomic damage connected with his overall career. (CT 1852.) The jury awarded Colome $85,500 in economic damage connected with the Stroh's tournament, $500,000 in economic damage to his overall career (reduced by Colome's 9% comparative fault for striking the door), $225,000 in noneconomic damage connected with the Stroh's tournament and $425,000 in noneconomic damage connected with Colome's overall career. (CT 1853-1855.)

As for Montoya, the jury found Dr. Kelly's and Dr. Morales's breach of Business and Professions Code section 18711, subdivision (a), legally damaged Montoya (CT 1856) and interfered with his prospective economic advantage. (CT 1857.) The jury awarded Montoya $200,000. (CT 1858.)

C. The Judgments, Post-Trial Motions And Rulings.

On November 9, 1992, the trial court entered judgments awarding Colome different amounts against Dr. Kelly and Dr. Morales for breach of Business and Professions Code section 18711, subdivision (a) and, additionally, against Dr. Kelly for negligent hiring and supervision. (CT 2272-2290.)[8/] The court also entered judgment for Montoya for $200,000. (CT 2293-2296.) Dr. Kelly and Dr. Morales moved for judgment notwithstanding the verdict based upon, among other things, immunity and speculative and excessive damages (CT 2330-2349) and for a new trial raising the same grounds. (CT 2367-2381.) On January 4, 1993, the trial court denied the motions in their entirety (CT 2534)

8/ The court entered judgment under each theory; thus, the judgment could be understood as permitting Colome to recover $3,051,500 against Kelly. Colome has conceded, however, that he would be entitled to collect only under one theory. (See Tavaglione v. Billings (1993) 4 Cal.4th 1150, 1158-1159.)

and on January 20, 1993, Dr. Kelly and Dr. Morales timely filed their notice of appeal. (CT 2547.)

STATEMENT OF APPEALABILITY OF JUDGMENTS

The judgments are appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1) and the order denying the motion for judgment notwithstanding the verdict is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(4).

LEGAL DISCUSSION

I.

BOTH JUDGMENTS SHOULD BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF DR. KELLY AND DR. MORALES BECAUSE THEY ARE IMMUNE FROM LIABILITY.

A. Dr. Kelly And Dr. Morales Cannot Be Held Liable For Breach Of A Mandatory Statutory Duty Based On Business And Professions Code Section 18711, Subdivision (a).

1. The statute did not impose *any* duty on Dr. Kelly or Dr. Morales; thus, they cannot be held liable for breach of a mandatory statutory duty.

At trial, Colome and Montoya relied on Government Code section 815.6 as a basis for imposing liability on Dr. Kelly and Dr. Morales; section 815.6 provides:

> "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."[9/]

9/ Technically, it appears that liability against a public employee should be based on Evidence Code section 669 because a public employee's liability simply parallels that of a private person absent statutory immunity (Gov. Code, § 820, subd. (a)), rather than on Government Code section 815.6 which, by its express language, applies only to public

(continued...)

Plaintiffs' theory was that Business and Professions Code section 18711, subdivision (a), imposed a mandatory duty within the meaning of Government Code section 815.6. When this incident took place, Business and Professions Code section 18711 provided:[10/]

> "(a) On or after July 1, 1986, the commission shall require, as a condition of licensure and as a part of the application process, each applicant for a license as a professional boxer or for the renewal of a license if the boxer has boxed within the preceding year, in addition to any other medical examinations, to be examined by a licensed physician and surgeon who specializes in neurology or neurosurgery. The physician may recommend any additional tests he or she deems necessary. . . ."[11/]

The jury found that Dr. Kelly and Dr. Morales breached this statute (CT 1842-1844) and both Colome and Montoya obtained judgments against the doctors on that theory. (CT 2287-2288, 2294-2296.) The judgments, however, do not withstand the most rudimentary scrutiny.

To determine whether liability can be imposed for breach of a mandatory statutory duty, courts have established a three-pronged test: (1) the enactment must impose a

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9/(...continued)
entities. (See Fredette v. City of Long Beach (1986) 187 Cal.App.3d 122, 134.) The distinction, however, is merely one of name, rather than substance. (Compare Lua v. Southern Pacific Transportation Co. (1992) 6 Cal.App.4th 1897, 1901 [to recover for negligence per se under Evidence Code section 669, plaintiff must prove defendant violated statute which was designed to protect against the type of injury which occurred and violation proximately caused injury] with Zolin v. Superior Court (1993) 19 Cal.App.4th 1157, 1161 [articulating same test for liability under Government Code section 815.6].)

10/ The Legislature made non-substantive changes to the statute in 1993.

11/ Subdivision (b) of section 18711 relieved a boxer from undergoing a neurological exam if he had taken one within 120 days before his license expired. Plaintiffs recovered judgment against the Commission based on that subdivision (CT 2288), but not against Dr. Kelly and Dr. Morales. Thus, we will not discuss subdivision (b).

mandatory, not a discretionary, duty on the defendant; (2) the enactment must have been intended to protect against the kind of risk of injury suffered by the party asserting the claim; and (3) breach of the mandatory duty must have been a proximate cause of the injury suffered. (Zolin v. Superior Court (1993) 19 Cal.App.4th 1157, 1161; MacDonald v. State of California (1991) 230 Cal.App.3d 319, 327.) For the purposes of this appeal, we will assume section 18711 imposed a mandatory, i.e. obligatory, rather than permissive, duty to require a boxer to undergo an examination by a neurologist or neurosurgeon. (But compare Morris v. County of Marin (1977) 18 Cal.3d 901, 904 [Labor Code provision requiring county to ensure building permit applicant possessed workers' compensation insurance created mandatory duty] with Thompson v. City of Lake Elsinore (1993) 18 Cal.App.4th 49, 54-57 [ordinance which required building official to review certain data and, if he found the data conformed to code, "he shall issue a [building] permit" did not create mandatory duty, but provision requiring him to issue certificate of occupancy once completed building was found in compliance did create mandatory duty]; Brenneman v. State of California (1989) 208 Cal.App.3d 812, 817-818 [requirement that state reassess parolee's risk 75-105 days after release did not create mandatory statutory duty liability because state was not obligated to take any action even if it investigated].)

Nevertheless, as far as Dr. Kelly and Dr. Morales are concerned, plaintiffs' theory that Business and Professions Code section 18711 imposed a duty which, if breached, led to liability founders immediately--the statute compelled the Commission to require a boxer to undergo a neurological exam by neurologist or neurosurgeon, but it imposed no duty whatsoever on individual physicians to do anything, much less to be a neurosurgeon or neurologist, as plaintiffs' theory would suggest. While the Commission might be liable to a boxing applicant for violating Business and Professions Code section 18711 (assuming the other criteria of Government Code section 815.6 were met) if it required the boxer to undergo an examination by a non-neurologist or non-neurosurgeon, and while Dr. Kelly might be liable to the Commission for breaching her contract with it to "personally

perform[]" the examinations, she and Dr. Morales simply owed no duty to Colome or Montoya arising out of Business and Professions Code section 18711.[12/]

At trial, plaintiffs attempted to leap this hurdle by suggesting that the contract itself, which provided that Dr. Kelly would "personally perform[]" the examination, but could delegate the mental status exam to a "licensed neuropsychologist" (CT 2871-2872) could somehow serve as the basis upon which they could sue for breach of a mandatory statutory duty. They were wrong. Government Code section 815.6 imposes liability "[w]here a public entity is under a mandatory duty imposed by an enactment"; an "enactment" as used in that section means "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, § 810.6; Brenneman, supra, 208 Cal.App.3d at pp. 816-817; see also Lehto v. City of Oxnard (1985) 171 Cal.App.3d 285, 294-295 [internal police department regulations were not enactments within the meaning of Government Code section 815.6.) A private contract simply does not fall within the definition of an "enactment" so as to transform any supposed breach of Dr. Kelly's contract with the Commission into violation of a mandatory statutory duty that would support judgment against her, and it certainly could not support a judgment against Dr. Morales, who was not a party to the contract.

Dr. Kelly and Dr. Morales simply did not owe any duty under Business and Professions Code section 18711, subdivision (a), to do anything at all. Thus, they cannot be held liable for breach of that statute.

12/ Moreover, even if it could be said that because the Commission hired Dr. Kelly, she became part of "the Commission," and she therefore could be found to have possessed the ability to require Colome to submit to a neurological exam (a highly dubious proposition), it is not even remotely arguable that Dr. Morales was part of "the Commission"--the jury found he was an employee of UCLA. (CT 1852-1853.)

2. Assuming the statute imposed a duty on Dr. Kelly and Dr. Morales, the statute was not meant to protect against this type of harm.

Assuming for the sake of argument that Business and Professions Code section 18711, subdivision (a), imposed duties on Dr. Kelly and Dr. Morales, the second question posed in the test for determining whether liability for breach of a mandatory statutory duty exists--whether the enactment was intended to protect against the kind of injury the plaintiff suffered--must be answered with a resounding "no." Even though the jury in this case was asked to answer that question (CT 1843), the question is one of law for the courts to decide. (Nunneley v. Edgar Hotel (1950) 36 Cal.2d 493, 497-498; Fredette v. City of Long Beach (1986) 187 Cal.App.3d 122, 135.) They answer that question by determining the intent of the Legislature in enacting the statute, relying on the legislative history for guidance. (Shelton v. City of Westminster (1982) 138 Cal.App.3d 610, 614; Zolin, supra, 19 Cal.App.4th at pp. 1163-1164.) If the injury of the kind sustained by the plaintiff was not one of the consequences the Legislature sought to prevent by imposing the mandatory duty, there is no liability under Government Code section 815.6. (Keech v. Berkeley Unified School Dist. (1984) 162 Cal.App.3d 464, 470.)

The legislative history of Business and Professions Code section 18711 unequivocally establishes that the statute arose out of concern over the brain damage virtually every boxer faces; the analysis of the bill by the Senate Committee on Business and Professions referred to a study which revealed that 87% of the boxers studied showed evidence of organic cerebral dysfunction, while the remaining 13% had evidence of subtle brain damage and some abnormal scores on neurological tests. (Leg. Hist., p. 39.)[13/] Throughout the statute's progress through the Legislature, the proponents of the bill referred to concerns

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13/ In a separately-filed request for judicial notice, Dr. Kelly and Dr. Morales ask this court to take judicial notice of the legislative history of Business and Professions Code section 1871. The page numbers cited refer to the Bates stamp numbers in the lower right hand corner of each page.

over the neurological health of boxers and the need for legislatively-mandated testing as a way of addressing those concerns. (E.g., Leg. Hist., pp. 63-64, 77, 80, 102-107.) Even the opponents of the bill did not dispute this concern or the need for a remedy; their objections lay only in the issue of who would bear the cost of the neurological examinations. (Leg. Hist., pp. 34, 64.) Thus, it is clear that the enactment was intended to provide a mechanism by which early neurological damage could be detected and further injury could be avoided by preventing the boxer from continuing to fight. In stark contrast to that readily apparent goal, nowhere in the legislative history is there any indication that the Legislature perceived that qualified boxers were being denied boxing licenses or that it viewed the neurological exam as a means to protect against the danger that qualified boxers would be denied their license to box and thus would miss out on lucrative bouts.

This interpretation is consistent with the historic interest the state has shown in enacting legislation aimed at addressing the particular danger boxing poses; as our Supreme Court noted almost fifty years ago, "the people, the Legislature, and the commission [have] evidence[d] an unusually strong policy [of close regulation], obviously resting upon a detailed study of the problems relative to boxing matches. . . . [I]t is manifest that one of the chief goals is to provide safeguards for the protection of persons engaging in the activity." (Hudson v. Craft (1949) 33 Cal.2d 654, 659.) To vindicate that policy, Business and Professions Code section 18711 must be interpreted as aimed at preventing boxers whose neurological health is questionable from boxing, not at ensuring that questionable boxers are allowed to box for their financial benefit. The statute certainly should not be interpreted, as is Montoya's premise, as aimed at ensuring that a manager's percentage of a purse is protected. This statute simply was not enacted to guard against the type of harm alleged here and it therefore cannot provide a basis for liability under Government Code section 815.6. (See Keech, supra, 162 Cal.App.3d at pp. 470-471 [Education Code statute requiring assessment within set time period of special education to be given handicapped students was not intended to protect parents of students from "injury" of incurring costs of hospitalizing student pending assessment]; cf. State of California v. Superior Court (Ushana D.) (1992) 8

Cal.App.4th 954 [Education Code provision requiring denial of teaching certification was designed to protect students from being molested but because there was no evidence Legislature intended to transform statute into vehicle for private damage suits by molested students, no liability under Government Code section 815.6 existed].)

3. Assuming the statute established a duty and that the duty was breached, plaintiffs failed to prove the breach was a proximate cause of their injuries.

Even if Business and Professions Code section 18711 imposed duties on Dr. Kelly and Dr. Morales for the benefit of Colome and Montoya, and even if the statute was meant to protect against the harm they suffered, plaintiffs' judgments for breach of mandatory statutory duty are still defective. In order to recover for breach of a mandatory statutory duty, the plaintiff must prove the breach of the mandatory duty caused his injury. (Zolin, supra, 19 Cal.App.4th at p. 1161; State, supra, 8 Cal.App.4th at pp. 957-958.) Causation requires proof that the defendant's conduct was a "substantial factor" in bringing about the harm to the plaintiff. (Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1052-1053.) Tortious conduct is not a substantial factor in bringing about the harm if the harm would have been sustained even if the actor had not been negligent. (Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, 1498.)

In this case, plaintiffs produced no evidence at all that the breach of any duty to examine Colome only through a neurologist or neurosurgeon was the cause of their injuries. The evidence established that Colome failed the examination because he scored abnormally on six sections of the exam (RT 448), but plaintiffs did not produce a shred of evidence that if Dr. Kelly herself, or another neurologist or neurosurgeon had given the exam, Colome would have passed. That dearth of proof defeats any causal connection between the alleged breach of the statute and the injury. (See McDonald v. John P. Scripps Newspaper (1989) 210 Cal.App.3d 100, 104 [plaintiff lost spelling bee lost because he misspelled a word, not

because the person who defeated him was not qualified to compete; thus, plaintiff failed to establish defendant's breach was proximate cause of his injury].)

The fact that Colome's own expert, Dr. Saucedo, who re-examined Colome and whose mental status test results persuaded the Commission to reinstate Colome, was himself a psychologist, not the statutorily required "licensed physician and surgeon who specializes in neurology or neurosurgery" (Bus. & Prof. Code, § 18711, subd. (a); RT 1112, 1394-1395), buttresses the conclusion that the alleged breach of the statute was not the cause of plaintiff's injury. At best, Dr. Saucedo's testimony simply established that, given a different, more comprehensive mental status examination, and allowing leeway in interpreting the results to compensate for lower scores generally achieved by Spanish-speaking boxers (although the jury found no language or cultural bias in the test), Colome could pass a neurological exam. Nothing in that testimony, or any other evidence Colome produced, however, tied the alleged statutory breach--permitting a doctor of social work rather than a neurologist or neurosurgeon to give the exam--to Colome's injury.

Although both Colome and Montoya recovered judgments based on their breach of a mandatory statutory duty theory, none of the elements of that theory were present in this case. Thus, that theory cannot support the judgments.

B. Dr. Kelly And Dr. Morales Are Immune From Liability For How The Physical Exam Was Conducted Under Government Code Section 855.6.

Once it becomes clear that breach of a mandatory statutory duty cannot provide the basis for liability against Dr. Kelly and Dr. Morales, it becomes equally clear that they are immune from liability under Government Code section 855.6. That section provides:

> "Except for an examination or diagnosis made for the purpose of treatment, neither a public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make . . . an adequate

physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health and safety of himself or others."[14/]

Although our research has not uncovered any relevant cases interpreting this section, Law Revision Comments to statutes are before the Legislature when statutes are enacted and therefore "constitute a useful source of legislature intent." (Burns v. City Council of the City of Folsom (1973) 31 Cal.App.3d 999, 1003; Davis v. Cordova Recreation and Park District (1972) 24 Cal.App.3d 789, 796 ["[I]nterpretive comment of the Law Revision Commission . . . is enlightening. Such comments are well accepted sources from which to ascertain legislative intent."].) The Law Revision Comment to section 855.6 states:

"[This statute] grants an immunity for failure to perform adequately . . . physical examinations to determine the qualifications of boxers. . . ."

It is impossible to conceive of a more explicit indication of statutory intent that would apply more precisely to the facts in issue than this one does to this case. It was undisputed that the purpose of the examination was to determine whether he was qualified to be licensed to box; Colome argued, and the jury found, that he took the test because the Commission required it before his license would be renewed and the test itself specifically advised Colome the purpose of the exam was to determine his ability to box. (RT 108 ["I understand this examination is for the sole purpose of obtaining a medical determination of my neurological condition as it relates to my ability to engage in a professional boxing

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14/ Both Dr. Kelly and Dr. Morales were public employees; the jury found that Dr. Kelly was an employee of the Commission and that Dr. Morales was an employee of UCLA--both public entities. (Gov. Code, § 811.2 [defining the State and the Regents of the University of California as public entities]; Gov. Code, § 811.4 [a public employee is an employee of a public entity].)

match."].) It was also undisputed that neurological defects can constitute a hazard to the safety of a boxer. (RT 1847-1861.) Unequivocally, Dr. Kelly and Dr. Morales were statutorily immune from liability for any of their failings connected with Colome's neurological examination. The judgments should be reversed with directions to enter judgment in Dr. Kelly's and Dr. Morales's favor based on that immunity.

II.

MONTOYA'S JUDGMENT CANNOT BE AFFIRMED ON THE ALTERNATIVE THEORY OF INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE BECAUSE DR. KELLY AND DR. MORALES OWED MONTOYA NO DUTY.

Setting aside the immunity that compels reversal of both Colome's and Montoya's judgments, the judgment in favor of Montoya suffers a further failing. Montoya sued Dr. Kelly and Dr. Morales separately on the breach of mandatory statutory duty theory we have already discussed and on the theory of negligent interference with prospective business advantage, claiming that once it became known that Colome failed his neurological examination and had been prohibited from participating in the Stroh's tournament, his own business as a boxing manager suffered. (CT 805, RT 1663-1673.) He obtained judgment on both theories. (CT 2293-2296.) As a matter of law, however, Dr. Kelly and Dr. Morales did not owe a duty to Montoya for negligent interference with prospective economic advantage.

A defendant can be held liable for economic harm inflicted upon a third party with whom he has had no direct dealings. (J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799.) That is true, however, only when the policy criteria that determine whether a duty should be found are met. (Id. at pp. 804-805; Earp v. Nobmann (1981) 122 Cal.App.3d 270, 289-290, overruled on other grounds Silberg v. Anderson (1990) 50 Cal.3d 205, 212; Seely v.

Seymour (1987) 190 Cal.App.3d 844, 860-861.) Those criteria are: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered harm; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. (J'Aire, supra, 24 Cal.3d at p. 804; Biakanja v. Irving (1958) 49 Cal.2d 647, 650.) Applying those factors here compels the conclusion that Dr. Kelly and Dr. Morales did not owe Montoya a duty.

First, the neurological examination was not intended to affect Montoya in any way; the purpose of the examination is to protect the health and safety of boxers by detecting early signs of neurological impairment. There is not the slightest suggestion in section 18711 or its history to suggest that the purpose underlying the statute is to protect the financial interests or reputations of boxing managers.

Second, it was wholly unforeseeable that if the exam were given by someone who held a Ph.D. in social work and had given three to four thousand similar exams in the past, rather than given by a neurologist or neurosurgeon, the boxer's manager might lose business.

Third, it was highly questionable whether Montoya actually was harmed at all--he claimed his phone calls were returned less promptly and his earnings at Forum events were down after 1988, but he did not (and could not) say why. (RT 1662-1668.)[15/] As for any lost commissions on Colome's earnings, those were as speculative as Colome's lost earnings themselves--a point we discuss in section IV of this brief--and were entirely unrecoverable.

Fourth, there was no connection between negligently performing the neurological examination and Montoya's alleged losses. Plaintiffs never proved that if Dr. Kelly or another neurologist, rather than Dr. Morales, performed the mental status portion of the exam, Colome would have passed. They certainly never proved that, had he passed and

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15/ The court correctly sustained defendants' objections to questions calling for Montoya's opinion on why these things happened because, in the court's words "[w]e're getting way beyond the realm of speculation." (RT 1668; see also RT 1669-1672.)

been permitted to box, Colome would have won the tournament and Montoya's career would have flourished.

Fifth, there is no moral blame attached to Dr. Kelly's and Dr. Morales' conduct. There was no evidence Dr. Kelly acted in anything other than good faith when she selected Dr. Morales to perform the mental status portion of the examination and she received the Commission's approval before Dr. Morales participated in giving the exam. Dr. Morales acted in equally good faith; he took part in training sessions on how the Commission's exam should be given, he had performed thousands of similar exams and, but for his title, he was fully qualified to administer this exam. (RT 2112, 2792.)

Finally, imposing liability would increase, not prevent, future harm. There was no evidence that these doctors did not believe in good faith that Colome's test results showed signs of neurological impairment and they acted immediately to protect him from further risk of injury. Whether, in retrospect, they were right or wrong about their interpretation of the test results, future doctors should be encouraged to act in exactly the same way, rather than to err on the side of endangering the boxer in order to protect his manager's financial interest.

None of the policy factors that determine whether a duty exists support the conclusion that Dr. Kelly and Dr. Morales owed a duty to Montoya. Thus, the judgment in his favor must be reversed with directions.

III.

ALTERNATIVELY, BOTH JUDGMENTS SHOULD BE REVERSED AND THE CAUSE REMANDED FOR A NEW TRIAL BECAUSE OF JURY INSTRUCTION ERROR.

A. The Trial Court Prejudicially Erred In Refusing To Instruct On The Medical Standard Of Care That Governed Dr. Kelly's And Dr. Morales's Conduct, Thereby Tainting The Breach Of Mandatory Statutory Duty Theory With Error.

If Colome's and Montoya's judgments survive reversal with directions despite the arguments presented above, they nevertheless must be reversed and the cause remanded for a new trial because of prejudicial jury instruction error.

At trial, it was undisputed that the standard of care in the medical community permitted neurologists to delegate the administration of mental status exams to technicians and other non-neurologists. (RT 638, 687-688, 689-695, 701, 759, 1397, 1894-1895, 1926, 1979, 2442-2449, 2608-2611.)[16/] Nevertheless, when Dr. Kelly and Dr. Morales requested that the jury be instructed regarding the duty owed by a physician to use the skill and care ordinarily exercised by physicians in the same or a similar locality (CT 2041, 2042) and that the standard of care to be exercised by a physician must be determined by expert testimony (CT 2046), the court refused to do so. (CT 2041-2042, 2044, 2046.) Instead, the court instructed the jury "if you find that a party to this action violated Business and Professions Code section 18711 . . . you will find that such violation was negligence unless such party proves . . . that he or she did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. . . ."

16/ In addition, Dr. Saucedo--Colome's expert--conceded he was not qualified to render any opinion regarding Dr. Kelly's conduct because he was not a neurologist, nor an M.D. (RT 1401.)

(CT 2205.) Although the court's reason for denying the physician standard of care instructions is unclear, it seems to have resulted from the court's view that because plaintiffs stated in their complaints that their claims were not based on professional negligence, the court was bound by the pleadings and thus could only instruct on the "ordinary prudence" standard to overcome the presumption of negligence raised by breach of a mandatory statutory duty. (RT 624.) That is not the case.

Whether a claim constitutes medical malpractice or ordinary negligence depends on the substance of the allegations made, not upon what the cause of action is denominated by the plaintiff. In Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181, the Supreme Court confronted the issue of when an action is one for professional negligence in a case where the plaintiff pleaded an intentional tort in order to collect punitive damages in derogation of Code of Civil Procedure section 425.13(a), one of the provisions of MICRA. The court stated that "the trial court must determine whether a plaintiff's action for damages is one 'arising out of the professional negligence of a health care provider'" and held that "an action for damages arises out of the professional negligence of a health care provider if the injury for which damages are sought is directly related to the professional services provided by the health care provider." (At p. 191; citations and emphasis omitted; see also p. 192 ["identifying a cause of action as an 'intentional tort' as opposed to 'negligence' does not itself remove the claim from the requirements of [Code of Civil Procedure] section 425.13(a). The allegations that identify the nature and cause of a plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided"].) The court held that even though denominated as an intentional tort, the claim was one for professional negligence.

Davis v. Superior Court (1994) 27 Cal.App.4th 623, following Central Pathology, came to the same conclusion, holding that claims for fraud and conspiracy were claims based on professional negligence since the actions were directly related to the manner in which the health practitioner provided professional services. (At p. 630.)

Thus, contrary to its belief, the trial court was not bound by the assertion in the complaints that the claims against Dr. Kelly and Dr. Morales were not for professional negligence; rather, the relevant inquiry was whether the injury for which plaintiffs sought relief directly related to the professional services provided by Dr. Kelly and Dr. Morales. Unquestionably it did--the theory of this lawsuit was that these defendants improperly administered the neurological examination, which caused Colome to be excluded from the Stroh's tournament, damaged his career in other respects and also resulted in financial loss by Montoya.

Given that, the standard of care by which Dr. Kelly's and Dr. Morales's conduct was to be judged had to be determined by reference to the degree of care exercised by skilled physicians in the community and it had to be determined by reference to the (undisputed) expert testimony on the issue. As the Supreme Court recently held:

> "The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the layman." (Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 1001; citations and quotations omitted; Landeros v. Flood (1976) 17 Cal.3d 399, 410; Sinz v. Owens (1949) 33 Cal.2d 749, 753.)

It was therefore error to refuse to instruct the jury on the expert standard of care that governed Dr. Kelly's and Dr. Morales's conduct and to instruct instead on the ordinary prudence standard.

The error was prejudicial. Recently, in Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 580-581, the Supreme Court held that to determine whether instructional error is prejudicial, a reviewing court must evaluate: "(1) the state of the evidence, (2) the effect

of other instructions, (3) the effect of counsel's argument, and (4) any indications by the jury itself that it was misled." (At pp. 580-581.) We therefore address each of these factors.

1. The state of the evidence.

As we have noted, the evidence was undisputed that the standard of care in the medical community permitted mental status examinations to be delegated to non-neurologists; thus, had the proper standard of care been applied, the jury would have had no alternative but to find that the purported violation of Business and Professions Code section 18711 was not negligence because a physician exercising the skill and care of similar physicians in the locality would have allowed Dr. Morales to conduct the mental status examination.

2. The effect of other instructions.

The erroneous instruction advising the jury that the issue was to be determined according to ordinary prudence was the only instruction directly addressing the standard of care. One other instruction briefly touched on the issue but, rather than curing the error, it enhanced it. The court advised the jury that "[e]vidence as to whether or not a person conformed to a custom that had grown up in a given locality or business is relevant and ought to be considered" in determining whether the defendant acted properly (CT 2202)--thereby at least suggesting to the jury that there was some reason it heard testimony that the medical standard of care permitted non-neurologists to conduct mental status examinations--but the remainder of the instruction obliterated any possible curative effect when it went on to say that custom was not controlling because "that question must be determined by the standard of care that I have stated to you," i.e., ordinary care. (Ibid.) The jury thus never learned the relevance of the undisputed testimony that physicians routinely delegate tests such as mental status examinations to non-physicians and they were never told how to apply that evidence to the issues before them.

3. The arguments of counsel.

Colome's closing argument focused on the standard of care and, in doing so, compounded the court's instructional error. Colome's counsel argued:

> "[Dr. Kelly's counsel] is . . . going to say . . . well, the standard of care in the community is I can delegate certain tasks to other trained professionals.
>
> "But the Commission, in its wisdom, saw fit to have certain rules. The Legislature had the rules. The Commission had the contract . . . and there is that word 'shall.' All examinations 'shall' be personally performed by a physician who is certified. . . . What that means is that if it's not performed by a licensed neuropsychologist [sic], then it must be performed by the physician." (RT 2791-2792.)

Thus, the argument reinforced the perception created by the instructions that any testimony concerning the standard of care exercised by physicians in the community was irrelevant and that violation of the statute (or contract) equalled liability despite that testimony.

4. Any indication from the jury itself that it was misled.

There were no explicit indications from the jury that it was misled; however, that is not surprising, given that from the instructions and closing argument, the jury had no reason to suspect there existed any criteria other than ordinary prudence by which to gauge defendants' conduct.

Throughout trial, plaintiffs seemed to believe that liability for breach of a mandatory statutory duty was established simply upon proof that the statute was violated (or, even more erroneously, that liability for breach of a mandatory statutory duty was established simply

upon proof that the Commission contract was breached). They overlooked that an enactment must be violated and, even then, they ignored the fact that that was only the first half of the equation; the second half was that liability did not result even if the party violated the statute, if he did so while exercising due care. The court instructed the jury on the second half of the equation but it erred in doing so. Under the authorities cited above, the due care of a physician can be determined only by reference to the degree of skill exercised by skilled physicians in the community, as testified to by expert witnesses. Thus, the trial court should have given defendants' requested instructions and should not have allowed the jury to assess Dr. Kelly's and Dr. Morales's conduct according to what "a person of ordinary prudence" would have done. If the jury had been instructed correctly, it would have been compelled to accept the undisputed expert testimony that it was within the standard of care for Dr. Morales to conduct the mental status exam. (Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal.App.3d 278, 313.) This would have led to a judgment in favor of him and Dr. Kelly.

The prejudicially erroneous instruction that was given entitles Dr. Morales to a new trial; there is no alternative theory against him upon which the judgment could be affirmed. As for Dr. Kelly, there were two other theories of liability that the jury resolved against her. However, those theories--negligent hiring and supervision--were also tainted with prejudicial jury instruction error and require a new trial, as we next explain.

B. The Trial Court Prejudicially Erred In Instructing Regarding What Constitutes Negligent Hiring And Supervision; Thus, The Judgment Against Dr. Kelly Cannot Be Affirmed On Alternative Grounds.

At trial, the court gave the jury only one instruction concerning Colome's claim against Dr. Kelly for negligently hiring and supervising Dr. Morales. That instruction was tacked onto the instruction setting forth the elements of breach of a mandatory statutory duty and it consisted entirely of the following:

"As to the causes of action for negligent hiring and/or supervision, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish:

1. That the defendant was negligent; and
2. Such negligence was a legal cause of injury to the plaintiff." (CT 2194-2195.)

The instruction was erroneous in at least two respects.

First, it omitted a critical element of the cause of action--that the employer knew or should have known that his employee posed an undue risk of harm to others. (Virginia G. v. ABC Unified School Dist. (1993) 15 Cal.App.4th 1848, 1855 [if school district knew or should have known teacher posed a risk to students, it could be held liable for negligent hiring and supervision].) California follows the Restatement Second of Agency, section 213, which provides:

"A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]" (Evan F. v. Hughson United Methodist Church (1992) 8 Cal.App.4th 828, 836; citations omitted; Underwriters Ins. Co. v. Purdie (1983) 145 Cal.App.3d 57, 69.)

Comment d explains that knowledge on the part of the employer that his employee poses a danger of harm to others is necessary to establish negligent hiring:

"The principal may be negligent because he has reason to know that the servant . . . because of his qualities, is likely to harm others in view of the work . . . entrusted to him. . . . [¶] An agent, although otherwise

> competent, may be incompetent because of his reckless or vicious disposition, and if the principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. . . . [¶] Liability results under the rule . . . not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . ." (Underwriters Ins. Co. v. Purdie, supra, 145 Cal.App.3d at p. 69; emphasis in original.)

The court's instruction, however, failed to encompass this concept; it never mentioned any requirement that plaintiff prove Dr. Kelly knew or should have known Dr. Morales posed any sort of threat to Colome or others.

Second, the instruction did not focus on which defendant's negligence would lead to liability for negligent hiring and supervision; it informed the jury that liability resulted if "defendant"--whether referring to Dr. Kelly or Dr. Morales is unclear--was negligent, causing injury. Thus, the jury could have concluded that Dr. Kelly was liable under these theories simply because it believed Dr. Morales was negligent--an issue the jury was never asked to resolve. (CT 1839-1858.) The instruction given by the trial court thus confused liability for negligent hiring and supervision with respondeat superior liability, where an employer is liable for the torts of his employee. (See Civ. Code, § 2338; John R. v. Oakland Unified School Dist. (1989) 48 Cal.3d 438, 447 ["[A]n employer's liability extends to torts of an employee committed within the scope of his employment . . ."].) The two are not the same. Negligent hiring requires employer knowledge that the employee posed an undue risk of harm--that is what makes the employer negligent in his own right. Yet that was the point that the evidence did not establish and the point the court's instruction never made to the jury. (Underwriters Ins. Co., supra, 145 Cal.App.3d at p. 69; see also Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal.App.3d 947, 954 [no cause of

action for negligent hiring existed where undisputed evidence established employer did not know of employee's propensities for drinking and violence].)

The Soule factors compel a finding that the erroneous instruction on negligent hiring and supervision was prejudicial.

1. The state of the evidence.

In the seven week trial--a trial whose transcript consumes more than 3,000 pages--plaintiffs presented no evidence to establish that Dr. Kelly knew Dr. Morales posed a harm to Colome or Montoya. They apparently could prove no such thing because the only criticism they ever leveled at Dr. Morales's involvement in Colome's examination was that he was not a neurologist or neurosurgeon and his participation therefore violated Business and Professions Code section 18711. Dr. Morales had administered three to four thousand mental status exams (RT 2112) and even Dr. Saucedo, Colome's expert, testified: "Q: Isn't it true that your sole criticism of Dr. Morales is that he is not a licensed neuropsychologist? A: Yes, that was my criticism. . . ." (RT 1399.) During closing argument Colome's counsel conceded that Dr. Morales's title, not his competency, was the basis upon which he premised liability: "[I]t may well be that Armando Morales is qualified to conduct this kind of examination because of his 20 years of experience, but that is not the issue here. . . . ¶ The issue is whether he was, under the terms of this statute, one of the individuals that was [designated] to follow the law [section 18711] here. . . . ¶ The issue is not whether he was qualified." (RT 2792.)

That is certainly not the standard for determining whether an employer has negligently hired or supervised; knowingly hiring an unfit person is the linchpin of liability under this theory. Even if permitting Dr. Morales to conduct the exam was a violation of Business and Professions Code section 18711, which rendered him or Dr. Kelly or both liable for breach of that statute, and even if Dr. Morales was negligent in conducting the exam--a fact never proven--that would not give rise to independent liability on Dr. Kelly's part for negligent

hiring and supervision unless Dr. Morales actually posed a danger to Colome and Dr. Kelly knew he did--neither of which was even argued, much less proven, at trial. Under the instruction given, however, the jury had no choice but to conclude that Dr. Kelly was liable for negligent hiring and supervision even without such evidence, merely because there was evidence that Dr. Morales was hired by Dr. Kelly.

2. The effect of other instructions.

There were no other jury instructions that cured--or even clarified--the grossly misleading instruction on negligent hiring and supervision. The instruction of which we complain was the only instruction that even mentioned the negligent hiring and supervision theories--theories that were highlighted as separate from breach of mandatory statutory duty (and from each other) in the jury verdict. Yet the instruction gave no guidance whatsoever concerning the elements of the theories.

In fact, the other instructions given by the court likely caused further confusion. The court gave the jury BAJI 3.10, 3.11, 3.12 and 3.16, which are general instructions defining negligence, explaining how to determine whether negligence has been committed, and advising that the amount of care to be exercised depends on custom and circumstances. (CT 2198-2200.) When the instruction on liability for negligent hiring and supervision stated the elements were established on proof that "defendant was negligent," it is inconceivable that the jury would not turn to the general instructions for a definition of negligence; indeed, in response to a jury question, the court told it to do so. (See discussion in subsection 4, p. 36 below.) Nowhere in any of those instructions, however, was there any suggestion that employer knowledge of the employee's danger was a required element of liability.

3. The arguments of counsel.

Colome's closing argument buttressed the view that Dr. Kelly was liable for negligent hiring and supervision merely because she hired Dr. Morales and permitted him to give the mental status portion of the examination to Colome. Colome's counsel had only a single sentence to say in closing argument about the basis for Dr. Kelly's liability for negligent hiring: "Dr. Kelly did the hiring." (RT 2799.) His argument concerning negligent supervision was slightly longer but substantively no different; he argued:

> "Negligent supervision is the second cause of action. Dr. Kelly supervised Dr. Morales or should have. . . . [T]his man was giving this examination the very first time. Isn't it prudent and reasonable to expect that the doctor whose neck is on the line is going to somehow monitor it? . . .
>
> "If not, at a very minimum, you would expect that Dr. Kelly and Dr. Morales would have gotten together to talk about the first exam, about what problems did you have, how did it come out, how did he feel to you. . . .
>
> "She trusted Dr. Morales but she negligently supervised his conducting of the examination." (RT 2799-2800.)

Once again, the jury was left with a single, erroneous impression--that Dr. Kelly's knowledge of whether Dr. Morales posed a risk of injuring Colome was irrelevant to liability for negligent hiring and supervision.

4. The jury explicitly indicated it was confused by the instructions.

There is no question that the erroneous instruction confused the jury--it sent a note to the court during deliberations asking: "What is the legal definition of negligently hired?" (CT 1806.) The court referred the jury to "instructions no. 310-311, 312 [and] 316" (CT 1806)--instructions that had nothing to do with negligent hiring but were, instead, instructions concerning negligence in general. (CT 2198-2200, 2202.) That was the final blow to proper consideration of the elements of the negligent hiring and supervision theories and brought the jury full circle to the inevitable verdict it reached--Dr. Kelly was liable because "she did the hiring" and someone was negligent.

A new trial should be ordered because of this prejudicially erroneous instruction.

IV.

MOST, IF NOT ALL, OF THE DAMAGES ARE UNRECOVERABLE AS A MATTER OF LAW OR ARE EXCESSIVE.

A. As A Matter Of Law, All Of The Damages, Which Were Dependent On Colome Winning The Stroh's Tournament, Were Too Speculative To Support Any Judgment.

Even if the theories which underlie plaintiffs' judgments survive reversal, the claimed damages which make up the judgments will not.

All of Colome's damages, economic and noneconomic, were based on the anticipated outcome of the Stroh's tournament if he had been allowed to box. His "proof" went something like this: Colome defeated Derrick Kelly in 1985 but Canela lost to Kelly in the finals of the Stroh's tournament. (RT 2279-2280.) Although Colome had never fought Canela before, he was a better fighter, so he would have won the Stroh's semi-final round

between the two. (RT 1038-1045.) Because Colome had beaten Kelly three years earlier, he would have done so again. Thus, Colome would have won the Stroh's tournament. (RT 2805-2806; see RT 1036-1039.) As the winner of the Stroh's tournament, Colome would have received lucrative contracts placing him "in the million dollar bracket." (RT 1784-1785.) Thus, because Colome improperly was not permitted to box in (and, necessarily, win) the Stroh's tournament, the defendants, including Dr. Kelly and Dr. Morales, were liable to Colome for $585,500 in economic damages[17/] and $650,000 in noneconomic damages, and to Montoya for $200,000. As a matter of law, however, damages based on such reasoning are too speculative to be recovered because Colome could not prove he would have won the Stroh's tournament if he had been allowed to box.

In Youst v. Longo (1987) 43 Cal.3d 64, our Supreme Court addressed the issue of the right to recover damages based on the outcome of a sporting event. There, the plaintiff alleged the defendant ran his trotter horse into the plaintiff's during a race, causing the plaintiff's horse to break stride and place sixth in the race. (At p. 68.) The plaintiff sued for negligent and intentional interference with prospective business advantage and claimed as his damages the difference between the purse he won as the sixth place finisher and the amount he would have won as the first, second or third place winner. (Ibid.)

The Supreme Court held that such damages are not recoverable for two reasons. First, any cause of action based on such a theory is inherently too speculative to permit recovery:

17/ The jury awarded Colome $85,500 as economic damages related to the Stroh's tournament and $500,000 in economic damages related to Colome's overall career. (CT 1853-1854.) The latter figure appears to reflect that the jury accepted some, but not all, of the testimony concerning lucrative future contracts; the former figure, however, is unexplainable. The winner of the Stroh's tournament was to receive $100,000 (RT 191, 322), not $85,500 and if the jury intended to reduce the award by Montoya's 33 1/3% commission, the figure should have been $67,300, not $85,500.

Montoya's damages appear to have been 33 1/3% of Colome's economic damages award.

"Determining the probable expectancy of winning a sporting contest but for the defendant's interference seems impossible in most if not all cases, including the instant case. Sports generally involve the application of various unique or unpredictable skills and techniques, together with instances of luck or chance occurring at different times during the event, any one of which factors can drastically change the event's outcome. . . . Usually, it is impossible to predict the outcome of most sporting events without awaiting the actual conclusion." (At pp. 75-76; emphasis in original.)

Second, public policy prohibits recognition of such claims:

"The courts are not appropriate forums for adjudicating claimed sporting event violations which allegedly resulted in prospective economic loss. Although the economic rewards for engaging in professional sports have grown over the past decades, a sporting event is still a contest. The atmosphere of competition remains predominant despite the potential economic rewards. . . . ¶ It is the competitive nature of sporting in general, including both strategy and luck, that makes a claim for a 'lost purse' markedly different from a claim for personal injuries.

"If the tort of interference were recognized in the context of a sporting competition, virtually no such event would take place without a tort claim from some losing competitor seeking to recover his supposed economic loss; a player's every move would be highly scrutinized for possible use in the courtroom. Placing this type of additional pressure on competitors could seriously harm competitive sports." (At p. 78; emphasis in original; footnote omitted.)

The same public policy considerations, although addressed in Youst in terms of one contestant's interference with another during a sporting event, are equally present here. The trial below turned into a battle of boxing analysts--films of various boxing matches were shown to the jury with (literally) blow-by-blow commentary on the respective boxers' ability, style and endurance; even the referees' and managers' reactions to the bouts were analyzed. (RT 988-990 [testimony analyzing boxing styles]; 996-1006 [film of Colome v. Peavy match shown]; 1006 [viewing of between-rounds action in Colome v. Peavy fight]; 1008-1022 [film of Colome v. Young Dick Tiger bout shown].) The jurors were turned into the ultimate impressionistic arbiters of whose style and ability would have prevailed in hypothetical matches between Colome and Canela and Colome and Derrick Kelly. It was a job the jury took seriously; during deliberations it asked to re-review portions of the films of both fights that had been shown. (CT 1809.)[18/] Yet, ultimately, the jury's decision came to nothing more than a guess of who would have won. Such a guess cannot support a judgment. (Bromme, supra, 5 Cal.App.4th at pp. 1506-1507 [jury not entitled to determine whether plaintiff would have "beaten the odds" and survived cancer where neither the jury nor the experts nor medical science had any meaningful way of reaching the determination].)

The very language the witnesses used to describe the likely outcome of the hypothetical Colome/Canela and Colome/Derrick Kelly fights betrayed the speculative nature of the quest to predict who would have won: "I think that . . . Colome looked so good winning the last two fights and was definitely on the up elevator, I think he would beat Canela who, style-wise, might have made for an easier fight" (RT 1038); "It (Colome v. Kelly) would be a good fight, but I would take Colome" (RT 1040-1041); "I think that Colome, considering the way he ascended and the streak he was on . . . [he] could have certainly defeated some of these fighters and more often than not, held his own." (RT

18/ Presumably, if defendants wished to complain of a lack of substantial evidence to support the jury's findings, this court would have to view the films as well and determine whether, from them, the jury correctly could have determined that Colome would have prevailed in the hypothetical matches that would have made him the Stroh's tournament champion.

1044.) At the same time, the witnesses readily conceded that "you can't predict how well a boxer will perform in a given fight" (RT 1073) and "there are . . . people who make their living attempting to anticipate who might win a given boxing match." (RT 1084.) These admissions defeated any right to recover because anticipated profits are not compensable if it is uncertain whether any profit would have been derived at all. (Block v. Tobin (1975) 45 Cal.App.3d 214, 220; see also Frustruck v. City of Fairfax (1963) 212 Cal.App.2d 345, 368 ["even where damages are recoverable for prospective detriment, the occurrence of such detriment must be shown with such a degree of probability as amounts to a reasonable certainty that such detriment will result from the original injury"].)

Nor is this court required to ignore the obvious fact that the multi-billion dollar economies of Las Vegas and Atlantic City exist because the outcome of a sporting event is impossible to predict or that, against all odds, 45 year old George Foreman recently knocked out a previously-undefeated boxer 19 years his junior to become the heavyweight champion of the world. (Anderson, Sports of the Times, N. Y. Times (Nov. 6, 1994) page 1, column 1; see Youst, supra, 43 Cal.3d at p. 77 ["Courts must be guided by considerations of common sense, justice and fair play when making public policy determinations].)

Although lost profits and future damages do not have to be proven with absolute certainty, courts must be able to say with confidence that an injury occurred before damages can be recovered. Here, it was sheer speculation to Colome would have won the semi-final and final rounds of the Stroh's tournament; thus, all of his claimed damages, which flowed from the premise that he would have won, were so speculative that, as a matter of law, they were not recoverable. The judgments must be reversed.

B. Alternatively, All Damages Apart From Those Related To The Stroh's Tournament Must Be Stricken Because, As A Matter Of Law, It Was Not Foreseeable That Colome Would Injure His Own Hand If The Neurological Exam Were Negligently Performed.

To the extent the $500,000 in economic damages the jury awarded for injuries to Colome's overall career could be interpreted as premised on the theory that, but for the hand injury, Colome could have continued to box professionally and would have earned that much regardless of the fact that he did not get to compete in the Stroh's tournament[19/] (rather than on the idea that winning the Stroh's tournament would have reaped that amount of benefit), the damages still are unsupportable. The jury found it was foreseeable that Colome would smash his own hand into a door when he learned that he would not be allowed to box in the Stroh's tournament. This court, however, should hold as a matter of law that the injury was not a foreseeable result of any negligence by Dr. Kelly or Dr. Morales.[20/]

Foreseeability is the cornerstone of tort liability; one is not liable for the consequences of one's acts if those consequences could not have been foreseen at the time. (E.g. Ulwelling v. Crown Coach Corp. (1962) 206 Cal.App.2d 96, 118 ["one is not bound to foresee every possible injury which might occur, or every possible eventuality, but only those which were reasonably foreseeable"].) What is foreseeable "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." (Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 57; quotations, brackets and citations omitted.)

19/ Such a theory would not appear to be supported by the evidence; the testimony was that the lucrative future contracts would have befallen Colome as the winner of the Stroh's tournament. (RT 813, 853, 1644-1649, 1688-1689.) Nevertheless, we brief this issue in an abundance of caution.

20/ The verdict did not ask the jury whether Colome's injury was the foreseeable result of any negligence, merely whether it was foreseeable that Colome would act the way he did. (CT 283.) Nevertheless, we will assume that the jury's verdict encompassed a finding that the hand injury was a foreseeable result of Dr. Kelly's and Dr. Morales's negligence.

Is it so likely that a negligently conducted neurological examination will result in a self-inflicted hand injury that a reasonable physician conducting the examination must take into account that possibility and try somehow to guard against it? Simply stating the proposition illuminates its absurdity--how could Dr. Kelly or Dr. Morales conceivably have anticipated that Colome's reaction to being told he would not be allowed to participate in the Stroh's tournament would be to smash his fist into a door? Losing the chance to participate because of being unlicensed might have been predictable; a temper tantrum resulting in permanent injury was so unforeseeable that, as a matter of law, it cannot support the half-million dollars in future economic damages that the jury awarded here.

C. The Noneconomic Damages Must Be Stricken Entirely Or Reduced.

1. Noneconomic damages are not available when the plaintiff's injury is purely financial.

Colome also recovered $650,000 in noneconomic damages--$225,000 "as a legal result of the conduct by these defendants as to the Stroh's Boxing Tournament" (CT 2286) and $425,000 "as a legal result of the conduct by these defendants as to his overall boxing career, separate from his participation in the Stroh's Boxing Tournament." (CT 2287.)[21/] Colome insisted he was not claiming he suffered any noneconomic damages such as pain and suffering or emotional distress based on his hand injury (RT 1220-1223); rather, his claimed noneconomic damages were based on the distress he allegedly suffered as a result of his financial losses. (CT 2225.) The door-smashing incident apparently was used simply to illustrate the degree of frustration he felt at his losses. (RT 1220-1221 [Colome's counsel: "(Opposing counsel) seems to believe, mistakenly, that I am trying to seek emotional

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21/ For the reasons explained in section IV A above, the noneconomic damages, to the extent they were premised on loss of financial benefits that would have been reaped as a result of winning the Stroh's tournament, also were too speculative to be recovered.

damages for the pain that Colome suffered by hitting his hand and that is not what I am trying to do. What I am trying to do is to lay a foundation for my argument that there were injuries to his hand which was directly related to the frustration that he suffered on learning he could not fight and that the injury to his hand has hampered his earning capacity"].)

Consistent with his position that the hand injury itself was not the basis for his noneconomic damages, Colome convinced the court to alter BAJI 12.85, which permits a plaintiff to recover emotional distress damages arising from financial injury when the injury is "caused by a defendant's intentional or reckless conduct" (BAJI 12.85; emphasis added); the altered version the court gave the jury permitted the jury to award emotional distress damages for negligently caused financial injury. It stated:

> "A plaintiff who has suffered a substantial financial injury which was caused by a defendant's negligent conduct, is entitled to recover damages from that defendant for any mental or emotional distress resulting from such financial injury." (CT 2225.)

Settled California law, however, expressly prohibits recovery for emotional distress when it arises out of financial injury that results from purely negligent conduct:

> "California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff or intentional wrongdoing by defendant. Damages for emotional suffering are allowed when the tortfeasor's conduct, although negligent as a matter of law, contains elements of intentional malfeasance or bad faith. The more significant recent cases include Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal.App.3d 917; Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425; and Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566; Kendall Yacht Corp. v. United California Bank (1975) 50 Cal.App.3d 949; and Windeler v. Scheers Jewelers (1970) 8 Cal.App.3d 844;

see also Acadia, California, Ltd. v. Herbert (1960) 54 Cal.2d 328. Cases such as Crisci, supra, and Gruenberg, supra, however, involve bad faith and are therefore really intentional tort cases, and although Jarchow, supra, declared that negligent infliction of emotional distress was actionable, the case involved a willful refusal to take action to clear title. . . . Thus elements of breach of covenant of good faith and of affirmative refusal to perform obligations—elements which justified recovery in Crisci and Gruenberg, supra—were likewise present in Jarchow. To the extent that the court in Jarchow purported to extend the doctrine of the foregoing cases to allow recovery for emotional suffering damages in cases involving negligence without bad faith and without physical injury, the extension was unwarranted by California law, for all prior cases contain some element of intentional or affirmative wrongdoing by defendant." (Quezada v. Hart (1977) 67 Cal.App.3d 754, 761-762; parallel citations and parenthetical explanations omitted.)

Subsequent cases have continued to emphasize that negligence alone will not support recovery for noneconomic damages where the defendant's conduct results only in economic injury to the plaintiff. (E.g., Smith v. Superior Court (1992) 10 Cal.App.4th 1033, 1040 ["[M]ere negligence will not support a recovery for mental suffering where the defendant's tortious conduct has resulted in only economic injury to the plaintiff"]; Devin v. United Services (1992) 6 Cal.App.4th 1149, 1162 ["[I]t is the general rule that negligence which causes only monetary harm does not support an award of emotional distress damages"; emphasis in original].) Here, Colome's theory was that Dr. Kelly's and Dr. Morales's conduct resulted in financial injury to him, depriving him of his license to box, of the purse he supposedly would have won in the Stroh's tournament, and of the lucrative contracts for bouts in the future which would have been offered had he won the Stroh's tournament. Those are precisely the types of purely economic injuries that will not support recovery for

additional noneconomic damages and the noneconomic damages therefore should be stricken from the judgment.

2. Even if Colome were entitled to noneconomic damages, the $425,000 award for such damages as they related to his overall career is excessive.

Setting aside that it is legally unforeseeable that a grown man will slam his fist into a door in a pique, and assuming Colome is able to recover noneconomic damages arising out of financial injury, the $425,000 in noneconomic damages the jury awarded in connection with Colome's career, apart from the Stroh's tournament, is excessive. (CT 2287.)[22/] The jury found that Colome's hand injury did not legally cause noneconomic damage to Colome's overall career, yet it set those damages at $425,000. (CT 2284.) The only conceivable basis for such an award, given the jury's finding that the noneconomic damages did not result from an inability to box because of the hand injury, would be to compensate for emotional distress arising out of being deprived of the license to box for three months. During closing argument, Colome's counsel seemed to suggest that Colome suffered emotional distress between February 8--the day of the Stroh's tournament--and May 12--the day Colome's license was reinstated--and counsel urged the jury to award noneconomic damages on that basis. (RT 2809.) The jury apparently followed this suggestion. (CT 2284.) If that was the jury's theory, the damages were grossly excessive.

Although Colome testified at trial, he never mentioned suffering any emotional distress between February 8 and May 12. (RT 1460-1589.) Colome's wife's testimony supplies the only conceivable basis for emotional distress damages during that time period; she testified that Colome's attitude changed after he was barred from the Stroh's tournament and that he was "always angry," blaming the Commission that "they had taken his whole life

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22/ The damages were reduced by Colome's comparative 9% fault and apportioned among the defendants found liable under each cause of action. (E.g., CT 2288, 2289, 2290.)

away." (RT 1719-1720.) That, however, was the sum total of the evidence presented during the seven week trial that even remotely would provide the basis for the jury's award of $425,000 ($141,666 per month or $5,182 per day) for being deprived of the right to box for three months.

Although the law commits the responsibility for determining the amount of damages suffered by the plaintiff to the jury, the jury's decision cannot be allowed to stand where the award as a matter of law is excessive. (Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1252; Mouchette v. Board of Education (1990) 217 Cal.App.3d 303, 316.) The excessiveness of this award is apparent simply by considering the fact that the amount the jury awarded for Colome's three months of distress at being unlicensed to box was only slightly less than the amount it found Colome would have earned in his entire future career. The excessiveness becomes even more apparent when one realizes there was no evidence that Colome could or would have boxed during the three-month period he was unlicensed; indeed, given that Colome had injured his hand--an injury the jury found was not the cause of Colome's emotional distress--he most likely would not have done so. Thus, there was nothing to establish some special loss arising out of being unlicensed that would have heightened the degree of Colome's mental suffering at not being permitted to box. The $425,000 awarded for noneconomic damages unrelated to the Stroh's tournament was grossly excessive.

D. If Any Noneconomic Damages Remain, They Must Be Reduced To $250,000.

If any noneconomic damages remain after application of the above principles, they must be reduced pursuant to Civil Code section 3333.2, which provides that in any action against a health care provider based on professional negligence, the noneconomic damages awarded cannot exceed $250,000.

For the reasons detailed in Section IIIA of this brief, any judgment based on a breach of Business and Professions Code section 18711 necessarily is one for professional negligence because Colome's injuries were directly related to the professional services provided by Dr. Kelly and Dr. Morales in conducting Colome's neurological examination. (Central Pathology Service Medical Clinic, Inc., supra, 3 Cal.4th at p. 191.) Colome's causes of action for negligent hiring and supervision also fall within the meaning of professional negligence and thus within the scope of Civil Code section 3333.2; it is settled that "the competent selection and review of medical staff is precisely the type of professional service a hospital is licensed and expected to provide" rendering section 3333.2 applicable. (Bell v. Sharp Cabrillo Hospital (1989) 212 Cal.App.3d 1034, 1050-1051; see Elam v. College Park Hospital (1982) 132 Cal.App.3d 332, 346.) Negligent hiring and negligent supervision claims are indistinguishable from claims based on negligent selection and review of medical staff; thus, the Bell result applies to Colome's claims against Dr. Kelly for negligently hiring and supervising Dr. Morales. Any noneconomic damages that survive under any theory therefore must be reduced to $250,000.

CONCLUSION

Under any theory and by any calculation, the judgments in this case cannot stand. They should be reversed with directions to enter judgment in favor of appellants Dr. Kimberly Kelly and Dr. Armando Morales; alternatively, they should be reversed and the cause remanded for a new trial.

Dated: April 3, 1995

Respectfully submitted,

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