THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Harrington, Circuit Court Judge

Case No. 2011-CP-10-1559

Wildflower Nursery, Inc. d/b/a Pleasant Landscapes.....Appellant,

v.

Joseph W. Beasley, Jr. a/k/a Bill Beasley.....Respondent.

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The July 3, 2014 order should be vacated because Wildflower Nursery's due process rights were violated in two respects: (1) it was never given notice of the trial and (2) after Wildflower made an appearance, the order was issued *ex parte*.

II. The trial court should not have stricken Wildflower's Complaint without giving it an opportunity to retain an attorney.

III. The trial court's orders in November of 2013 and June of 2014, which purport to enforce a judgment against Wildflower, must be vacated because they were issued before a judgment was entered.

STATEMENT OF THE CASE

Wildflower Nursery, Inc. d/b/a Pleasant Landscapes (hereinafter "Wildflower") filed a Complaint in the magistrate's court on December 15, 2010, seeking $5,999.39, plus court costs against Joseph W. Beasley a/k/a Billy Beasley (hereinafter "Beasley"). (*See* R. p. 23). Beasley filed an Answer, and after successfully continuing the trial, Beasley's counsel wrote a letter to the magistrate asking that the matter be transferred to the Court of Common Plea because he was asserting a $15,300 counterclaim against Wildflower. (*See* R. p. 28 (Answer); R. p. 103 (Continuance Letter); R. p. 104 (Removal Letter)). The matter was transferred to the Court of Common Pleas on March 1, 2011. (R. p. 3).

On September 23, 2011, Beasley moved to strike Wildflower's Complaint because it was filed by a non-lawyer. (R. p. 31). The motion to strike and the trial of the case were heard on May 7, 2013 in Wildflower's absence. (R. pp. 75 – 82 (May 7, 2013 Transcript)). On May 10, 2013, the trial court entered a Form 4 Order granting Beasley's motion to strike Wildflower's Complaint and granting Beasley's counterclaim in the

amount of $10,300. (R. pp. 5 – 6). The Form 4 Order indicated a formal order would follow.

Prior to the issuance of a formal order, Beasley tried to collect the judgment. He filed a motion to appoint a receiver on August 30, 2013, and Wildflower filed a *pro se* motion to vacate on September 12, 2013. (R. p. 39 (Motion to Appoint Receiver); R. p. 41 (Motion to Vacate)). The trial court denied both motions on November 26, 2013. (R. p. 7).

After filing a motion to appoint a receiver, Beasley filed a motion for supplemental proceedings, asking that the case be referred to a master, that a subpoena be issued directing Wildflower to produce its financial records, and for "further relief" the court deemed appropriate. (R. p. 35). Wildflower, which had since retained counsel, filed a reply to Beasley's motion for supplemental proceedings, asking that the May 9, 2013 order be vacated. These motions were heard on May 15, 2014. On June 9, 2014, the trial court denied Wildflower's motion to vacate and granted Beasley's motion for supplemental proceedings. (R. p. 9). Wildflower appealed from that order on July 9, 2014.

At the time Wildflower filed its appeal, it was unaware that just days earlier, on July 3, 2014, the trial court issued a formal order that was promised in its May 9, 2013 Form 4 Order. (R. p. 15). Wildflower did not receive written notice of the entry of this order until July 11, 2014, when Beasley served and filed a motion to amend the order. (R. p. 64). Wildflower timely filed a motion to alter, amend, and/or reconsider the July 3 order, and the motion for reconsideration was denied on July 21, 2014. (R. p. 18). That same day, the trial court issued an amended final order. (R. p. 20). This appeal followed.

FACTS

This dispute arose after Beasley hired Wildflower to install an in-ground pool and landscape his backyard. After the job was finished, Beasley owed Wildflower approximately $17,800. When Beasley refused to pay the invoice, Wildflower filed a Complaint in the magistrate's court on December 15, 2010, seeking $5,999.39, plus court costs. (*See* R. p. 23). This amount represented only a portion of the money owed.

I. Magistrate's Court Proceedings

Wildflower's Complaint was filed by Mr. James Parker, the owner of Wildflower. Mr. Parker is not an attorney. However, non-attorney owners of a business are allowed to file Complaints on their corporation's behalf in the magistrate's court pursuant to Rule 21 of the South Carolina Magistrate Court Rules. *See* Rule 21, SCMCR ("A business . . . may be represented in a civil magistrates court proceeding by a non-lawyer officer, agent, or employee . . . .")

On December 29, 2010, two weeks after the Complaint was filed, Beasley filed his Answer. (*See* R. p. 28). This Answer was on a form provided by the South Carolina Judicial Department and referenced an attached letter, which detailed his reasons for not paying Wildflower's invoice. (R. pp. 29 – 30). Beasley did ***not*** fill out the Judicial Department's form for asserting a counterclaim in magistrate's court. (*See* R. p. 108).

In Beasley's Answer, he explained that he "fe[lt] that the amount due to [Wildflower] is incorrect" and that he had "numerous problems with the performance of the work." (R. p. 29). He went on to say that his "main concerns are the mortar (grout) colors being taken care of so they all match, the shrubs surviving for more than 2 weeks, and the leak in the pool being taken care of, as well as the glass tile being square and

level . . . ." (*Id.* at 29 – 30). According to Beasley, two other companies gave him proposals to fix these alleged problems, and the cheapest appraisal was $15,300. (*Id.* at 30). He concluded by explaining: "The reasons I have not paid the balance due, is I feel the job is not complete." (*Id.*)

Wildflower disputes that this Answer asserted a counterclaim against it. However, to the extent a counterclaim could be inferred, Wildflower was not required to answer it. *See* Rule 9(a), SCMCR ("The claims contained in the counterclaim shall be deemed denied by the plaintiff and no answer or reply is required to be filed by the plaintiff in response to a counterclaim filed by the defendant.").

The matter was set to be tried on February 11, 2011. Four days prior to the trial, Beasley filed a letter seeking a continuance because his witnesses were not available on the day of trial. (*See* R. p. 103). The trial was rescheduled for March 2, 2011.

Approximately one week prior to the rescheduled trial, on February 22, 2011, Beasley's present counsel noticed their appearance and asked that the case be removed to the circuit court. (*See* R. p. 104). The letter noted that Beasley believed he was entitled to $15,300 from Wildflower, an amount that exceeds the jurisdictional limit of the magistrate's court. (*Id.*) Recognizing that the answer that had been filed did not definitively assert a counterclaim, defense counsel stated he would "amend [Beasley's] answer and definitively assert this counterclaim," if the magistrate required. (*See id.*)

The magistrate issued an order transferring the case to the Charleston County Court of Common Pleas, and this order was filed with the clerk's office on March 1, 2011. (R. pp. 3 – 4). Beasley never amended his answer to "definitively assert [a] counterclaim" (*See* R. p. 104), and the Complaint and Answer that had been filed with the

magistrate remained unchanged. (*See* R. p. 23; *see also* R. p. 28).

II. Circuit Court Proceedings

Once the matter was transferred, the parties awaited a bench trial. On September 23, 2011, six months after the order of transfer, Beasley moved to strike Wildflower's Complaint because it was filed on behalf of a corporation by a non-lawyer. (*See* R. p. 31 – 34). The motion was served on Wildflower, which awaited a hearing on the motion. Notice of a hearing never came despite Wildflower making "dutiful inquires" about the status of the case. (*See* R. p. 106 – 07).

Wildflower has since learned that the motion to strike was heard on May 9, 2013, when the case, unbeknownst to Wildflower, was called for trial. Wildflower did not receive notice of the trial and did not appear.

A. May 9, 2013 hearing

At the May 9, 2013 hearing, counsel for Beasley stated this about Wildflower's absence:

> The plaintiff is a corporation. I told them that they can't be represented – that they can't represent themselves in Circuit Court since the matter before I even became involved was transferred.[1] They wouldn't get an attorney. We filed a motion to have their complaint struck because they can't represent themselves in Circuit Court. They still didn't get an attorney and we're here today. We notified them of this hearing, and they still haven't shown up and they still don't have an attorney. Your Honor, we do have a counterclaim that I would like to proceed on. (footnote added) (R. p. 77, lines 17 – 25, R. p. 78, lines 1 – 2)

There is no further discussion on how notice was provided to Wildflower or whether the clerk's office had ever sent notice. (*See id.* at pp. 78 – 82). Instead, after the above

[1] This statement is incorrect. The matter was transferred ***after*** Beasley retained counsel and upon defense counsel's request.

statement was made, the trial court allowed Beasley to present his counterclaim "within two minutes." (*Id.* at p. 78, lines 17 – 18).

Beasley testified summarily that Wildflower did not perform work in accordance with the contract documents and that it would cost him $10,300 to correct Wildflower's work. (*Id.* at p. 79, lines 15 – 17; p. 80, lines 6 – 8, lines 21 – 24). Beasley did not explain the nature of the work Wildflower agreed to do nor did he explain how Wildflower's work was deficient. The contract was not entered into evidence. At the end of the hearing, the circuit court took the matter under advisement. (*Id.* at p. 81, lines 15 – 16).

B. May 10, 2013 Form 4 Order and July 3, 2014 Formal Order

The next day, the circuit court entered a Form 4 Order, which stated:

> Defendant's Motion to Strike Plaintiff's Summons and Complaint is GRANTED. It is further ordered that Defendant's Counterclaim, in the amount of $10,300.00, is GRANTED. A formal order will follow.

(emphasis added) (*See* R. pp. 5 – 6). This Order, like the notice of the motion hearing and the trial, was never served on Wildflower. A formal order was not filed until over a year later, on July 3, 2014. (*See* R. pp. 15 – 17).

C. Attempts to Enforce Judgment between May 2013 and July 2014

Although the Form 4 Order indicated a formal order would follow, Beasley took action to enforce the judgment prior to a formal order being issued. On August 30, 2013, Beasley filed a motion to appoint a receiver, basing it on a "judgment" that was purportedly "entered against the Plaintiff in favor of the Plaintiff [sic] on August 10, 2013." (*See* R. pp. 39 – 40). This motion ***was*** properly served upon Wildflower at its correct address. (*See* R. p. 105 (Certificate of Service attached to Motion to Appoint

Receiver)).

Thus, it was not until Beasley tried to collect the $10,300 that Wildflower became aware of the court proceeding that had occurred in its absence. Upon learning of the purported $10,300 judgment, Wildflower took immediate action and filed a *pro se* motion to vacate on September 12, 2013. (*See* R. pp. 41 – 45). Beasley responded with a motion for supplemental proceedings, asking that the case be referred to a master, that a subpoena be issued directing Wildflower to produce its financial records, and for "further relief" the court deemed appropriate. (*See* R. pp. 35 – 38).

Wildflower retained Christopher Inglese as counsel, and he noticed his appearance on November 8, 2013. (*See* R. p. 74). Thereafter, the trial court issued another Form 4 order denying Wildflower's motion to vacate and denying Beasley's motion to appoint a receiver. (*See* R. pp. 7 – 8). Beasley's motion for supplemental proceedings remained pending.

Wildflower filed a reply to Beasley's motion for supplemental proceedings, asking the court to vacate its May 9, 2013 order. (*See* R. pp. 46 – 63). A hearing was held on these motions in May 2014. The trial court denied Wildflower's motion to vacate and granted Beasley's motion for supplemental proceedings. The order referred the matter to a master, required Mr. Parker (the owner of Wildflower) to appear before the master at an unspecified date and time, enjoined Wildflower from selling or otherwise compromising any of its assets except in the usual course of trade, and ordered Wildflower to produce financial documents. (*See* R. pp. 9 – 14). This order was entered on June 9, 2014, and Wildflower timely served and filed a notice of appeal on July 9, 2014.

D. Trial Court Activity after May 2014 Hearing

Prior to Wildflower's service of its notice of appeal, Beasley apparently submitted to the trial court a proposed formal order to which the May 2013 Form 4 Order had alluded. Wildflower's counsel was not provided a copy of this proposed formal order. The trial judge signed the order on June 16, 2014, and it was filed with the clerk's office on July 3, 2014, but not served on Wildflower. (*See* R. pp. 64 – 70). It was not until July 11, 2014 – when Beasley served and filed a motion to amend the July 3, 2014 formal order – that Wildflower even knew the formal order had been issued.[2]

Wildflower timely moved to alter, amend, and/or reconsider the July 3, 2014 order. (R. pp. 71 – 73). Wildflower also moved to vacate the trial court's other orders, which purported to allow execution on a judgment that had not yet existed. The circuit court denied Wildflower's motion, but granted Beasley's motion to amend. An amended order was issued on July 21, 2014, and this appeal followed. (*See* R. pp. 20 – 22).

ARGUMENTS

I. The trial court's July 3, 2014 Order should be vacated because it was issued in violation of Wildflower's due process rights.

A. Wildflower was not properly notified of the trial.

As sworn to in Mr. Parker's affidavit, Wildflower never received notice of when Beasley's motion to strike would be heard or when the trial would take place, despite making "dutiful inquiries." (*See* R. pp. 106 – 107). No evidence to the contrary exists.

In *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972), our Supreme Court held:

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[2] Beasley sought to amend the order because it incorrectly stated that James Parker, the owner of Wildflower, was present at trial. (*See* R. pp. 64 – 70).

> It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.

Here, the Court's file fails to show how the Clerk's Office notified Wildflower of the hearing on the motion to strike or of the trial date. The transcript reveals that the trial court made no inquiry into whether Wildflower was notified of the hearing and apparently relied solely on defense counsel's statement, "We notified them of this hearing, and they still haven't shown up." (R. p. 77). However, this statement does not provide any details about when or by what means the notification took place, nor does counsel submit any documentation of such notification. (*See* R. pp. 77 – 81). In contrast to that lack of evidence showing notice, the owner of Wildflower has submitted an affidavit swearing under oath that he never received such notice. (*See* R. pp. 106 – 107).

No evidence supports the trial court's finding (made over a year later in its Amended Order) that Wildflower "received notice from the Clerk as to the date and time of this hearing." (*See* R. p. 21). In addition to misremembering how/if Wildflower received notice of the hearing, the trial court's order also incorrectly recalls the extent of Beasley's testimony regarding the breach of contract. (*See id.*)

According to the trial court's Amended Order, "Beasley testified that much of the work originally called for in the contract between Plaintiff and Defendant had been left incomplete, and that additional portions of the work required significant remediation." (*See id.*) It goes on to state "Defendant testified about the contracted-for work that had

not been finished by Plaintiff, and also testified about the specific items of work that had been incorrectly performed and which had to be removed and replaced." (*See id.*) A review of the transcript belies those assertions. (*See* R. pp. 77 – 81).

"Without due notice and opportunity to be heard" the trial court had no jurisdiction to adjudicate Wildflower's rights. *See Webster,* 259 S.C. at 391, 192 S.E.2d at 216; *see also Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 338, 191 S.E.2d 761, 770 (1972) ("It is often difficult to define 'due process.' But it is not difficult for attorneys and judges to agree that if due process means anything, it means that a litigant must be given an opportunity to meet an issue before an adverse determination is made."). Accordingly, Wildflower's due process rights were violated, and the July 3, 2014 and May 10, 2013 Orders are void. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) ("'The definition of 'void' under [Rule 60(b)(4), SCRCP] only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.'" (quoting *McDaniel v. U.S. Fid. & Guar. Co.,* 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)). Wildflower asks this Court to vacate the orders and allow a trial on the merits. *Cf Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) (vacating a default judgment where there was a good faith mistake, no attempt to thwart the judicial system, and in light of the policy that favors "trial of issues on merit over securing judgment by slight technicalities"); *see also Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013) ("Our decision to reverse the trial court's refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits").

B. The July 3, 2014 Order was issued *ex parte*.

After Beasley attempted to execute the "judgment" against Wildflower and Wildflower became aware that the May 2013 Form 4 Order was entered without its knowledge, it hired an attorney who appeared at a hearing in May 2014. (*See* R. pp. 83 – 102). During that hearing, Wildflower's attorney pointed out that a formal order had never been issued and was not on file with the clerk's office. (*See* R. pp. 94 – 95, 100 – 101). Because the Form 4 Order indicated that a more formal order would follow, the form order was not final. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (noting that a form order is not a final order if the circuit court specifies that a formal order will be filed).

On June 16, 2014, the circuit court signed a formal order (R. pp. 15 – 17); however, if the proposed order was prepared by Beasley, as Wildflower believes it was, then the order was submitted to the trial court *ex parte* and in violation of the Rules of Civil Procedure. *See* Rule 5(b)(3), SCRCP ("Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means.").

Rule 5 of the South Carolina Rules of Civil Procedure was amended in 1994 to include Rule 5(b)(3). According to the Reporter's Note, the purpose of the amendment was to ensure that opposing counsel has "the opportunity to review and comment on the proposed order before it is signed." In 1993, a year before Rule 5 was amended, the Supreme Court issued an opinion condemning *ex parte* transmittals of court orders, though it declined to adopt a per se rule automatically reversing orders so procured. *See*

Burgess v. Stern, 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993). Instead, the Court found it appropriate to consider whether the *ex parte* communication was prejudicial. *Id.* Although it adopted a "prejudice" standard, the Court also recognized:

> "It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against 'prejudicial' ex parte communications, but against ex parte communications."

Id. at 330-31, 428 S.E.2d at 883 (quoting *In re: Wisconsin Steel*, 48 B.R. 753 (D.Ill. 1985)).

Here, the *ex parte* transmittal came on the heels of Wildflower having been kept in the dark about upcoming matters in the trial court from September 2011 until August of 2013. In light of the continuous problems regarding due process, Beasley's *ex parte* communication with regard to the July 3, 2014 Order was prejudicial under the circumstances.

Wildflower believes the entire order should be vacated because its due process rights were violated. If this Court agrees, then it need not go further. However, other irregularities and misapprehensions are prevalent in the order, which further support Wildflower's arguments. These additional arguments are addressed below.

II. The Motion to Strike Should Not Have Been Granted

The trial court struck Wildflower's Complaint because Mr. Parker, who is not an attorney, had filed it. To support this finding this Court relied upon *Renaissance*

Enterprises, Inc. v. Summit Teleservices, Inc.,[3] 334 S.C. 649, 515 S.E.2d 257 (1999), correctly noting that a corporation must be represented by an attorney in the circuit court, but incorrectly concluding that the appropriate remedy was to strike Wildflower's Complaint.

While some jurisdictions have held that the unauthorized practice of law renders a proceeding to be a nullity, South Carolina has declined to adopt that harsh result. Instead, our courts look to the facts and circumstances of each case to determine a just remedy. *Brown v. Coe*, 365 S.C. 137, 144, 616 S.E.2d 705, 709 (2005).

In *Brown*, a non-lawyer personal representative filed a notice of appeal on behalf of an estate. The Respondent moved to dismiss the appeal because it was being championed by someone who was not licensed to practice law. The Supreme Court agreed that the personal representative was not authorized to pursue the appeal, but denied the motion to dismiss. Instead, the Court allowed the personal representative thirty days to acquire an attorney to represent the estate on appeal. In reaching this decision, the Court noted that the personal representative had represented the estate in previous appellate matters, which led her to believe she was allowed to do so; there had been no previous case addressing the issue; and most importantly, the pro-se appellant in *Renaissance Enterprises* had been afforded the same opportunity. *Id.*

Here, the Complaint was properly filed in the magistrate's court, where corporations can be represented by non-lawyers. Mr. Parker was not aware that he could not continue to represent the corporation once it was removed to the circuit court, he never received notice of the hearing on the motion to strike, and Wildflower has since

[3] The Order actually cites to *Renaissance Enterprises, Inc. v. Babb*, which appears to be a scrivener's error.

hired counsel to champion his Complaint. Indeed, both the Complaint and the Answer, which met the standards of the Magistrate Court Rules, are defective vis á vis the South Carolina Rules of Civil Procedure. *See* Rule 10, SCRCP (setting forth the requirements for the form of pleadings). It is manifestly unjust for the trial court to strike Wildflower's Complaint for a procedural defect that resulted from the removal to circuit court, but overlook Beasley's own procedural defects, which would otherwise have resulted in the Clerk of Court refusing to file his counterclaim. *See* Rule 10(e) ("The clerk of the court shall not file any pleadings or other papers not prepared in accordance with this rule; except plats, photographs, diagrams, documents, and other paper exhibits as provided in paragraph 10(c).").

III. The November 2013 and June 2014 Orders must be vacated because no judgment against Wildflower existed when they were issued.

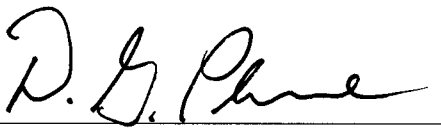
It is well established that judgments do not come into existence until a final order has been issued. *Cook v. Jennings*, 18 S.E. 640, 643 (1893) ("Wherever and whenever a court has made a final determination of the rights of the parties in the action, such is a judgment."). A Form 4 Order that indicates a more formal order will follow is not final. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (noting that a form order is not a final order if the circuit court specifies that a formal order will be filed); *see also Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final."); Rule 203(b)(1), SCACR ("When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.").

Before issuing its formal order regarding the "judgment" against Wildflower, the trial court issued orders that allowed Beasley to enforce the non-final judgment. In doing so, the trial court allowed the cart to come before the horse, and both cart and horse have trampled Wildflower's due process rights.

CONCLUSION

Based on the foregoing, Wildflower asks that this Court vacate the orders issued by the trial court from May 10, 2013 through July 21, 2014 and allow this matter to be tried on its merits.

Respectfully submitted,



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PROOF OF SERVICE

I certify that on this 12th day of May, 2015, I have served the foregoing Appellant's Final Brief via U.S. Mail, first class postage prepaid, on the following counsel of record:

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Briefs comply with South Carolina Appellate Court Rule 211(b).

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May 12, 2015

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