

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

RECEIVED

Michael J. Baxley, Circuit Court Judge

JUN 23 2014

Case No. 2007-CP-10-1553
Appellate Case No. 2014-000831

S.C. SUPREME COURT App. Opinion No. 2014-UP-055 – Filed February 5, 2014

Jamesetta Washington, as Guardian ad Litem
for Jayden W., a minor,

Petitioner,

v.

Edmund Rhett, Jr., M.D., Low County Obstetrics
and Gynecology, P.A.; Tenet South Carolina, Inc.
d/b/a East Cooper Regional Medical Center and
AMN Services, Inc. f/k/a Nurses RX Inc.,

Defendants,

OF WHOM Edmund Rhett, Jr., MD is

Respondent.

Return to Petition for Writ of Certiorari

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Respondent would restate the questions as:

Should the Supreme Court exercise its discretion to grant the Petition for a Writ of Certiorari where there are no special or important reasons to review the unpublished decision of the Court of Appeals affirming the judgment entered on the jury's verdict for Defendant Dr. Rhett?

- I. Did the Court of Appeals properly decline to consider the Petitioner's challenge to the Trial Court's admission of expert opinion testimony by Dr. Milunsky on contributing causal factors in the Child's conditions because the jury determined Dr. Rhett did not breach his duty of due care without ever reaching any question related to causation?
- II. Did the Court of Appeals properly affirm the Trial Court's charge to the jury on informed consent because the charge requested by the Plaintiff did not state the correct, applicable law under the facts of this case?

INTRODUCTION

After a two and a half week trial in this medical malpractice case, the jury rendered its verdict finding that Dr. Rhett had not breached the standard of care. On appeal, the Plaintiff raised seven issues which included attacks on the Trial Court's evidentiary rulings and challenges to the Trial Court's refusal to give certain requests to charge. The Court of Appeals affirmed, finding, in pertinent part, that the Trial Court did not err in charging the jury on informed consent, and otherwise declined to address the evidentiary issues relating to causation because the jury found that Dr. Rhett did not breach his duty of due care. The Plaintiff seeks review of the decision with assertions that the Court of Appeals erred in (1) affirming the Trial Court's admission of opinion testimony from Defendant's expert, Dr. Milunsky, regarding a possible contributing causes of the Child's brain damage; and (2) affirming the Trial Court's charge to the jury on informed consent in emergencies. Dr. Rhett maintains that there are no special or important reasons to review Court of Appeals' decision.

As a threshold issue, the Plaintiff's claim of error in the admission evidence on the element of proximate cause was not preserved for appeal because the Plaintiff opened the door to such expert medical opinion on those subjects by raising the issue during her opening statement and the presentation of opinions from her own experts on the same points. Moreover, any such alleged error is not reversible because, as the Court of Appeals found, the jury in this case rendered its verdict for the Defendant with the answer of NO to the special interrogatory: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" [ROA 3714.] As to the alleged error in the charge to the jury, the trial court virtually quoted from the correct law on informed consent as set forth in Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) and Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984), and neither the law nor the facts supported the charge requested by the Plaintiff.

STATEMENT OF THE CASE

This case arises out of the birth of the Plaintiff Child, Jayden Washington, who was delivered by Defendant Obstetrician, Dr. Edmund Rhett, Jr. with the assistance of a vacuum extractor on July 17, 2002. The Child's mother, Jamesetta Washington, brought this action as his GAL, alleging that Dr. Rhett did not obtain informed consent to use the vacuum and he was negligent in using the vacuum extractor; and that as a result the Child suffered a brain injury. (ROA 28, 47.) Dr. Rhett answered denying that he was negligent in manner that proximately caused any injury to the Child. (ROA 72.)

After years of discovery and motions, the case finally came to trial before Judge Baxley for jury selection on July 26, 2010, and concluded after thirteen days of trial on

August 11, 2010. The trial court granted a partial directed verdict to Plaintiff and instructed the jury that the General Consent Form that the Plaintiff had signed upon admission to the hospital was not, as a matter of law, informed consent to the use of the vacuum extractor. (ROA 2072, ll. 17-18; 2205, l. 23-2206, l.3.) However, the jury returned a verdict for the Defendant with the answer of NO to the question: “Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?” (ROA 3714.)

STATEMENT OF THE FACTS

As in virtually all medical malpractice cases, the details of the medical care provided to the Plaintiff are found in the medical records. However, in this case, the actual delivery was videotaped and the jury was provided with a unique visual record of the events as they had transpired.

According to the medical records, when the Plaintiff attended her first prenatal visit in January 2002, she provided a history that included the fact that she had last used alcohol and marijuana on November 1, 2001. (ROA 3227, 3237.) When she transferred to another medical practice, she gave a history that she had uses alcohol (2x week) between the ages of 18 and 20, and she had stopped October 20, 2001. (ROA 3033.)

After the Plaintiff was admitted to East Cooper Hospital on July 15, 2002, a fetal monitor was attached to monitor the Child’s heart rate and the contractions. (ROA 1248, ll. 23-25; 1249, ll. 13-23.) The fetal monitoring strips are another important piece of the documentary evidence. (ROA 3342-3498.) The Plaintiff’s labor was slow and she had been in labor for almost 18 hours when Dr. Rhett came on call at noon on July 16th. After the fetal monitor showed a dip in the Child’s heart rate mid-day, Dr. Rhett examined the

Plaintiff and found that she was dilated only 4-5 cm, so he stopped the Pitocin, gave her oxygen, and repositioned her. The heart rate went back up and they restarted the Pitocin and continued to monitor her labor. (See ROA 3342-3498.)

Then, at approximately 7:00 pm, the heart rate had gone down again and the monitoring strips showed that the Child's heartbeat had slowed down for a prolonged period. (ROA 1254; Tr. 1342.) Upon examination, Dr. Rhett determined that the Plaintiff was fully dilated and he was ready for her to push. (ROA 1244; Tr. 1332.) However, as the videotape shows, she was exhausted from being in labor for 24 hours and she could not push. By 7:30pm, the Child's heart rate had not gone back up and it was critically necessary to deliver that baby as quickly as possible. (ROA 1635-38.) At that point, Dr. Rhett had three options to deliver that baby: perform a caesarian section or proceed with a vaginal delivery with the assistance of either forceps or a vacuum extractor. (ROA 1256-57, 1259.) Dr. Rhett determined that a c-section was not a viable option because the baby was already inside the vagina (i.e. would have had to have been literally pushed back up the birth canal to deliver by c-section), and it would have taken at least 20 minutes to prepare the operating room and the Plaintiff for surgery. (ROA 1259, 1264, 1272, 1427.) Therefore, Dr. Rhett opted to use the vacuum extractor and the Child was delivered three minutes later at 7:37 pm. The timing can be detected on the video. The cause of the Child's heart rate decelerations and the urgent need to deliver him was apparent when he was delivered with the umbilical cord wrapped around his neck. (ROA 1281, l. 17 - 1282, l. 14)(See also ROA 3342.)

Fortunately, the Child's APGAR scores were normal when he was born. (ROA 720, ll, 22-24.) However, he developed problems, and he was transferred to MUSC

where it was determined that he had a brain bleed/hemorrhage which required surgery. (ROA 469-70.) The Plaintiff's expert in pediatric neurology testified that the Child suffers from a combination of mild to moderate problems with developmental delays consistent with neurologic injuries associated with the brain hemorrhage. (ROA 673-75.) However, the Defendant's expert testified that the Child also was born with a connective tissue disorder and a number of other genetic problems, including a colomba, hyperextensibility, pulmonary artery branch stenosis, hyperplastic transverse sinus in his skull, a heart murmur, bilateral hydroceles, scoliosis – none of which were caused by the brain hemorrhage. (ROA 1470-82, 1489-90.)

The pivotal causation question at trial was whether the use of the vacuum extractor was a proximate cause of the Child's brain bleed and neurologic injuries. On the causation issue, the Plaintiff presented testimony from her experts in a preemptive attempt to rebut the anticipated defense argument that genetics and her alcohol use might have caused her Child's problems. Plaintiff's board-certified expert in pediatric neurology, Dr. Katz, testified that her use of alcohol in the first trimester was not related to the brain bleeds or any of the Child's problems. (ROA 697, l.14 – 698, l. 9.) Dr. Adler, another board-certified pediatric neurologist called by the Plaintiff, also testified to his opinion that the Plaintiff's alcohol use had no effect on the Child's brain bleeds or any of his problems. (ROA 826, ll. 9-16; 827, ll. 4-11) Dr. Zimmerman, a board-certified pediatric neuro-radiologist, testified that there was no imaging evidence of fetal alcohol syndrome. (ROA 900, ll. 14-15.) Dr. Burton, a board-certified pediatrician and clinical geneticist, testified that, in her opinion, Plaintiff's alcohol use had no impact on the Child's motor, cognitive or neurologic problems. (ROA 2485.) Dr. Burton also testified

that in her opinion, the Child's brain damage was not caused by any genetic conditions. (ROA 2503, l. 13 – 2505, l. 10.)

The Defendant presented testimony from Dr. Milunsky, board-certified in internal medicine, pediatrics, and clinical genetics, who testified that the Plaintiff's use of alcohol in the first trimester, as evidenced in the medical records, was potentially relevant to the child's inflammatory problems and developmental delays. (ROA 1491, l. 18 – 1492, l. 7.) More specifically, Dr. Milunsky testified that while the Child did not have fetal alcohol syndrome, (ROA 1492, ll. 22-23.), his features were consistent with incomplete fetal alcohol syndrome, and that it was most probable that his problems occurred as a consequence of multiple factors that had nothing to do with the head bleed, but rather from alcohol use and/or his genetic connective tissue problems. (ROA 1495, ll. 11-22.)

I. The Court of Appeals properly declined to consider the Plaintiff's complaints about the Trial Court's admission of expert opinion testimony by Dr. Milunsky as to the Plaintiff's use of alcohol during her pregnancy and a genetic condition as contributing causal factors in the Child's conditions.

The Plaintiff argues that “[t]his case presents a conflict between the decision of the Court of Appeals and prior decisions reached by this Court regarding admission of expert testimony.” In essence, much of the Plaintiff's argument is devoted to restating her arguments as to why the Trial Court supposedly erred in allowing expert opinion testimony from Dr. Milunsky. Without restating his arguments, the Respondent directs the Court's attention to the discussion in his brief as to why the Trial Court acted within its discretion under Rule 702 and *State v. Council* in admitting the expert opinion testimony from Dr. Milunsky regarding the Plaintiff's use of alcohol during her pregnancy and the Child's genetic conditions as contributing causal factors in the child's conditions.

However, the Court of Appeals declined to reach the merits of the Trial Court's evidentiary rulings allowing Dr. Milunsky's opinion testimony because the jury never reached the issue of causation, citing to Stephens ex rel. Lillian C. v. CSX Transp., Inc., 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) stating:

Because the jury determined Dr. Rhett did not breach his duty of due care, and thus, did not reach subsequent questions related to causation, this court need not address any issue raised by Jamesetta that relates to causation. *See Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) ("Because the jury's verdict [that neither defendant breached its duty of reasonable care] made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling . . . unless it relates to breach of [the defendants'] duty of reasonable care."). On this basis, we decline to address issues related to the admissibility of testimony showing that maternal use of alcohol or genetics may have caused the child's problems because we find these issues relate exclusively to the causation element.

[Opinion, p. 3.] The Plaintiff argues that the Court of Appeals erred in relying upon *Stephens*, and overlooked that the prejudicial testimony tainted the entire trial, including the jury's consideration of the standard of care issue, and therefore the jury's finding that Dr. Rhett did not deviate from the standard of care should not preclude consideration of her evidentiary issues.

Plaintiff argues that the Court of Appeals erred in failing to consider S.C. State Hwy Dep't v. Graydon, 246 S.C. 509, 511, 144 S.E.2d 485 (1965), which holds: "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial." To the extent that *Graydon* discusses such a presumption – it is not conclusive, and can be rebutted. Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170-01 (Ct. App. 1988). And here, the jury's answer to the special interrogatory clearly rebuts any possible presumption of prejudice and demonstrates that the jury never reached the causation question. Notably, in *Mali v. Odom*, the Court found

that the erroneous admission of incompetent evidence on damages, could not have affected the jury's findings as to liability, and ordered a new trial on damages only. *Id.*

Plaintiff also argues the evidence of her alcohol use prejudiced the jury against her and influenced their finding that Dr. Rhett did not deviate from the standard of care, citing to Templeton v. C. & W. Ry. Co., 117 S.C. 44, 55, 108 S.E.2d 363, 367 (1921), for the proposition that “there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission.” [Petition, p. 19.]

However, the Plaintiff's argument has no merit in view of the facts that (1) Plaintiff's own counsel opened the door on the issue of her prenatal alcohol use, and (2) Dr.

Milunsky never testified at trial that the Plaintiff Mother *abused* alcohol. The medical records irrefutably show that the Plaintiff gave a medical history of using alcohol in the first trimester, and Dr. Milunsky gave his opinion based on that medical history without characterizing her alcohol use as abuse. [ROA 1491-92.]. Moreover, the Plaintiff herself raised the issue of alcohol use during her opening statement and by eliciting expert medical opinions on the causal connection of alcohol use from her own experts. [ROA 343-44 (opening statement); ROA 697-98 (Dr. Katz); ROA 826-27 (Dr. Adler); (ROA 900 (Dr. Zimmerman); (ROA 2485 (Dr. Burton).]

In *Stephens*, as here, the jury answered special interrogatories finding that the defendant did not breach the duty of reasonable care, and thus, the Court held that it was not necessary to address issues related to jury charges on any issue other than the duty of care. Accordingly, by the same analysis, the Court of Appeals properly held in this case

that it was not necessary to address any issues related to evidentiary rulings that relate only to proximate cause.

The Court of Appeals' holding is also supported by Laurens Tel. Co. v. Enter. Bank, 90 S.C. 50, 72 S.E. 878, 882 (1911) (error in jury instruction immaterial, where jury found that the defendants had not violated the law), and Selh v. Moore-McCormack Lines, Inc., 362 F.2d 541, 542 (2d Cir. 1966) ("In light of the jury verdict, it is unnecessary for this Court, in passing on the appeal with respect to the claims of negligence and unseaworthiness, to consider the propriety of the district court's rulings concerning the admission and exclusion of testimony by medical experts and others relating to whether plaintiff's exposure to the hot fuel oil could have aggravated a dormant cancer in his larynx. Since the jury found that there was no negligence and no unseaworthiness, they did not answer the questions relating to proximate cause and, hence, these evidentiary rulings, whether erroneous or not, afford no basis for reversal."). See also Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C., 978 A.2d 852, 864 (Md. App. 2009) ("The jury ... found that neither Dr. Margolis nor Dr. Martin committed a breach in the standard of care when providing care to Dr. Orr. Thus, the jury did not proceed to determine the question of causation. Accordingly, ... appellants cannot show prejudice as a result of the trial court's refusal to give their requested "substantial factor" instruction when giving its instructions on causation.").

II. The Trial Court charged the jury on the correct, applicable law of informed consent in emergencies.

One of the Plaintiff's allegations of negligence was lack of informed consent to the use of the vacuum. Despite the fact that the Plaintiff signed a General Consent Form when she was admitted to the hospital, (ROA 3499), Plaintiff claimed that the form did

not specifically mention or authorize the obstetrician to use a vacuum to assist in delivering the baby, and the Defendant did not tell her he was going to use a vacuum or advise of her the risks. (ROA 990-01.) Dr. Rhett testified that he did not discuss the vacuum with the Plaintiff because there was an emergency and he did not have time, and he also thought the general consent covered it. Three OB/GYN experts testified that Dr. Rhett complied with the standard of care as to informed consent under the circumstances that presented during the delivery. (ROA 1893, l. 12 – 1894, l. 6 – Dr. Hobbs; ROA 1574, ll. 13-23 - Dr. Weinstein; ROA 1739, l. 22 – 1741, l. 11 – Dr. Van Dorsten.)

Plaintiff moved for a partial directed verdict on informed consent, asking that the trial court instruct the jury as a matter of law that the General Consent Form does not represent informed consent. (ROA 2036, ll. 6-9.) Despite the expert testimony that the General Consent Form met the standard of care, the trial court granted the motion. (ROA 2073, ll. 16-18.) In the charge to the jury, the trial court virtually quoted from the correct law on informed consent as set forth in Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) and Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984):

Now, let's talk about informed consent. A doctor has the duty to inform a patient of the known risk or dangers of the treatment or procedure that the doctor proposes so that the patient will be able to make an intelligent decision as to whether to follow the doctor's proposed treatment. The basis of the doctrine of informed consent is the patient's right to exercise control over his or her own body by deciding intelligently for herself whether or not to submit to the particular procedure. ***In the absence of an emergency that requires immediately treatment***, the doctor must tell the patient of One, the diagnosis. Two, the general nature of any proposed procedure and the course of treatment. Three, the material risks involved in the course of treatment. Four, the probability of success associated with the course of treatment. Five, the prognosis if a particular procedure is not done or course of treatment not followed. Six, the existence of any alternatives to the procedure or course of treatment.

Now, let's talk about *emergency situations*. However, informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. Therefore, under this ruling it is for you to decide whether a medical emergency existed at the time of the vacuum procedure requiring immediate treatment and overriding the need to obtain informed consent. At the close of the evidence in this case, the Court ruled that the document entitled Consent for Admission and Treatment, entered into evidence as Exhibit 2-004, does not provide informed consent for a vacuum extraction delivery. This does not mean that the issue of informed consent in this case must be decided in favor of the plaintiff, but simply means that Exhibit 2-004, alone and by itself, does not meet the requirements of South Carolina law with regard to informed consent and the vacuum extraction delivery in this case. (ROA 2202, l. 5 – 2206, l. 11 (emphasis added).)

The Plaintiff objected to the jury charge on emergency situations because the Trial Court had not given her Request to Charge #12, which was literally photocopied from Judge Anderson's charge book:

Informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. However, a physician must respect a competent patient's refusal of treatment, even in an emergency. If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency.

Even under the emergency exception to the informed consent doctrine, a physician should seek the consent of the patient, or, if the patient is incapable of providing consent, the consent of a family member, before administering treatment. Impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.

(ROA 3666-67; see objection and ruling at ROA 2236, l. 7 – 2237, l. 14.)

The Court of Appeals found that the Plaintiff's requested charge contained statements that were "inapplicable to the facts of this case, and incorrect statements of the law:"

Specifically, (1) the statement, "a physician must respect a competent patient's refusal of treatment, even in an emergency," is inapplicable because there is no evidence Jamesetta refused any treatment; (2) the statement, "If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency," is legally incorrect, *see Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008) ("[N]o independent cause of action for medical battery exists in South Carolina."); and (3) the statement, "if the patient is incapable of providing consent, the consent of a family member [should be sought], before administering treatment" is legally inaccurate, *see Harvey v. Strickland*, 350 S.C. 303, 311, 566 S.E.2d 529, 534 (2002) (rejecting doctor's argument he was under a duty to obtain patient's mother's consent for blood transfusion when patient was unconscious), as well as inapplicable to the facts of this case because there is no evidence Jamesetta was incapable of providing consent. As to all other statements in the requested jury charge, we find the trial court's charge correctly and adequately covered those points of law.

The Plaintiff argues that she does not object to Trial Court's failure to charge the first paragraph of her request, but complains that the jury was not charged the second paragraph in its entirety. Notwithstanding, that the request comes from Judge Anderson's charge book, the authorities cited with the proposed charge do not support the language about any requirement that a physician seek consent from family members or "impracticability of conferring with the patient" as a prerequisite to the emergency exception as presented.

The request to charge cites to South Carolina authority of Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002), and the Adult Health Care Consent Act, S.C. Code Ann. §44-66-60. However, *Harvey*¹ and §44-66-60 address claims for battery in situations of where a patient has refused medical treatment due to religious beliefs. In fact, the Request to Charge is found in Judge Anderson's charge book under Section 27-

¹In that case, the patient was a Jehovah's Witness and he had expressly indicated he did not want any treatment involving the use of blood or blood products during elective surgery.

22, entitled “Medical Malpractice – Right to be Free of Unwanted Medical Treatment.” Anderson, S.C. Requests to Charge - Civil, § 27-22 (2009). Here, the Plaintiff did not refuse treatment and no action for battery was made out; thus, such language was not applicable and there was no error in declining to give the requested charge. Further, there is nothing in *Harvey* or §44-66-60 that supports the language in the second paragraph about any requirement that a physician seek consent from family members or “impracticability of conferring with the patient” as prerequisite to the emergency exception as presented.

Plaintiff tries to prove that the jury was confused by the informed consent charge based on the Affidavit of Plaintiff’s Counsel, Mary Watters, who interviewed three of the jurors after the trial. (ROA 3716.) As a threshold matter, the Defendant submits that Ms. Watters’ hearsay about what the jurors discussed with her is an improper basis to challenge the jury charge under Rule 606, SCRE, because it does not prove any improper external influence on the jury’s deliberations. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371 (2008) (“ Rule 606 thus draws a distinction between evidence of external influences on the jury’s deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter.”) Furthermore, as to the substance of Ms. Watters’ averments, they do not support any ground to grant a new trial based on the trial court’s refusal to charge the exact language of Plaintiff’s Request #12.

There was much testimony from experts for both parties about informed consent and whether an emergency was presented. Based on the evidence presented, the trial

court's charge to the jury, as a whole, was correct and the Court of Appeals properly affirmed the judgment on that verdict.

CONCLUSION

Wherefore, based on the foregoing, the Defendant Dr. Edmund Rhett, Jr. respectfully submits that the Court of Appeals properly considered all the correct legal standards as applied to the evidence and proceedings in the trial of this case and properly affirmed the judgment entered on the jury's verdict. Accordingly, there are no special or important reasons to review Court of Appeals' decision, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



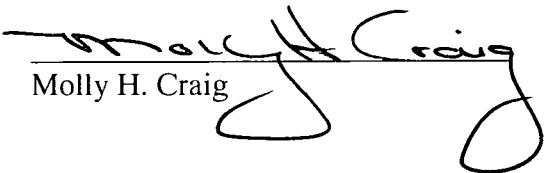
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June 18, 2014

Certificate of Service

I certify that on this 18th day of June 2014, a copy of the foregoing Return was served on Petitioner by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to her Counsel of Record as listed below:

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