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' REPLY BRIEF

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INTRODUCTION

The trial below was a remarkable assortment of muddy theories, half-defined or undefined claims, and improper recoveries. In their opening brief, defendants and appellants Dr. Kimberly Kelly and Dr. Armando Morales demonstrated that the judgments which resulted must be reversed because there are no legal theories on which liability could be imposed at all and that, even if there were a viable theory which would support the judgments, jury instruction errors and numerous errors in every element of damages award would still compel the granting of a new trial.

Plaintiffs and respondents Diomedes Colome and Jimmy Montoya have each filed separate briefs (we respond to both in this single reply brief) attempting to salvage the judgments. Unfortunately, the arguments presented in their briefs are no more logical or legally defensible than the theories they presented at trial were. In many instances, respondents simply recite the jury findings, as if the findings could respond to the legal arguments presented. In at least one instance, respondents attempt to impose liability on Dr. Kelly and Dr. Morales on a theory that was not argued against them at trial, on which they received no jury findings against these defendants and on which no judgments were entered against these defendants. When those efforts fail, respondents resort to "distinguishing" controlling case law on the most specious of grounds.

These judgments cannot survive--they are so riddled with error from beginning to end that the only real choice for this court is to decide which of the many grounds for reversal it will select. Because of the statutory immunity which applies to this case, it should reverse with directions to enter judgment in favor of Dr. Kelly and Dr. Morales. Alternatively, based on jury instruction error and the award of improper damages, it should reverse and remand the action for a new trial.

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.

Before we begin to address the arguments made by Colome and Montoya concerning the statutory basis for liability on the part of Dr. Kelly and Dr. Morales, it is necessary to explain why we do not discuss certain issues raised by the respondents. First, we do not address the argument made on pages 11-12 of Colome's respondents brief and pages 9-12 of Montoya's respondent's brief urging that the duty imposed by Business and Professions Code section 18711 was mandatory, rather than permissive, because, as noted in their opening brief, Dr. Kelly and Dr. Morales assumed for the purposes of this appeal that the statute did, indeed, establish a mandatory duty to perform the neurological examination only through a neurologist or neurosurgeon. (See AOB p. 15.) Second, we do not address the arguments made in pages 28-34 of Colome's respondent's brief concerning the applicability of Government Code sections 818.4, 821.2, 818.8, 822.2 and 820.6 to this case because those statutes were raised only by cross-appellants the State Athletic Commission, Kenneth Gray, Frederick Flynn and Richard Drew and do not apply to Dr. Kelly and Dr. Morales. With that clarification, we turn to the arguments raised in respondents' briefs.

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.

1. The jury found that Dr. Morales was not an employee of the Commission and thus there is no theory under which he could be found to have owed a duty pursuant to Business and Professions Code section 18711 and neither agency nor contract law provide a basis upon which a duty on the part of Dr. Kelly can be found.

In their opening brief, Dr. Kelly and Dr. Morales explained that, at trial, Colome and Montoya premised liability in this case on Government Code section 815.6, which provides that "[w]here 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." Dr. Kelly and Dr. Morales further demonstrated that the attempt to rely on that statute as a basis of liability foundered at the outset because the underlying statute--Business and Professions Code section 18711--imposed no duty whatsoever on them. (See AOB pp. 13-16.) Instead, the statute concerns and is addressed only to the Commission--it states that "the commission shall require, as a condition of licensure and as part of the application process, each applicant . . . to be examined by a licensed physician and surgeon who specializes in neurology or neurosurgery. . . ." (subd. (a)); it does not impose any duty or obligation in any individual physician to do anything at all.

In response to that plain proposition, both Colome and Montoya urge that liability can be imposed on Dr. Kelly because, in Colome's words, "the examining physicians examined Mr. Colome in the capacity of agents of the State Athletic Commission, and were acting

pursuant to a contract with the State of California which, in effect, made them state employees for the purpose of this examination" and that liability can therefore be imposed on these doctors under agency principles. (Colome RB pp. 13-16; Montoya RB p. 14.) For several reasons, however, this response misses the mark.

As far as Dr. Morales is concerned, the jury expressly rejected the proposition that Dr. Morales was an employee of the Commission; it found that he was an employee of UCLA (CT 1853) and neither Colome nor Montoya has cross-appealed to complain that the finding was contrary to the evidence. Thus, liability cannot be imposed on Dr. Morales under the theory that he was an agent of the Commission and the Commission's statutory obligations therefore became his obligations as well.

Colome himself implicitly concedes as much--he recites the jury finding that Dr. Kelly was an employee of the Commission (Colome RB p. 16) and urges that because of that finding "[i]t is therefore clear that Dr. Kelly was an agent of the State of California, subjecting her to liability along with the State of California for her wrongful acts" (Colome RB p. 17; emphasis added) but his brief is tellingly silent regarding how Dr. Morales, as a UCLA employee, could be viewed as an agent of the state and its Commission. Montoya simply makes the conclusory statement that "liability is established under the theory of agency" (Montoya RB p. 14) without any explanation or analysis. In fact, the jury finding that Dr. Morales was an employee of UCLA, together with the complete lack of any evidence in the record that he acted as an agent for the Commission, ends the inquiry as far as Dr. Morales is concerned--the judgment against him must be reversed because Business and Professions Code section 18711 imposed no duty on him and he therefore cannot be held liable for breach of a mandatory statutory duty under Business and Professions Code section 18711.

Colome's and Montoya's attempts to impose liability on Dr. Kelly are equally misplaced. First, Colome devotes several pages of his brief to urging that, because of agency principles, liability could be imposed on Dr. Kelly for breach of subdivision (b) of Business and Professions Code section 18711--which prohibits re-examination of a boxer who

has successfully passed a neurological examination within the preceding 120 days. (Colome RB pp. 21-25.) What he fails to explain to this court, however, is that that theory was never urged against Dr. Kelly at trial--the jury verdict asked only if she breached subdivision (a) of the statute (CT 2274) and no judgment was entered against her on the theory that she breached subdivision (b). (CT 2288.) Given that he failed to present that theory against Dr. Kelly at trial and failed to obtain a judgment against her on that theory, Colome cannot now raise the theory in an effort to avoid reversal of the judgment he did get.

There was good reason for Colome not to pursue the theory against Dr. Kelly in any event--while it is true, as Colome asserts, that a principal can be held liable for the tortious acts of his agent (see e.g., Hudson v. Nixon (1962) 57 Cal.2d 482, 484; Civ. Code, §2343) and it is also true, as Colome asserts, that an agent can be held liable in his own right for any wrongful acts he commits (see e.g., Civ. Code, §2343), agency law does not impose liability on an agent for the acts of his principal. It is for that reason that Colome's assertions that Dr. Kelly could be held liable for breaching subdivision (b) of Business and Professions Code--setting aside the fact that no judgment on that theory was entered against her--is erroneous. Even if, as the jury found, Dr. Kelly was an employee of the State and its Commission, the evidence established that she was a neurologist working at UCLA and there was no evidence that she was a member of the Commission, was involved in deciding which boxers would receive neurological examinations or when they would do so, or that she in any way was involved in the decision to require Colome to undergo a new neurological examination within the period in which he normally would have been exempt from re-taking the exam. Because Dr. Kelly had nothing to do with those acts, however improper they may have been and to whatever degree they might provide a basis upon which Colome could recover from the Commission, she cannot be held liable under the theory that she breached a mandatory statutory duty under Business and Professions Code section 18711, subdivision (b), both because no judgment was entered against her on that theory and because an agent is liable only for his own acts and not for those committed by his principal.

As far as any liability on the part of Dr. Kelly for breach of the provisions of Business and Professions Code section 18711, subdivision (a)--requiring the Commission to conduct neurological examinations through a physician who specializes in neurology--is concerned, Montoya seems to be under the impression that if a statute is obligatory, rather than permissive, liability follows automatically as long as someone, somewhere breached the statute. (Montoya RB pp. 13-14.) Simply stating that the statute required a certain act, however, does not answer the question raised when liability for breach of a mandatory statutory duty is at issue; namely, was the act required of this defendant. (See Zolin v. Superior Court (1993) 19 Cal.App.4th 1157, 1161; MacDonald v. State of California (1991) 230 Cal.App.3d 319, 327 [liability can be imposed for breach of a mandatory statutory duty only if the enactment imposed a duty on the defendant].) Thus, Montoya's response to Dr. Kelly's assertion that Business and Professions Code section 18711, subdivision (a) imposed no duty on her constitutes no response at all.

Colome's response fares no better. He cites and relies solely on contract law to support his claim that the statute imposed a duty on Dr. Kelly. (See Colome RB p. 15, citing Bayuk v. Edson (1965) 236 Cal.App.2d 309.) Colome, however, was not a party to that contract and one who is not a party to a contract cannot sue for its breach. (Watson v. Aced (1957) 156 Cal.App.2d 87, 91; see also American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal.App.3d 951, 962.) He therefore cannot rely on the contract between Dr. Kelly and the Commission as a basis for liability.

Colome's response, we presume, would be to insist that he did not sue for breach of contract but, instead, sued for breach of mandatory statutory duty under Government Code section 815.6. That is entirely correct and that is the reason why the theory on which Colome did sue does not permit liability to be imposed on these doctors. Government Code section 815.6 imposes liability only where the public entity or employee is under a mandatory duty pursuant to an "enactment" to act in a certain way; an "enactment is not a contract, it is "a constitutional provision, statute, charter provision, ordinance or regulation." (Gov. Code, §810.6; Brenneman v. State of California (1989) 208 Cal.App.3d 812, 816-

817.) Thus, Colome could not use the terms of the contract between Dr. Kelly and the Commission as a basis for imposing liability under Government Code section 815.6 on her; instead, he had to establish that Business and Professions Code section 18711 required Dr. Kelly to do something. At trial, he urges that the "something" Dr. Kelly was to do was to conduct the examination herself; however, that obligation did not arise from the statute because all the statute provides is that "the commission shall require . . . each applicant . . . to be examined by a licensed physician and surgeon who specializes in neurology or neurosurgery." Because the statute imposed no duty on either Dr. Kelly or Dr. Morales, the judgments should be reversed.

2. Even if the statute had imposed a duty on Dr. Kelly or Dr. Morales, the statute was not meant to protect against the type of harm inflicted in this case.

Setting aside the lack of any duty imposed by Business and Professions Code section 18711 on Dr. Kelly and Dr. Morales, the statute further fails to provide a basis upon which liability can be imposed because the statute was not intended to protect against the risk of the injury that was suffered in this case. (See AOB pp. 17-19.) As Colome points out in his brief, although the jury found that Business and Professions Code section 18711, subdivision (a) was intended to protect against the risk of the injury suffered by Colome (Colome RB p. 17; CT 2275), the question was not properly one for the jury at all, even if the parties agreed to submit it to the jury. (Fredette v. City of Long Beach (1986) 187 Cal.App.3d 122, 135 [whether the injury involved resulted from an occurrence of the nature which the statute was designed to prevent and whether the plaintiff was one of the persons for whose protection the statute was enacted are questions of law]; Nunneley v. Edgar Hotel (1950) 36 Cal.2d 493, 497-498; Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal.App.3d 814, 822 [same]; Crestwood Lumber Co. v. Citizens Sav. and Loan Assn. (1978) 83 Cal.App.3d 819, 826.) Thus, this court is not bound by the jury's answer to that legal question.

In order to address the issue of whether Business and Professions Code section 18711, subdivision (a), was intended to address the injury he suffered, Colome states in his brief that "it is clear that the legislative intent in passing Bus[iness] and Prof[essions] Code [section] 18711 was to enact standards for the administration of professional licensing examinations to boxers, to ensure that the health and safety of all applicants for licensure would not be compromised. . . ." (Colome RB p. 18; emphasis added.) That is precisely the point Dr. Kelly and Dr. Morales made in their opening brief; the legislative history unequivocally establishes that the purpose underlying enactment of Business and Professions Code section 18711 was to prevent, to the degree possible, boxers who suffer from neurological injury from incurring further injury by continuing to box. (See AOB pp. 17-18.) Of course, Colome adds his own twist, claiming that the statute was meant to ensure that the boxer's safety was not compromised through the "arbitrary and unlawful administration of neurological examinations" (Colome RB p. 18) but not only is there nothing in the legislative history to suggest that the Legislature was concerned with "arbitrary and unlawful" examinations (and Colome has cited no such evidence), Colome also fails to suggest how his health and safety was in any way endangered by anything Dr. Kelly or Dr. Morales did, even after conceding that protecting the health and safety of the boxers was the very reason the statute was enacted.

What Colome really is attempting to do in this case is to take a statute that was specifically aimed at preventing physical injury and to twist it into a law meant to protect the financial interest a boxer has in continuing to box. To do so stands the purpose of the statute on its head and would place the Commission and the physicians who conduct examinations at its request in the position of defending against claims by some boxers who assert that they wrongfully passed the exam and their health has been ruined by continuing to box and against others who allege that they wrongfully failed the exam and their financial prospects have been ruined. There is nothing in the legislative history to suggest that the Legislature had this second instance in mind when it enacted Business and Profession Code section 18711 and, for that reason, no liability can be imposed on Dr. Kelly and Dr. Morales in this case.

3. Assuming the statute established a duty and that the duty was breached, there was no evidence to establish that the breach was a proximate cause of the injury.

Colome's response to the argument made by Dr. Kelly and Dr. Morales in their opening brief that he presented no evidence establishing that their alleged breach of the statute was a proximate cause of his injuries (see AOB pp. 19-20) is puzzling--Colome begins by simply reciting the jury verdict. (Colome RB pp. 20-21.) We are, of course, well aware that the jury found that breach of the mandatory statutory duty was a proximate cause of the injury; the point is that there was no evidence to support that finding. Although Colome appears to believe otherwise, an appellate court is certainly empowered to reverse a judgment when there is no evidence to support the verdict (Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal.App.3d 973, 1011-1012); to suggest otherwise would be to eviscerate the very purpose of an appeal.

There is no quarreling with the fact that Colome failed to introduce evidence on this element of his cause of action--he presented evidence that he failed the examination but he introduced no evidence that if Dr. Kelly or any other neurologist had conducted the examination, rather than Dr. Morales, the outcome of the test would have been any different. He attempted to establish the necessary causal connection between the allegedly wrongful act and the injury by presenting the testimony of Dr. Saucedo, but Dr. Saucedo himself was neither a neurologist nor a neurosurgeon. (RT 1112, 1394-1395.) Thus, all the proffered evidence established was that another non-neurologist disagreed with the test results. That, of course, did nothing to further Colome's claim that he was injured because a non-neurologist--Dr. Morales--conducted the exam. (See Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1052-1053 [causation requires proof that a defendant's conduct was a substantial factor in bringing about the harm to the plaintiff]; Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, 1498 [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].)

Apparently aware that he has nothing to point to in the record to establish the necessary proximate cause element of his claim, Colome simply engages in speculation, urging that "if Dr. Kelly had conducted the mental status portion of this examination, her professional expertise would have enabled her to determine that Colome's illiteracy is distinguishable from neurological impairment" and "if Kelly had delegated the task of administering this examination to a licensed physician specializing in neurology . . . that individual would have had the expertise to realize that despite his apparent illiteracy, Colome was completely devoid of neurological impairment, and fit to box." (Colome RB p. 21.) Speculation in a brief, however, cannot substitute for evidence at trial and there simply was no such evidence introduced in the trial below. The judgments against Dr. Kelly and Dr. Morales fail for this reason as well.

B. Dr. Kelly and Dr. Morales Are Immune From Liability Under Government Code Section 855.6.

In their opening brief, Dr. Kelly and Dr. Morales established that, in the absence of any potential liability for breach of a mandatory statutory duty, they are immune from any liability in this case under Government Code section 855.6. Government Code section 855.6 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."

As if that statute were not itself clear enough, the Law Revision Comment to the section explains that:

> "[This statute] grants an immunity for failure to perform adequately . . . physical examinations to determine the qualifications of boxers. . . ." (Cal. Law Revision Com. com., West Ann. Gov. Code, §855.6 (1995) p. 487.)

Because this statute is so clear, Colome stretches to absurdity to argue that it does not apply in this case. Colome urges that his claim "is not that he was subject to an improper administration of the examination; it is that he was subject to an illegal administration of the examination." (Colome RB pp. 26-27; emphasis in original.) Although Colome does not provide any explanation for what he means by "improper" versus "illegal," it appears that he relies on Business and Professions Code section 18711, subdivision (b)--the theory that was not submitted against Dr. Kelly and Dr. Morales and on which no judgment against them was entered. If that is the case, that is the end of the discussion--the "illegality" theory did not apply to them.

If, however, Colome is attempting to draw a distinction that applies equally to claims under subdivision (a) of Business and Professions Code section 18711, then his efforts fail. Merely because Colome chooses to call an examination that is performed by a doctor of social work, rather than by a neurologist, an "illegal" examination rather than an "improper" one does not enable him to escape the statute. It is absurd to suggest, as Colome does, that if Dr. Kelly and Dr. Morales had merely glanced over him when he appeared at UCLA, immunity would apply because the "examination" was merely "improper," but that because they gave Colome a thorough examination, albeit possibly through the wrong person, both can be held liable. Government Code section 855.6 applies by its plain terms to any inadequate physical or mental examination given for the purpose of determining whether a person has a mental or physical condition that poses a threat to his own health or safety and in the only case we have found that addresses the meaning of the statute, the Court of Appeal held that the statute would provide immunity to a physician who "express[es] a good-faith opinion as to a patient's mental condition." (Kravitz v. State (1970) 8 Cal.App.3d 301,

306.) That is precisely what was done in this case. Colome's semantics aside, the statute applies here.

Montoya's argument concerning Government Code section 855.6 simply misses the point. Relying on Morris v. County of Marin (1977) 18 Cal.3d 901; West v. State of California (1986) 181 Cal.App.3d 753; Elson v. Public Utilities Commission (1975) 51 Cal.App.3d 577 and Young v. City of Inglewood (1979) 92 Cal.App.3d 437, he simply urges that immunity does not apply where there has been a breach of a mandatory statutory duty. (Montoya RB pp. 13-14.) The point here is that there has been no breach of any mandatory statutory duty and, given that, Government Code section 855.6 provides immunity for all other acts these defendants might have engaged in. The cases Montoya cites are simply irrelevant to this issue.

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.

In addition to the immunity that compels reversal of both Colome's and Montoya's judgments, Montoya's judgment for $200,000 in damages based on the theory that Dr. Kelly and Dr. Morales interfered with the economic advantage he would have reaped as Colome's manager had Colome not been wrongly denied the opportunity to participate in the Stroh's tournament must be reversed simply because these two defendants owed Montoya no duty whatsoever.

In our opening brief, we explained that the policy considerations which determine whether a defendant owed a duty to the plaintiff--in this instance, Montoya--were not met. The neurological examination was intended to protect Colome from personal injury, not to

protect the underlying financial interests or reputation of his manager; it was unforeseeable that if a doctor of social work, rather than the neurologist herself, gave Colome the exam, his manager might be injured; there was a serious question, given the quality of the evidence Montoya presented, whether he was even injured at all; there was no evidence connecting any negligent acts by Dr. Kelly or Dr. Morales to Montoya's injury; there was no moral blame that attached to the conduct of Dr. Kelly or Dr. Morales; and imposing liability would increase, not prevent, future harm. (See AOB pp. 22-24.)

Montoya, of course, claims otherwise; he begins by asserting that simply because he had a "vested" interest in Colome, the examination was intended to benefit him. (Montoya RB p. 21.) Not so. In support of their opening brief, Dr. Kelly and Dr. Morales submitted the legislative history underlying Business & Professions Code section 18711. As that history makes clear, the only consideration the legislature took into account in enacting the statute was preservation of the health of the boxer. Simply because many people, family and friends among them, may share the legislature's concern over a boxer's safety and well-being does not mean that all of those people may sue if the neurological examination conducted pursuant to that statute is done improperly. The right to recover is limited to the person or persons who were intended to be benefitted by the transaction and, here, only Colome was such a beneficiary.

Montoya next asserts that Dr. Kelly and Dr. Morales owed him a duty of care because he was a foreseeable plaintiff, although his explanation of why this is so is gibberish. Montoya simply asserts that if Colome were found not to be neurologically fit, then "each Plaintiff is a foreseeable Plaintiff as each would be greatly affected" by that result. (Montoya RB p. 21.) The foreseeability issue in a duty analysis, however, is whether the particular class of plaintiff was likely to be a victim of the type of harm alleged and, here, Colome and Montoya based their claims on the fact that a doctor of social work, rather than a doctor of neurology, performed part of the exam. It does not follow, however, that by doing so Dr. Kelly and Dr. Morales knew or should have know that Colome's manager might lose business.

As for the requirement that the court should be reasonably certain that the plaintiff suffered the harm alleged before a duty of care will be found to have existed, Montoya is largely silent. This is for good reason--in their opening brief, Dr. Kelly and Dr. Morales explained that the "evidence" concerning Montoya's injuries consisted of the bald assertions that after Colome failed his examination, Montoya's phone calls were not returned as promptly as they once were--although Montoya could not say why--and that Montoya's earnings that year were less than the previous year--although he again could not say why. (See AOB p. 23; RT 1662-1668.) There was nothing in this evidence that would permit any court to conclude with reasonable certainty that this plaintiff did, in fact, suffer any injury as a result of these defendants' acts.

To satisfy the requirement that he show a connection between the negligently performed neurological examination and his alleged business setbacks, Montoya makes a single claim--"Morales testified that he was once an amateur boxer. Morales knew or should have know of the boxer-manager relationship." (Montoya RB p. 21.) Such an assertion is nothing more than a reiteration of his conclusory statement that he was a foreseeable victim of the injury but even if this court could confidently state that anyone who has ever boxed, even as an amateur, should know the ins and outs of the boxing profession--a highly doubtful proposition--the point still remains that such an assumption establishes no connection between the negligent act and the resulting injury. Montoya never proved that if a neurologist had administered the mental status examination, Colome would have passed and he certainly never proved that, had Colome passed, his own career would have flourished.

Finally, Montoya attaches moral blame to the conduct of Dr. Kelly and Dr. Morales by simply asserting that they had a "moral obligation" to discuss the test results with each other. (Montoya RB pp. 21-22.) While perhaps they should have done so, it was hardly <u>immoral</u> to have foregone such a discussion. Real harm, however, could come from imposing liability on doctors such as these--all neurologists should be encouraged to err on the side of caution to prevent the brain and neurological damage that the legislative history of section 18711 establishes is widespread among boxers, rather than to consider the financial

interests of persons such as the managers. At the very least, the liability of physicians conducting neurological examinations to determine whether boxing could pose a risk of injury or death to the athlete should be limited to the person in whose interest the physicians act--the boxer himself.

None of the policy reasons which determine whether liability should be imposed on a defendant under a certain set of circumstances are present when applied to Montoya's claims in this case. Thus, the judgment in favor of Montoya should be reversed with directions to enter judgment in favor of Dr. Kelly and Dr. Morales.

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 the judgments survive the above arguments, and thus respondents escape without a reversal with directions to enter judgment in appellants' favor, the judgments nevertheless must be reversed because of two instances of jury instruction error. In the first instance, the trial court refused to instruct the jury that the conduct of Dr. Kelly and Dr. Morales was to be judged according to the skill and care exercised by physicians practicing in the same or a similar locality and, instead, instructed the jury that their acts were to be evaluated according to what would be reasonably expected of a person of ordinary prudence acting under similar circumstances. (CT 2201-2202, 2205.) This was error under the Supreme Court's holdings in Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992)

3 Cal.4th 181 and Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 1001.)

Colome, however, never comes to terms with this point. He insists that he did not sue for medical malpractice but for failure to comply with the terms of the statute governing how such examinations are to be conducted. (Colome RB pp. 35-36.) Because of this, and because he believes the Supreme Court's holding in Central Pathology applies only to pleading punitive damages (Colome RB pp. 36-37), he argues that no jury instruction error occurred. Colome, however, should re-read Central Pathology. The Supreme Court's holding in that seminal case is not a narrow one concerning the pleading requirements for punitive damages, as Colome asserts. Instead, the significance of the case, and its true holding, (as distinguished from its factual context which Colome recites) is that an action against a health care provider is to be judged according to the basis of the claims made, not simply by reference to the theory which the plaintiff has chosen to allege, to determine whether it states a claim arising out of the provision of health care services. (3 Cal.4th at pp. 191, 192.) The plaintiff in Central Pathology made precisely the argument Colome makes here--that he was not suing for medical malpractice but, in that case, for the ordinary torts of fraud and intentional infliction of emotional distress. (3 Cal.4th at p. 185.) The Supreme Court rejected the argument that the law to be applied turns on the theory upon which the plaintiff has chosen to sue and, instead, held that the facts giving rise to the cause of action are what is relevant. Here, the fact remains that even though Colome based his theory of recovery on breach of a mandatory statutory duty, the acts which gave rise to that claim were the conduct by physicians in administering a physical exam. Central Pathology is far from inapplicable; it is controlling.

Moreover, Colome has nothing to say about the other Supreme Court case cited by Dr. Kelly and Dr. Morales in their opening brief--Flowers v. Torrance Memorial Hospital Medical Center, supra, 8 Cal.4th 992. Its holding, however, cannot be ignored:

> "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." (At p. 1001; citations omitted.)

It is safe to say that whether a doctor of social work is qualified to conduct the mental status portion of a neurological exam is not within the common knowledge of a layman and thus can be judged only by reference to the standard of care to be exercised by physicians. It was precisely this right, however, that was denied Dr. Kelly and Dr. Morales when the trial court instructed on an ordinary, rather than a medical, standard of care.

Colome, however, argues that any error was harmless, although his argument does not withstand scrutiny. He states that "the jury was apprised of the relevance of the standard of care in the medical community" (Colome RB p. 40) but that is precisely the instruction that the trial court refused to give. (CT 2041-2042, 2044, 2046.) He then refers to "evidence" that Dr. Morales was unqualified--without any citation to the record--and simply ignores the fact that the evidence was undisputed at trial that the medical standard of care permitted neurologists to delegate the administration of the mental status examinations to non-neurologists. (RT 638, 687-688, 689-695, 701, 759, 1397, 1894-1895, 1926, 1979, 2442-2449, 2608-2611.) He does not even attempt to address the other factors outlined in Soule v. General Motors Corp. (1994) 8 Cal.4th 548 that are to be considered in determining whether jury instruction error is harmful--factors which we individually and explicitly addressed in our opening brief and which we will not repeat here, other than to emphasize that Colome's own attorney urged the jury to ignore the medical standard of care in his closing argument to appellants' great detriment. (RT 2791-2792; AOB pp. 28-30.) It is clear that the trial court's refusal to instruct the jury concerning the medical standard of care that was to govern the conduct of these physician defendants was highly prejudicial.

B. The Trial Court Prejudicially Erred In Instructing The Jury Regarding What Constitutes Negligent Hiring And Supervision; Thus, The Judgment Cannot Be Affirmed On That Alternative Theory.

The trial court also prejudicially erred in its instructions concerning what constitutes negligent hiring. At trial, the court tacked on to the breach of mandatory duty instruction a provision which stated:

> "As to the causes of action for negligent hiring and/or supervision, the plaintiff has the burden of proving by 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 given, however, failed to include an element of the cause of action for negligent hiring; namely, that the employer--Dr. Kelly--knew or should have known that the employee--Dr. Morales--posed an undue risk of harm to others (Virginia G. v. ABC Unified School Dist. (1993) 15 Cal.App.4th 1848, 1855; Evan F. v. Hughson United Methodist Church (1992) 8 Cal.App.4th 828, 836) and it failed to inform the jury regarding which defendant's negligence would lead to liability. (See AOB pp. 30-32.) Given that there was no evidence to support the required element that Dr. Kelly knew or should have known that Dr. Morales posed a danger to others (in fact, the evidence established that he was highly qualified and the only real criticism of his participation in the test was that, in Colome's view, Business and Professions Code section 18711 did not allow his participation) (RT 2112, 1399), given that the other instructions simply concerned negligence in general and did not contain the elements of the cause of action for negligent hiring and supervision (CT 2198-2200), given that Colome's attorney repeated the theory erroneously given to the jury that Dr. Kelly could be held liable for negligent hiring and supervision merely because she hired Dr. Morales (RT 2799-2800), and given that the jury explicitly indicated it was

confused by the instructions when it asked, during deliberations, "[w]hat is the legal definition of negligently hired?" (CT 1806), the error was plainly prejudicial.

Colome does not begin to rebut these contentions; instead, he argues in effect that the instructions on general negligence were close enough to his real theory and that the general foreseeability instruction which was given--that an injury is foreseeable if a person knows or should know that as a result of his actions, someone might be injured--was sufficient to cover the negligent hiring claim. (Colome RB pp. 41-42; see CT 2199.) But the general negligence instructions, including the general foreseeability instruction, did nothing to fill in the blanks on plaintiff's theory because those instructions focused the jury's attention on the likelihood that injury will result from the defendant's conduct, while negligent hiring liability depends on the likelihood that harm will result from the acts of another. That point--an element of Colome's cause of action for negligent hiring and supervision--is what was missing from the jury instructions entirely.

Colome, however, urges that even though one of the elements of his cause of action was omitted from the jury instructions, the error nevertheless can be deemed harmless because "the twelve-member jury unanimously found defendant Kelly negligently hired Armando Morales." (Colome RB p. 43; emphasis in original.) We are mystified by this reasoning--the point is that because of the faulty instructions, the jury did not know how to assess whether or not Dr. Kelly acted negligently when she hired Dr. Morales. To point to the jury finding, in response to an argument that the instructions which were meant to guide the jury in making the finding were erroneous, as a "cure" for the error is simply nonsense. (See Scott v. County of Los Angeles (1994) 27 Cal.App.4th 125, 152 [if record indicates jury was likely misled, the judgment must be reversed]; Nussbaum v. Weeks (1989) 214 Cal.App.3d 1589, 1594 [if jury instructions are proper, verdict is proper if there is any evidence to support it].)

The record conclusively establishes that the jury instructions which were given were erroneous and the jury itself articulated its confusion when it asked for, but did not receive,

some explanation regarding what constitutes negligent hiring and supervision. The prejudicial jury instructions errors warrant a new trial.

IV.

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

In their final arguments, Colome and Montoya make only the most cursory effort to defend the $1.2 million dollar judgment. Colome simply recites the jury verdict, as if a jury's answer to the question of the amount of damages to be awarded would respond to an appellate argument that certain elements of the award are unrecoverable as a matter of law. He and Montoya then attempt to distinguish controlling Supreme Court authority holding that damages based on the presumed outcome of a sporting event are not recoverable--Colome by arguing that he sued under a different theory and Montoya by claiming that the case involved a personal injury--as if the Supreme Court's reasoning that certain damages, such as those arising from the outcome of sporting events, are so based on guesswork that they can never be awarded depended on the theory under which those damages were sought, rather than on the inherently speculative nature of the damages themselves. Colome then ends by essentially conceding that he cannot point to any evidence in the record that would support the noneconomic damages awarded by declining to "recount the details of the irreparable harm that trial of this case revealed. . . ." (Colome RB p. 48.) With proper analysis, however, it is readily apparent that the damages cannot stand. We now explain.

A. Under *Youst v. Longo*, Damages Based On The Outcome Of A Sporting Event Are Not Recoverable.

As we explained in our opening brief, in Youst v. Longo (1987) 43 Cal.3d 64, the Supreme Court held that damages based on the outcome of a sporting event cannot be recovered for two reasons. First, the Supreme Court held that such damages are inherently speculative because it is impossible ever to determine who might have won a sporting event:

> "Determining the probable expectancy of winning a sporting contest but for the defendant's interference seems impossible in most if not all cases. . . . 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 dramatically 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 deleted.)

Second, the Supreme Court held that, for public policy reasons, such damages should not be awarded:

> "The courts are not appropriate forums for adjudicating claimed sporting event violations which allegedly result 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." (At p. 78; emphasis in original; footnote omitted.)

The Youst holding thus joined a long line of cases which prohibit recovery of damages that cannot reasonably be calculated without resorting to guesswork. (See, e.g., Lemat Corp. v. Barry (1969) 275 Cal.App.2d 671, 680 [lost profits unavailable for basketball player's breach of contract because they were "speculative and uncertain and practically impossible to ascertain"]; Darmour Prod. Corp. v. H. M. Baruch Corp. (1933) 135 Cal.App. 351, 354 [producer denied lost profits because "they would seem to be highly speculative"] disapproved on other grounds I.J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal.3d 327, 336; Alder v. Drudis (1947) 30 Cal.2d 372, 382 [prospective profits were too speculative given uncertain commercial viability of machine to produce three dimensional motion pictures].)

Both Colome and Montoya attempt to escape the Youst holding in order to salvage their case. In his brief, Colome claims that Youst "has nothing to do with [his] claims because [he] is not suing under a theory of Intentional Interference with Prospective Economic Advantage." (Colome RB p. 46.) Montoya, on the other hand, concedes that he did seek damages for interference with prospective business advantage--and, thus, Colome's claimed "distinction" is unavailable to him--however, he urges that Youst is distinguishable because "Colome was not injured during a sporting event." (Montoya RB p. 17.) Neither distinction holds water. The Supreme Court's reasoning was not based on the theory upon which the Youst plaintiff sued, nor on the fact that a personal injury occurred during the event--in fact, Youst the plaintiff did not suffer any personal injury at all but, instead, based his claim for interference with prospective economic advantage on the defendant's striking of plaintiff's horse, causing him to break stride during the race. (Youst, supra, 43 Cal.3d at p. 68.) Instead, as the passages quoted above make clear, the Supreme Court based its decision on the impossibility, because of the "chance" factors of luck, skill and technique, of ever accurately predicting who in fact most likely would have won any given contest. That rationale applies equally whether a plaintiff sues for interference with prospective economic damage, breach of mandatory statutory duty, negligence or any other theory the plaintiff might devise. Thus, despite both respondents' assertions to the contrary, the Supreme Court

has addressed the very issue posed by the damages awarded in this case and has clearly held that the damages that were awarded here are unrecoverable under California law.

In addition to his specious attempt to distinguish Youst on nonexistent differences between that case and this, Montoya further argues that he is entitled to recover damages based on the presumed outcome of the Stroh's tournament simply because several witnesses testified that they "would take Colome" in the hypothetical matches between Colome and Canela and Colome and Derrick Kelly. (See e.g., RT 1038, 1040-1041, 1044; Montoya RB pp. 17-19.) The point Montoya misses, however, is that "evidence" such as that is not substantial evidence to support a verdict because a plaintiff cannot override a Supreme Court decision declining to involve courts in the business of guessing on the possible outcome of something as inherently unpredictable as a sporting match simply by finding a witness who is willing to indulge in such speculation. As explained in Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135-1136:

> "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon . . . factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence." (Citations omitted.)

The issue of whether a witness' testimony is based on improper matters and thus insufficient to support the damages awarded presents a legal, not a factual, issue and is a proper issue on appeal. (See Rettner v. Shepherd (1991) 231 Cal.App.3d 943, 949; Smith v. Dept. of Motor Vehicles (1969) 1 Cal.App.3d 499, 503.) Thus, to the extent Colome and Montoya claim that they were entitled to recover damages based on what their witnesses testified would have been the outcome of any Colome/Canela or Colome/Derrick Kelly fight, they are simply wrong.

It was sheer guesswork to say whether or not Colome would have won any rounds of the Stroh's tournament if he had fought. Thus, all of the claimed damages which flowed from the premise that he would have won were so speculative that they could not properly have been awarded and, having been awarded, 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 Examination Were Negligently Performed.

Colome's response to the second damages argument we presented in our opening brief is as ineffectual as his response to our first damages argument. As the court will recall, the jury awarded Colome $500,000 for economic damage to his overall career. (CT 1854.) It appears that the award was based on the theory that Colome would have won the Stroh's tournament and, as the Stroh's tournament winner, would have gone on to earn $500,000 in the future. If that was the basis of the award--and it most likely was since all of Colome's evidence concerned the lucrative future contracts he would have received as the Stroh's champion (see, e.g., RT 813, 853, 1644-1649, 1688-1689)-- then, for the reasons explained in the section above, the damages cannot survive appeal--they are simply too speculative. If, however, the $500,000 award could be interpreted as premised on the theory that, regardless of what the outcome of the Stroh's tournament might have been, Colome would have continued to box professionally and would have earned $500,000 doing so if only he had not injured his hand, it still cannot stand.

It is undisputed, of course, that Dr. Kelly and Dr. Morales did not personally injure Colome's hand--he inflicted the injury on himself when he smashed a door in frustration upon learning that he would not be allowed to box in the Stroh's tournament. Thus, Dr. Kelly and Dr. Morales could be held liable for the consequences of that injury only if it was legally foreseeable that what they did--conduct a portion of a neurological exam through a

doctor of social work rather than a neurologist--would lead to Colome's hand injury. Foreseeability in this context is a question of law for the court to decide, taking into consideration whether the injury that results is "likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding [his] practical conduct." (Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 57.) Thus, in response to the assertion that, as a matter of law, the complained of injury was not the type of injury that a reasonable person could anticipate would result from the negligence complained of, it is not enough simply to recite, as Colome has done, that the jury found that the injury was foreseeable. Rather, the plaintiff must provide some rationale for how or why the law should support that conclusion.

Colome has not even attempted to do so here, quite likely because the proposition that a doctor administering a neurological examination as a predicate to a boxing license must foresee that if a doctor of social work administers part of the test, the applicant might smash his own fist into a wall and destroy his career is absurd on its face. Does the law require a doctor to take into account the likelihood of a grown man's temper tantrum in all his dealings with that man? Our research has uncovered no cases suggesting that such a possibility is foreseeable to the degree that the doctors will be held responsible for self-inflicted injuries (apart, perhaps, from a psychiatrist dealing with a suicidal patient) and, if anything, the law should encourage self-control, not reward pique. This court should hold that, if the $500,000 in economic damages awarded for injury to Colome's overall career was based on Colome's hand injury, it was unforeseeable as a matter of law that such any injury would result from the conduct of Dr. Kelly and Dr. Morales.

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

1. Colome's theory at trial was that he was entitled to recover noneconomic damages based on purely financial injury and those damages must be stricken because the law does not permit recovery of such damages.

Once again simply reciting that the jury awarded the complained of damages, but this time adding the new twist of attempting to attribute to appellants the erroneous theory that compels striking a portion of his damages, Colome next discusses the noneconomic damages totaling $650,000, without ever grasping, much less responding to, the issues presented in this appeal. (Colome RB p. 48.)

In our opening brief, we established that the trial court erred in rewriting an unequivocal BAJI instruction--which states that noneconomic damages arising out of a financial injury can be recovered as a result of intentional or reckless conduct--to read that noneconomic damages arising out of financial injury can be recovered as a result of negligent conduct. (CT 2225; see AOB pp. 42-45.) This was a clear violation of a long line of cases which distinguish between the two instances and which, in no uncertain terms, hold that noneconomic damages are not available when the financial injury arises out of merely negligent conduct:

- "[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" (Smith v. Superior Court (1992) 10 Cal.App.4th 1033, 1040);
- "[I]t is the general rule that negligence which causes only monetary harm does not support an award of emotional distress damages" (Devin v. United Services Auto Assn. (1992) 6 Cal.App.4th 1149, 1162; emphasis in original).

This presents a legal, not a factual, issue (Agarwal v. Johnson (1979) 25 Cal.3d 932, 949 [appellate court's task is to determine whether the instruction given contain an incorrect statement of the law]) and Colome's failure to grasp the difference between the two renders his reliance on the jury verdict misplaced.

Apparently because he cannot quarrel with the fact that the law does not permit recovery of noneconomic damages arising out of purely financial injury, Colome decides to quarrel with the proposition that his injuries here were purely financial--he self righteously huffs that Dr. Kelly and Dr. Morales "merely state [in their opening brief] that Colome's injury is purely financial." (Colome RB p. 48; emphasis in original.) This, however, is not simply a statement--at trial Colome's attorney, Carl Douglas, repeatedly insisted that he was not basing his claim for noneconomic damages on the hand injury--which might have supported a noneconomic damages award--but that he instead was making the claim based on Colome's distress over his financial loss. He said: "(Opposing counsel) seems to believe, mistakenly, that I am trying to seek emotional 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." (RT 1220-1221.) In addition, it was Colome, not appellants, who insisted that the jury be instructed that Colome was entitled to recover noneconomic damages based on financial injury. Clearly, this was Colome's theory and a theory on which he successfully persuaded the court to give the jury erroneous instructions. For Colome now to attempt to suggest that the assertion that he recovered noneconomic damages arising out of a nonintentional financial injury is simply a "statement" in Dr. Kelly's and Dr. Morales's brief that has no support in the record is disingenuous at best.

2. If the noneconomic damages were recoverable, they nevertheless were excessive.

Even if the noneconomic damages were to survive the argument presented above, however, they must be reduced as excessive. Although Colome declines to discuss the issue because, in his view, to point to any evidence that would support the $425,000 award for noneconomic damages unrelated to the Stroh's tournament would "place this Court in the role of the trier of fact" (Colome RB p. 48), excessiveness of damages is a legal question for appellate courts to resolve and, without question, an appellate court can reverse a jury verdict if there is no evidence to support an award or if an award is excessive. (Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal.App.3d 451, 469; Mouchette v. Board of Education (1990) 217 Cal.App.3d 303, 316 disapproved on other grounds Caldwell v. Montoya (1995) 10 Cal.4th 972, 984; Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1252.) This court should view Colome's refusal to cite where in the record any evidence that would support this portion of the judgment can be found as a concession of error and strike the award without further ado.

If the court does search the record, it will find no such evidence. As the court will recall, the jury found that Colome's hand injury did not legally cause economic damages to his overall career. (CT 2284.) Thus, given that the jury failed to find that Colome's emotional distress resulted from an inability to box because of the hand injury, the only conceivable basis under which the jury awarded $425,000 in noneconomic damages related to Colome's overall career would be to compensate him for emotional distress he suffered from being barred from boxing because he lacked a license for the period between February 8 and May 12, 1988.

There was, however, no evidence that would support such an award. Although Colome testified at trial, he never mentioned any emotional distress during that time period at all and all Colome's wife testified to was that Colome was "always angry" and blaming the Commission that "they had taken his whole life away." (RT 1719-1720.) There was no

other evidence--no one testified that Colome missed other boxing bouts, no one testified that he had trouble eating or sleeping or socializing with friends, no one testified that Colome suffered anything other that what would be entirely normal anger. The excessiveness becomes even more apparent when the court considers that it totaled only slightly less than the amount the jury found Colome would earn in his entire career, yet it supposedly was meant to compensate Colome for only three months of distress at being unable to box. Yet Colome asks this court to affirm a $425,000 award--$5,182 per day of distress--when he apparently did not think his distress was significant enough even to present evidence concerning it to the jury. The grossly excessive award must be reversed and the cause remanded for a new trial.

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

As we explained in Section IIIA above, the judgments against Dr. Kelly and Dr. Morales are, indeed, for professional negligence and Colome cannot escape the Supreme Court's holding in Central Pathology simply through the same efforts rejected in that case, i.e. by insisting that his legal theory was something other than medical malpractice. The issue in Central Pathology was under what circumstances MICRA applies when the plaintiff sues on a theory other than medical malpractice and the Supreme Court answered that it applies when "the injury for which damages are sought is directly related to the professional services provided by the health care provider." (Central Pathology, supra, 3 Cal.4th 181, 191.) There is no question that Dr. Kelly and Dr. Morales were both sued for their actions in the neurological examination; thus, there is no question that MICRA applies.

CONCLUSION

Respondents' briefs provide no basis upon which the multi-million dollar judgments in this case can be affirmed. Their efforts to "distinguish" controlling case law border on the absurd, their response to the trial court's complete failure to instruct the jury on the elements of one of their own theories simply reaffirms that no such instructions were given and their efforts to defend the damages under <u>any</u> theory are nonexistent. The judgments should be reversed with directions to enter judgment in favor of appellants Dr. Kimberly Kelly and Dr. Armando Morales; alternatively, the judgments should be reversed and the cause remanded for a new trial.

Dated: November 20, 1995

Respectfully submitted,

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