THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Civil Action No. 2017-CP-07-02310
Appellate Case No. 2022-001148

Calvin C. "Skip" Hoagland and Lisa Sulka, ... Respondents

v.

Privilege Underwriters Reciprocal Exchange, ... Petitioner

PETITION FOR A WRIT OF CERTIORARI

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Introduction

This is a highly unusual matter involving judicial power limits which warrants this Court's review. Points raised by this petition include whether a trial court can reverse a final judgment *sua sponte* after 10 days; whether the circuit court can change a judgment based on a "mistake" after 5 months; whether the circuit court can change a judgment in favor of a movant based on a ground not advanced by the movant; and whether the circuit court can change a judgment using the vehicle of a defective Rule 59(e) motion. Pursuant to Rules 240 and 242 of the South Carolina Appellate Court Rules, Petitioner Privilege Underwriters Reciprocal Exchange ("PURE") petitions this Court to issue a writ of *certiorari* to review: 1) the Court of Appeals' dismissal of PURE's appeal of an order overturning judgment in favor of PURE, dated August 19, 2022; and 2) the Court of Appeals' denial of PURE's petition for rehearing. (S.C. Ct. App. Order filed February 10, 2023). The Court of Appeals ruled that the trial court orders at issue were not immediately appealable. *Certiorari* should be granted because the Court of Appeals' dismissal is inconsistent with this Court's precedent on appealability being determined based on the "effect" of an order, rather than its label. *See Morrow v. Fundamental Long-Term Care,* 773 S.E.2d 144 (2015) (holding that appealability depends on the effect, rather than the style or the name, of the order). Further, the Court of Appeals' dismissal is inconsistent with this Court's precedent regarding the lack of judicial power to make *sua sponte* changes to a judgment after the expiration of ten days from that judgment. *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000). Finally, the Court of Appeals' dismissal is inconsistent with precedent regarding granting of relief based on grounds not moved for and regarding defective Rule 59(e), SCRCP, motions. This Court should grant *certiorari*, reverse the Court of Appeals' dismissal of the appeal, and remand for the appeal to proceed on its merits.

Certification by Counsel

The Court of Appeals finally ruled on Appellants' Petition for Rehearing and Rehearing *En Banc* on February 10, 2023.

Questions Presented for Review

1. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order was not immediately appealable where Sulka's motion to reconsider was improper and therefore did not toll time limits for appeal, rendering the earlier summary judgment for PURE final for purposes of appeal?

2. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order, was not immediately appealable where the circuit court's decision rested, not on arguments raised in Sulka's motion to reconsider, but instead on a *sua sponte* "mistake" basis, thus depriving PURE of due process, and affecting the substantial rights of PURE?

3. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order was not immediately appealable where Hoagland did not challenge the June 20, 2022, order, and thus the circuit court did not have any jurisdiction to vacate a judgment regarding Hoagland in response to another party's motion?

Statement of the Case

This matter was brought pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and the Uniform Declaratory Judgment Act, South Carolina Code Ann. §§ 15-53-10 through 15-53-140, ("Declaratory Judgment Action")[1], and involves disputes regarding insurance with respect to an underlying defamation case brought in the Beaufort County Court of Common Pleas between Lisa Sulka and Calvin C. "Skip" Hoagland, styled: *Lisa Sulka v. C.C. "Skip" Hoagland*, Civil Action No. 2017-CP-07-01547 ("The Underlying Lawsuit"). In the Underlying

[1] At this time, counsel John T. Lay and C. Mitchell Brown are representing PURE in the declaratory judgment action. Sean Trudy was, prior to his recent passing, representing Mr. Hoagland as personal counsel. By Court appointment, now Ivon Keith McCarty represents Mr. Hoagland. John E. Parker and Danny Henderson, formerly with Peters, Murdaugh, Parker, Eltzroth and Detrick, but now with The Parker Law Group, L.L.P., represent Sulka.

Lawsuit, Sulka alleged that Hoagland published false and defamatory statements about her in emails published to various individuals.

PURE issued two policies of insurance (primary and excess) for which Hoagland was an insured, subject to conditions and exclusions in the policy, for certain risks. Pursuant to these insurance policies, PURE provided a defense to Hoagland in the Underlying Lawsuit through Attorney Barrett Brewer, subject to a reservation of rights by PURE. PURE filed this Declaratory Judgment Action to address coverage.

From 2017 until mid-2020, Brewer represented and defended Hoagland in the Underlying Lawsuit. However, in mid-2020, Hoagland fired Brewer and expressly refused alternative counsel paid for by PURE, claiming he wished to represent and defend himself. Hoagland clearly expressed intent that he did not want Brewer or any other attorney to represent him. As a result, Brewer filed a motion to withdraw in accordance with Rule 1.16(a)(3), which the circuit court granted. Sulka, through her counsel, not only consented to Brewer's motion, but also approved of Hoagland defending himself.

Subsequently, and on repeated occasions, Hoagland chose to *not* defend himself, and expressed that he would not appear at any proceedings, whether depositions, hearings, or a trial, in the Underlying Lawsuit, and that he would throw any paper or court ordered subpoenas related to the matter "in the trash." PURE moved to be allowed to file a Second Amended Complaint to add, *inter alia*, that Hoagland was not "cooperating" in this defense in violation of the conditions in the insurance policies. This motion to amend was granted. While Sulka filed an Answer to the Second Amended Complaint, Hoagland never did.

On October 5, 2021, PURE filed a motion for partial summary judgment in this Declaratory Judgment Action, requesting that the circuit court rule as a matter of law that PURE

was not required to provide a defense or indemnity to Hoagland in the Underlying Lawsuit because Hoagland materially breached his contractual duty to cooperate with PURE in defending against the Underlying Lawsuit, resulting in substantial, including inherent, prejudice to PURE. Hoagland did not oppose PURE's motion, file any opposition memoranda, or appear for the hearing. Sulka did oppose PURE's motion for partial summary judgment alleging that: (1) Hoagland and PURE were involved in a "tacit" civil conspiracy together to preclude coverage; (2) the matter was not yet ripe because prejudice had not yet occurred; and (3) to deny coverage would violate public policy. Sulka did not file a cross motion for summary judgment.

A hearing was held on PURE's motion for partial summary judgment on January 5, 2022. On January 20, 2022, the circuit court issued an order, ***granting*** PURE's motion for partial summary judgment (the "January 2022 Order"). Sulka filed a motion to reconsider arguing for the first time that the Court failed to consider, in the light most favorable to Sulka, evidence that PURE "did not act in good faith" in attempting to secure the cooperation of Hoagland in defending against the Underlying Matter (or conversely, that PURE did not present evidence that it acted in good faith in attempting to secure Hoagland's cooperation**).** In her motion to reconsider, Sulka did not make any arguments seeking to have the Court reconsider her prior arguments opposing summary judgment for PURE. Sulka also did not argue that the summary judgment grant to PURE was inconsistent with this Court's intentions or that the Court had made some kind of mistake. Hoagland continued his lack of opposition and did not file any motion to reconsider. The circuit court also did not notify any of the parties that the January 2022 Order was in error or communicated incorrectly.

Between January 31, 2022, to February 3, 2022, Sulka scheduled and then presented her case in the Underlying Action to a Beaufort County jury against Hoagland. Hoagland had notice

of, but did not attend trial, just as he stated he would not. The unopposed trial resulted in a verdict for Sulka for $40,000,000 in actual damages and $10,000,000 in punitive damages.

On May 18, 2022, the circuit court held a hearing on Sulka's motion to reconsider the January 2022 Order. During this hearing, and for the first time, the circuit court indicated it had made a mistake and that it had not intended to grant summary judgment to PURE. On May 24, 2022, the circuit court entered a form order that "vacated" the January 2022 Order and instructed Sulka's counsel to draft a formal order to that effect. Sulka's counsel did so, to which PURE filed objections and supporting arguments that the January 2022 Order should be upheld and that the court lacked the power to take the action it expressed its intent to take.

On June 7, 2022, the circuit court entered the formal order (the "June 2022 Order"). The June 2022 Order "vacated" the January 2022 Order based on mistake, "substituted" it with an order denying PURE's Motion for Summary Judgment, and also stated "It was and remains my intent that the Plaintiff, Privilege Underwriters Reciprocal Exchange was obligated to provide coverage to Mr. Hoagland in the underlying case of *Lisa Sulka vs. Skip Hoagland*, Civil Action # 2017-CP-07-1547." Following the June 2022 Order, PURE filed a motion to reconsider the June 2022 Order, which the circuit court denied in an August 4, 2022, order (the "August 2022 Order").

On August 16, 2022, PURE filed a notice of appeal of the June 2022 Order and the August 2022 Order. Two days later, the Court of Appeals dismissed the appeal *sua sponte* in an order signed by the Chief Judge stating, "[I]t is well-settled that an order denying summary judgment is never reviewable on appeal . . ." On September 6, 2022, PURE then filed a petition for rehearing, requesting rehearing *en banc* due to the questions of exceptional importance involving immediate appealability and trial court power limitations. Just over five months later, on February 10, 2023, the Court of Appeals issued an order denying PURE's petition for rehearing.

ARGUMENT

1. The Court of Appeals erred in finding the June 2022 Order was not immediately appealable where Sulka's motion to reconsider was improper and therefore did not toll time limits, which meant that the partial summary judgment grant was final for purposes of appeal.

When a party makes an argument for the first time in a motion to reconsider that it could have made initially, that argument is improper and should not be considered. *Patterson v. Reid*, 456 S.E.2d 436 (Ct. App. 1995) (noting a party cannot for the first time raise by 59(e) motion an issue which could have been raised at trial); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 566–67, 762 S.E.2d 693, 695 (2014) (finding that defendant's issue was not preserved when it was raised for first time in Rule 59(e) motion to amend judgment after trial court granted partial summary judgment in favor of plaintiff).

Here, Sulka (and Hoagland[2]) lost summary judgment to PURE. In opposing summary judgment, Sulka argued that PURE and Hoagland conspired to deprive Sulka of the benefits of any insurance coverage, and Sulka argued various other points.[3] In the January 2022 Order, the circuit court granted summary judgment to PURE, ruling against Sulka's opposition arguments. Sulka filed a motion to reconsider, not asking for general reconsideration, but instead raising a single argument, namely that PURE failed to demonstrate it had exercised good faith in attempting to have Hoagland cooperate in his defense. Sulka had the opportunity to raise that argument in her opposition to summary judgment, but she did not.

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[2] *See* discussion of Hoagland's failure to contest summary judgment, *infra*.

[3] Because Sulka formally consented to Brewer's motion to withdraw and Hoagland's *pro se* representation, she knowingly and voluntarily waived any argument with respect to Brewer's withdrawal of representation of Hoagland and Hoagland's subsequent *pro se* representation, as well as any consequences arising therefrom. *See Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (S.C. 1994); *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (S.C. 2009).

Consequently, the single argument motion to reconsider was procedurally defective, and therefore, the circuit court had nothing to validly consider with respect to Sulka's motion to reconsider. Because Sulka's motion to reconsider was procedurally barred from consideration, it should not have tolled any timelines to appeal, and the January 2022 Order thus should have matured into a final judgment for purposes of appeal. *Cf. Elam v. South Carolina Dept. of Trans.*, 602 S.E.2d 772 (1994) (holding a procedurally defective Rule 59 motion does not stay any time limits, including time for appeal).

Because Sulka's motion to reconsider raised only one argument, and that one argument had not been raised previously (but could have been), it was not a proper motion to reconsider. This was noted and pointed out to the circuit court, which proceeded regardless to issue the June 2022 Order. Therefore, the Court of Appeals was the proper forum to correct that error and vacate the circuit court's orders on appeal, [4] and the Court of Appeals therefore erroneously dismissed and denied PURE's appeal and petition for rehearing.

2. The Court of Appeals erred in finding the June 2022 Order was not immediately appealable where the circuit court's decision rested, not on grounds raised by Sulka's motion to reconsider, but instead on a *sua sponte* basis, thus depriving PURE of due process, and affecting the substantial rights of PURE.

The circuit court ruled on an entirely different basis and did not address any of the arguments made in Sulka's motion to reconsider. This too is improper, and consequently the Court of Appeals erred in dismissing PURE's appeal. *See, e.g.*, *Friedberg v. Goudeau*, 279 S.C. 561, 309 S.E.2d 758 (1983) (reversing order granting motion for summary judgment because ground

[4] For illustrative purposes, assume a summary judgment is granted and the time for appeal unquestionably expires. Further assume that months after the time for appeal has expired, a party moves to "reconsider" the earlier summary judgment grant and the circuit court considers and grants that motion, purporting to now "deny" the summary judgment. The circuit court has no jurisdictional power to do this. Surely, such an abuse can and must be corrected on appeal. So too is it in this case.

on which motion granted not properly before the court); *Bass v. Bass*, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) ("Due process requires that a litigant be placed on notice of the issues which a court is to consider."); *Skinner v. Skinner*, 257 S.C. 544, 186 S.E.2d 523 (1972) (in granting a motion, a court ordinarily may not grant relief beyond the scope of the motion); *Henderson v. Gould, Inc.*, 288 S.C. 261, 266, 341 S.E.2d 806, 809 (Ct. App. 1986) (noting that it "would have been error" for the lower court to grant relief to defendants "which they had not sought on a ground inapplicable to them").

In *Turbeville v. Floyd*, counsel for the defendants argued that summary judgment should be granted on the three grounds set forth in the motion and plaintiff's counsel argued that it should not. 288 S.C. 171, 173-74, 341 S.E.2d 651, 652–53 (Ct. App. 1986). The circuit court's order, however, granted summary judgment "not on any of the three grounds set out in the notice of motion" but on a different ground that was not included in the notice of motion or argued by the movant to the circuit court. *Id*. The Court of Appeals found that such was a reversible error, noting that one of the "basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor" and "[o]rdinarily, a court may not grant relief beyond the limits or scope of such notice." *Id*.

Further, the circuit court decided, on a *sua sponte* basis, that it had made a "mistake" and had not intended to grant summary judgment to PURE in the January 2022 Order. A circuit court has only ten days from entry of judgment to alter or amend an earlier order on its own initiative absent a "reservation" of jurisdiction in the form order. *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) ("When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the January form order 'matured' into a final judgment."). *See also Ness v. Eckerd Corp.*, 350 S.C. 399, 402–03, 566 S.E.2d 193, 195 (Ct. App. 2002) (same);

Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) (same). Here, the January 2022 Order granted partial summary judgment to PURE, and contained no reservation. Thus, at the time of the June 2022 Order "vacating" the grant of summary judgment and "substituting" in an order "denying" summary judgment, the ten-day period for altering or amending an order *sua sponte* had long since passed. Thus, the June 2022 Order should be corrected on appeal as "a nullity because the trial judge no longer had jurisdiction" to alter or amend the January 2022 Order on a *sua sponte* basis. 339 S.C. at 494, 530 S.E.2d at 128.

In the August 2022 Order responding to PURE's motion for reconsideration, the circuit court cited to Rule 60, SCRCP, to correct a "clerical mistake" outside of the jurisdictional requirement of Rule 59(e), SCRCP. However, although circuit courts do have the power under Rule 60(a), SCRCP, to *sua sponte* correct certain clerical errors, Rule 60(a) does not grant circuit courts the unrestricted authority to *sua sponte* alter the scope of the judgment. Rule 60(a), SCRCP permits a court to correct "clerical mistakes in judgments, orders or other parts of the records" on its own initiative. A clerical error is "defined as a mistake in writing or copying" and for judgments is a mistake or omission by "a clerk, counsel, judge or printer which is not the result of exercise of judicial function." *Dion v. Ravenel*, 316 S.C. 226, 230, 449 S.E.2d 253 (Ct. App. 1994). Thus, "[w]hile a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." *Id.* at 230, 449 S.E.2d at 253-54. Here, the circuit court's June 2022 order entirely altered the scope of the January 2022 Order's judgment by denying, rather than granting PURE's motion for summary judgment, twenty weeks after entering the initial order. Therefore, Rule 60(a) does not provide a mechanism to achieve the circuit court's purported result. *See also*, *Blankenship v. Royalty Holding Co.*, 202 F.2d 77 (10th Cir. 1953) (where the record of the order was clear, and where all parties understood that an order granted

judgment with prejudice, the trial court lacked authority to change the scope of judgment based on his intent to reflect that the order granted judgment without prejudice).

Moreover, contrary to the circuit court's reasoning in the August 2022 Order denying PURE's motion to reconsider, *Landry v. Landry* does not empower a court to *sua sponte* alter the scope of judgment twenty two weeks after the entry of a judgment. 430 S.C. 153, 843 S.E.2d 491 (2020). The *Landry* opinion provides:

> The basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of blunders in execution whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Id. at 161, 843 S.E.2d at 495 (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265 (4th Cir. 2014).

Landry involved a situation in a domestic relations case where an order, drafted by the husband counsel for the court, reflected the husband's agreement to pay the wife in a divorce a portion of his retirement funds. 430 S.C. at 158, 843 S.E.2d at 493. The husband's counsel prepared the proposed order with an agreement handwritten by the husband and wife. *Id*. Nine weeks later, the husband filed a Rule 60(a) motion indicating his counsel mistakenly included the provision regarding his retirement funds during the process of incorporating the handwritten terms into the order and that he had not agreed to that term. *Id*. In light of no record evidence of the family court determining the parties' intent as to the retirement provision in the handwritten agreement, this Court remanded the matter, noting that the family court sits in equity and such rulings can thus be considered in balancing the equities to achieve a fair overall result. *Id*. at 167, 843 S.E.2d at 498.

In contrast to *Landry*, here, the circuit court decided an issue of law and entered a form order, prepared by the circuit court, stating, "Plaintiff Privilege Underwriters Reciprocal Exchange's Motion for Summary Judgment is granted for the coverage as to Skip Hoagland." Yet, twenty weeks after granting the dispositive motion, the circuit court indicated, during a hearing and for the first time, that it had made a "mistake" and did not mean to grant summary judgment to PURE. In such an instance, the utilization of Rule 60(a) is improper. *Landry*, at 161, 843 S.E.2d at 495 (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265 (4th Cir. 2014)).

Finally, Sulka's motion to reconsider did not raise "mistake," and therefore, the circuit court did not have the authority to, *sua sponte*, set aside the findings of the January 2022 Order. *See Woods v. Woods*, 418 S.C. 100, 122 n.10, 790 S.E.2d 906, 917 n.10 (Ct. App. 2016) (finding the lower court invoking Rule 60(b) on its own initiative was erroneous).

Because the circuit court did not address the single motion to reconsider argument made by Sulka, and instead improperly invoked *sua sponte* powers to change the scope of the judgment, the circuit court orders should be vacated, and the prior summary judgment order in favor of PURE should be reinstated. A contrary result deprives PURE of its due process rights, and represents an immediate deprival of substantial rights, and is thus immediately appealable, under S.C. Code Ann. § 14-3-330. Therefore, the Court of Appeals erroneously dismissed and denied PURE's appeal and petition for rehearing.

3. The Court of Appeals erred in finding the June 2022 Order vacating the January 2022 Order was not immediately appealable because Hoagland did not challenge the June 2022 Order, and thus the circuit court did not have any jurisdiction to vacate a judgment regarding Hoagland in response to a third-party motion.

Hoagland did not challenge the summary judgment order at any time – did not oppose summary judgment, did not move to reconsider summary judgment, and did not appeal the summary judgment order. Thus, the January 2022 Order's summary judgment grant in favor of

PURE as to Hoagland must stand because the circuit court had no power to "deny summary judgment" (at minimum as to Hoagland) pursuant to a different party's motion to reconsider the January 2022 Order. The judgment was final for all purposes as to Hoagland. Only Sulka moved to reconsider the January 2022 Order granting of summary judgment to PURE as to Hoagland. Sulka had no standing to move to reconsider on behalf of Hoagland, a party to whom she is adverse. As such, the circuit court's January 2022 Order as to Hoagland is final for all purposes, and there is no basis for this Court to alter, amend, or otherwise affect its prior order as to Hoagland. An unappealed order is the law of the case. *Judy v. Martin*, 674 S.E.2d 151 (2009).

The June 2022 Order makes no distinction between the parties, and purports in certain language to be granting a motion to reconsider and changing its earlier grant of summary judgment to PURE in its entirety. The circuit court had no power to do this, and this lack of power was pointed out to the circuit court. The circuit court did not expressly limit its order, however, and the Court of Appeals erred in not accepting the appeal to consider correcting the circuit court's error and not, at minimum, limiting the June 2022 Order respecting Sulka's motion to reconsider in this regard. *See, e.g.*, *Tupper v. Dorchester County*, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) (finding co-defendant's raising of statute of frauds issue not allowed to be asserted by other party who failed to assert the issue himself, no "bootstrapping" allowed).

Similarly, to the extent the June 2022 Order indicates PURE was obligated to provide a defense to Hoagland, in spite of neither Hoagland nor Sulka moving for such relief, the circuit court lacked the authority to do so, and Sulka lacks standing to request it. The duty to defend is "a valuable right of the insured for which the insured pays and to which the insured is entitled by the very words of the policy." *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 447, 438 S.E.2d 266, 268 (Ct. App. 1993) (quoting *Nationwide Mutual Ins. Co. v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993)).

The duty to provide a defense is a contractual obligation paid for by Hoagland "for the protection of the insured" only. *Id*. *See also Shelby Mut. Ins. Co. v. Askins,* 307 S.C. 81, 413 S.E.2d 855, 859 (Ct. App. 1992) ("Fundamental to the concept of duty to defend is the requirement that the party seeking the defense must be an insured under a contract of insurance."). Sulka, a non-party to the insurance policy, does not have standing to demand such an obligation. *See, e.g., id*. (declining to extend the duty to defend to a third party and holding that the third party did not have standing to assert such a claim).

As a result, the Court of Appeals should have clarified that the June 2022 Order could not alter January 2022 Orde's summary judgment grant to PURE as to Hoagland because it was final and unappealed, and the circuit court had no authority to change the January 20222 Order to the extent it pertained to Hoagland. Therefore, the Court of Appeals erroneously dismissed and denied PURE's appeal and petition for rehearing. Application of South Carolina law requires that the circuit court and Court of Appeals decisions permitting the circuit court to vacate the June 2022 Order, at the minimum as it relates to Hoagland, be reversed.

CONCLUSION

Based on the arguments set forth above, this Court should issue a writ of *certiorari* to review and reverse the Court of Appeals' decision below dismissing the appeal.

Respectfully submitted,

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