

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

The Honorable Robin B. Stilwell, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2015-002648

ABC Amusements, Inc. and Scott Wiener,

Respondents,

v.

Michael O. Howard, High-Lite Rides, Inc.,
and MGR Rides, LLC

Appellants,

INITIAL BRIEF OF RESPONDENTS

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Respondents received Appellants Initial Brief on November 30, 2016. Respondents received an extension to file their Initial Brief on or before March 1, 2017. Respondents have timely filed this Initial Brief. 208(a)(3), SCACR.

STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' PRE-TRIAL MOTION FOR SUMMARY JUDGMENT AS TO BREACH OF A COVENANT NOT TO COMPETE?**
- II. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO BREACH OF A COVENANT NOT TO COMPETE?**
- III. **DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY THAT THEY COULD NOT CONSIDER AWARDED DAMAGES BASED UPON A BREACH OF A COVENANT NOT TO COMPETE AFTER APPELLANTS' MOTION FOR DIRECTED VERDICT WAS GRANTED AND AFTER ALL TESTIMONY AND EVIDENCE WAS COMPLETED?**
- IV. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(B), SCRPC, AS TO APPELLANT HOWARD'S CLAIM FOR BREACH OF CONTRACT/DEBT COLLECTION?**
- V. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE PURSUANT TO RULE 59, SCRPC, AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS?**
- VI. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL *NISI REMITTITUR*, PURSUANT TO RULE 59, SCRPC, AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS?**
- VII. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE, PURSUANT TO RULE 59, SCRPC, AS TO THE VERDICT AWARDED TO APPELLANTS?**
- VIII. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL *NISI ADDITUR*, PURSUANT TO RULE 59, SCRPC, AS TO THE VERDICT AWARDED TO APPELLANTS?**
- IX. **DID THE TRIAL COURT ERR IN ALLOWING THE ADMISSION OF RESPONDENTS' EXHIBITS THREE (3) AND FOUR (4) AT TRIAL?**

STATEMENT OF THE CASE

This case concerns the Purchase and Sale of equipment and a book of business by Respondents, Scott Wiener and ABC Amusements, Inc. (hereinafter collectively "Respondents") from Appellants Michael O. Howard, High-Lite Rides, Inc. and MGR Rides, LLC (hereinafter collectively "Appellants").

Respondents filed a Summons and Complaint in the Greenville County Court of Common Pleas on August 21, 2013 against Appellants Michael O. Howard, High-Lite Rides, Inc. and MGR Rides, LLC for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act and Conversion. (Complaint).

Appellants filed an Answer and Counterclaim on or about October 21, 2013 and subsequently amended the same several times. Appellants ultimately plead the following Counterclaims: (1) Breach of Contract/Debt Collection and Breach of Contract as to High-Lite Rides, Inc.; (2) Breach of Contract/Debt Collection as to Michael Howard; (3) Breach of Contract as to High-Lite Rides, Inc.; and (4) Claim and Delivery as to Michael Howard. (Amended Answer and Counterclaim filed October 13, 2015).

Both Appellants and Respondents filed dispositive motions during the pendency of this case, all of which were denied.

The case went to a jury trial the week of November 9, 2015. Prior to the admission of evidence, Appellants renewed their Motion for Summary Judgment regarding Respondent's allegation that Appellants violated the Non-Competition provision contained in the agreement. (Transcript p. 59-61). After the parties argued their positions, Judge Stilwell took the motion under advisement.

After Respondents' case in chief, Respondents motion for a Directed Verdict as to Respondent's Breach of Contract cause of action was denied. (Transcript p. 364). Appellants' motion for a Directed Verdict as to Respondents' Breach of Contract cause of action, specifically, for the Covenant not to Compete was taken under advisement. (Transcript p. 365-369). Appellants' motion for a Directed Verdict as to Respondents' cause of action for conversion, as to one piece of equipment, was consented to by the Respondents and was therefore granted. (Transcript p. 371-372). Lastly, Appellants' motions for a Directed Verdict as to Michael Howard's Breach of Contract/Debt Collection cause of action and Directed Verdict as to Breach of Contract with High-Lite Rides, Inc. cause of action were denied. (Transcript p. 372-374).

After Appellants' case in chief, Appellants renewed their motion for a Directed Verdict on the Covenant not to Compete, which was granted. Appellants' motion for a Directed Verdict as to Respondents' cause of action for Breach of Contract Accompanied by a Fraudulent Act was consented to by the Respondents, and was therefore granted. Appellants remaining directed verdict motions were denied. (Transcript p. 506-513).

The jury rendered a verdict on November 12, 2015. The jury held that the amusement ride equipment/machines at issue in the case were owned by the Appellants, that the Respondents were entitled to \$690,589.00 in damages for Breach of Contract and that Appellants were entitled to \$3,360.00 in damages for Breach of Contract. (Verdict Form).

Respondents made the following post trial Motions which were subsequently denied: Motion Notwithstanding the Verdict that Respondents are the owners of the amusement ride equipment/machines and Motion for Attorneys Fees. (Transcript p. 564-565) (Order Denying Motion for Attorneys Fees and Costs).

Appellants made the following post trial Motions which were subsequently denied: Motion for Judgment Notwithstanding the Verdict as to Howard's Breach of Contract (Debt Collection) cause of action, Motion for a New Trial for the Court's failure to instruct the jury that they could not consider awarding Respondent's damages pursuant to an alleged Covenant not to Compete, Motion for a new trial based upon the verdict amount awarded to the Respondents, Motion for a New Trial *nisi remittitur*, Motion for a new trial based upon amount awarded to Appellants, Motion for a New Trial *nisi additur* and Motion for a new trial based upon admission of Exhibits 3 and 4. (Defendant's Post Trial Motions) (Order Denying Post-Trial Motions).

Judgment was entered against Appellants on or about November 16, 2015 in the amount of \$687,229.00, taking into account the offset in the award to the Appellants. On or about May 23, 2016, Appellants made a payment to Respondents in the amount of \$400,000.00 in order to partially satisfy the judgment. (Partial Satisfaction of Judgment).

A Notice of Appeal was filed and served by Appellants on or about December 22, 2015. (Notice of Appeal).

FACTS

On or about April 1, 2010, Scott Wiener and/or ABC Amusements, Inc. (hereinafter collectively "Respondents"), entered into a certain Agreement for the Purchase and Sale of Equipment and a book of business with Michael O. Howard, High-Lite Rides, Inc. and MGR Rides, LLC (hereinafter collectively "Appellants"). (Plaintiff's Trial Exhibit 1). Scott Wiener is the President of ABC Amusements, Inc. which is in the business of playing festivals, shows and carnivals. Michael O. Howard is the sole owner of both High-Lite Rides, Inc. and MGR Rides, LLC. MGR Rides, LLC is also in the business of playing festivals, shows and carnivals. High-Lite Rides, Inc. is in the business of manufacturing amusement rides.

The Agreement concerned the purchase of equipment and an existing business related to the rental and use of amusement rides for \$633,000.00. The purchase price, pursuant to the Agreement, was allocated as follows:

MGR Route.....	\$150,000.00
New HLC15 Carousel.....	\$58,000.00
New Festival Wheel.....	\$85,000.00
Loop-O-Plane.....	\$25,000.00
Spinner.....	\$45,000.00
SCAT.....	\$80,000.00
Tempest.....	\$45,000.00
S&W Wheel.....	\$15,000.00
Chair Swing.....	\$45,000.00
S&W Bug Ride.....	\$10,000.00
Rapid Slide.....	\$20,000.00
Visa Whale.....	\$10,000.00
Visa Helicopter.....	\$10,000.00
Berry Go Round.....	\$25,000.00
Ticket Trailer.....	\$10,000.00

The agreement contained a non-competition provision whereby one or more Appellants were prohibited from competing with the business Respondents purchased through the Agreement.

The Agreement provides the following:

Purchaser and Seller shall execute a Non-Competition Agreement to prohibit Seller from competing with the business of Purchaser under the terms and conditions specified in that Agreement. See Exhibit A, Paragraph 3.1.

The Agreement also includes a list of the “Terms” between the parties. The Terms list a “10 year non-compete clause” and further provide that “all new/Incoming rental business will be referred to ABC Amusements.” (Plaintiff’s Trial Exhibit 1) (emphasis added). Respondents asserted in their Complaint that Appellants breached the Agreement by violating the non-competition clause as well as the requirement to refer business. Respondents also alleged a counterclaim for Conversion as one of the rides, the Berry Go Round, having an allocated value of \$25,000.00, was never delivered and/or made available to Respondents. Respondents also contend that this

particular ride was incomplete at the time of the Agreement and that one or more Appellants agreed to assemble the ride and place it in operable condition.

Pursuant to the Agreement, Respondents were to pay Appellants monthly payments during the "amusement ride season," a period of 6 months per year. In return, Appellants were to deliver the equipment, refer "all new/Incoming rental business" to Respondents and further turn over the book of business Respondents paid \$150,000.00 for. Respondents filed the herein lawsuit due to Appellants failure to refer all new/Incoming business and for directly competing with Respondents with clients and amusement ride events that were considered a part of the "MGR Route."

Appellants argued at trial that the last page of the Contract, which included the purchase price breakdown and additional terms, should not be included. However, Michael Howard testified in his deposition that the Contract contained the last page. (Court's Trial Exhibit 3: Deposition of Michael Howard, p. 40-41 and Exhibit 1). It is also undisputed that Michael Howard drafted the Contract.

Respondents paid Appellants under the Agreement until July 1, 2013. Respondents ceased payments as a result of Respondents direct knowledge that Appellants were competing with Respondents and that Appellants were playing shows, fairs and festivals on the MGR Route using the client list that ABC Amusements, Inc. purchased from Appellants for \$150,000.00. Moreover, Appellants never delivered the Berry Go Round ride to Respondents.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' PRE-TRIAL MOTION FOR SUMMARY JUDGMENT AS TO BREACH OF A COVENANT NOT TO COMPETE.

During the pendency of this case, Appellant's filed a Motion for Summary Judgment as to all causes of action filed by Respondents against Appellants and all causes of action filed by Appellants against Respondents. This motion was denied. (Order Denying Defendants' Motion for Summary Judgment). Appellant's renewed this motion prior to trial, specifically regarding Breach of Contract of the Non-Competition Agreement. (Transcript p. 58-66):

In opposition to Appellants' Motion, Respondents argued that the Agreement not only did not contain a separate non-compete agreement, but it also did not include a note or personal guaranty as contemplated by the terms of the Agreement, which Appellants sought to enforce. Respondents further argued the doctrine of part performance: "[Appellants have] engaged in the actions that would amount to part performance, therefore, that overrides the statute of frauds and evidence is admissible to impose a non-compete requirement." (Transcript, p. 62-65). As a result, Judge Stilwell took the motion under advisement.

Moreover, Appellants' Motion for Summary Judgment is not appealable.

This Court has repeatedly held that the denial of summary judgment is not directly appealable. Willis v. Bishop, 276 S.C. 156, 276 S.E.2d 310 (1981); Mitchell v. Mitchell, 276 S.C. 44, 275 S.E.2d 1 (1981); Neal v. Carolina Power and Light, 274 S.C. 552, 265 S.E.2d 681 (1980); United States Fidelity & Guaranty Co. v. City of Spartanburg, 267 S.C. 210, 227 S.E.2d 188 (1976); Medlin v. W.T. Grant, Inc., 262 S.C. 185, 203 S.E.2d 426 (1974); Greenwich Savings Bank v. Jones, 261 S.C. 515, 201 S.E.2d 244 (1973); Geiger v. Carolina Pool Equipment Distributors, Inc., 257 S.C. 112, 184 S.E.2d 446 (1971); see also Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986); Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales, 283 S.C. 53, 320 S.E.2d 501 (Ct.App.1984). A majority of the other jurisdictions have reached this same conclusion. 4 C.J.S. Appeal and Error, § 98 (1993); 4 Am.Jur.2d Appeal and Error, § 104 (1962 & Supp.1993); 15 A.L.R.3d 899 (1967 & Supp.1993). Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. Raino v. Goodyear Tire, 309 S.C. 255, 422 S.E.2d 98 (1992); Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986).

A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. Parker Oil Co. v.

Smith, 34 N.C.App. 324, 237 S.E.2d 882 (1977); cf. Geiger v. Carolina Pool Equipment Distributors, Inc., *supra*. The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict. Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (motion to reconsider); Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989) (statement made while denying summary judgment is not the law of the case); PPG Industries v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct.App.1988) (motion to reconsider); 21 C.J.S. Courts, § 149, p. 183 (1990).

In short, the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. ***Therefore, an order denying a motion for summary judgment is not appealable.*** Good v. Hartford Accident & Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (an order which has not resulted in any binding adjudication of the rights of the parties is not appealable). Ballenger v. Bowen, 313 S.C. 476, 476–78, 443 S.E.2d 379, 380 (1994) (emphasis added).

For the reasons stated herein, appellate review of this issue should be denied.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO BREACH OF A COVENANT NOT TO COMPETE AFTER RESPONDENTS' CASE IN CHIEF.

The trial Court did not err in denying Appellants' Motion for directed verdict at the conclusion of Respondents' case as there was sufficient evidence presented by Respondents in their case in chief regarding the intent and part performance of the parties to enter into a non-competition agreement as well as language within the contract identifying such an agreement. Notably, the Court acknowledged that even if there was not a formal covenant not to compete, the parties entered into a contract that they themselves agreed to be governed by and the jury was therefore entitled to interpret the contract as written and agreed upon by the parties.

Respondents entered into evidence the Agreement between the parties which evidences the parties intent to enter into a non-competition agreement. Section 3.1 of the Agreement provides "Non-Competition Agreement. Purchaser and Seller shall execute a Non-Competition

Agreement to prohibit Seller from competing with the business of Purchaser under the terms and conditions specified in that Agreement." Section 8.5 provides "[s]eller agrees to refer all inquiries about amusement rides (not equipment) to Purchaser during the 10 year non compete period." Also, the Agreement provides that "all new/Incoming rental business will be referred to ABC Amusements." (Plaintiff's Trial Exhibit 1).

Moreover, in reviewing Respondents' Exhibit 1 at Trial, Scott Wiener testified as follows:

The new inquiries or anybody that inquired about rides or rentals, all new were supposed to come through ABC. There wasn't any exceptions on [the Agreement]. I mean, if you go back, you can go back and look at the last page. It didn't say, Well, maybe they don't like the way I comb my hair or dress or operate my operation. It just says, All new incoming rental business will be referred to ABC Amusements. (Transcript p. 131).

Wiener further testified on direct as follows:

Q: What did you believe the non-compete clause to encompass?

A: Not renting any of the equipment to my competitors. That's why I was paying \$150,000 extra. If I just wanted to buy the equipment and go on my way, then I would have paid him 150 less and just gone on my way. (Transcript p. 137).

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the *light most favorable to the nonmoving party*. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The trial court *must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt*. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). *An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below*. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. Id. at 300, 536 S.E.2d at 419. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012) (emphasis added).

The appellate court will reverse the trial court's ruling on a directed verdict motion *only when there is no evidence to support the ruling or when the ruling is controlled by an error of law*. Law at 434-35, 629 S.E.2d at 648. *When*

considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc., 379 S.C. 31, 39, 664 S.E.2d 83, 86 (Ct. App. 2008).

In taking the motion under advisement, Judge Stilwell reasoned as follows:

[t]here's certainly evidence of covenant not to compete. I'm not saying that it's good or bad, I'm just saying it's there. You know, insofar as ambiguous contracts go, this is probably one of the most ambiguous that I've seen. I mean, I suppose it could have been more ambiguous if it were on a cocktail napkin, but it's pretty much -- it's probably more ambiguous because it's got more clauses in it that give you more pause to wonder what the parties intended. So, it's there. (Transcript p. 369-370).

The Court correctly identified that fact that evidence of a non-compete had been presented by Respondents and therefore the Court correctly denied Appellants' Motion for a Directed Verdict and instead took the same under advisement to allow for the admissibility of additional testimony and evidence.

For the reasons stated herein, Respondents' aver that the trial Court did not err in denying Appellants' Motion for a Directed Verdict.

III. THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT THEY COULD NOT CONSIDER AWARDED DAMAGES BASED UPON A BREACH OF A COVENANT NOT TO COMPETE AFTER APPELLANTS' MOTION FOR DIRECTED VERDICT WAS GRANTED AFTER ALL TESTIMONY AND EVIDENCE WAS COMPLETED.

Prior to closing arguments, Appellants renewed their Motion for a Directed Verdict as to the Non-Competition Agreement. At that time the Court held as follows:

I'm going to find that there is no separate and distinct covenant not to compete. And no damages can flow from a breach of a separate and distinct covenant not to compete.... However, having made that ruling, I am not limiting the Plaintiff's ability to argue to the jury that the parties intent was that the Defendant not compete with the Plaintiff's business. And that damages -- they can argue that damages emanated from not referring business and from being in direct competition with the same. (Transcript p. 511).

After the jury received their instructions from the Court, Appellants requested that the jury be instructed that they cannot consider a breach of the Covenant Not to Compete. (Transcript p. 556). However, the Court reasoned with Appellants and held as follows:

The effect of finding that it was void and unenforceable is that they cannot claim perspective damages for 10 years or request injunctive relief precluding him from working. However, they can consider, if they determine that the intention of the parties was that he not compete and/or that he refer all new business to them, that they can consider that as an element of damages. (Transcript p. 556-557).

South Carolina Courts are clear that an alleged error in a jury instruction will not be reversed absent proof of error and prejudice.

In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the circuit court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). Hennes v. Shaw, 397 S.C. 391, 402, 725 S.E.2d 501, 507-08 (Ct. App. 2012).

“An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence.” Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party. Id. at 405, 663 S.E.2d at 33; see also Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) (“When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.”). “A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.” Cole, 378 S.C. at 404, 663 S.E.2d at 33. Berberich v. Jack, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011).

The burden always rests upon the appellant to show an abuse of discretion [Baggett v. Strickland, 158 S.C. 60, 155 S.E. 237 (1930)]; and in determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances. Rochester v. Holiday Magic, Inc., supra; Brown v. Weathers, 251 S.C. 67, 160 S.E.2d 133 (1968). Em-Co Metal Prod., Inc. v. Great Atl. & Pac. Tea Co., 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App. 1984).

An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

To warrant reversal, *the party seeking the requested jury charge must demonstrate error and prejudice.* Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (“*An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction.*”). “An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict.” Wells, 341 S.C. at 237, 533 S.E.2d at 343. Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 351, 683 S.E.2d 818, 822 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012) (emphasis added).

In Appellants' Initial Brief, Appellants presented no evidence of error or prejudice to their case as a result of the jury instruction. Rather they mentioned possible prejudice as a result of the Court's denial of Appellant's Motion for a Directed Verdict. Notwithstanding the foregoing, Respondents aver that the jury instruction was not in error and was specifically tailored to the unique circumstances of the case at hand.

Moreover, the Court specifically prohibited Respondents from seeking prospective damages or injunctive relief pursuant to the covenant not to compete. Respondents were limited to seeking damages as a result of Appellants' competition with Respondents during the prescribed time period and/or Appellants' failure to refer all new/incoming business to Respondents as contemplated in the Agreement.

For the reasons stated herein, Respondents pray that that Court affirm the trial Court's use of jury instructions as the Appellants have failed to present any error or prejudice to their case as a result of the instructions given by the trial Court (emphasis added).

IV. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(B), SCRPC, AS TO APPELLANT HOWARD'S CLAIM FOR BREACH OF CONTRACT/DEBT COLLECTION.

Appellants argued in their Post-Trial Motion that the Court erred in failing to grant their Motion for Judgment Notwithstanding the Verdict regarding Howard's claim for Breach of Contract/Debt Collection pursuant to SCRPC 50(b). (Defendant's Post-Trial Motions). In their Motion, Appellants argue that Respondents admitted at trial that they were obligated to make payments to Appellants under the Agreement. Appellants further state that Respondents admit that they have failed to make all required payments.

However, while doing so, Respondents asserted at trial that it was the Appellants who first breached the Agreement due to Appellants' failure to refer all new/Incoming business to Respondents beginning in 2012. (Transcript p. 102-104). In support of the same, Respondents presented the followings at trial: a summary of events MGR played during the Agreement (Plaintiff's Trial Exhibit 3) (Transcript p. 105-111), a summary of cash events MGR played during the Agreement (Plaintiff's Trial Exhibit 4) (Transcript p. 113-117), Profit and Loss Statements identifying amusement rental income (Plaintiff's Trial Exhibit 6) (Transcript p. 142-147), and Bank Statements (Plaintiff's Trial Exhibits 7-12) (Transcript p. 148-156).

Moreover, Respondents stipulated that Respondents had not made any payments to Appellants since July 1, 2013, well after Appellants alleged 2012 breach. (Transcript p. 166).

A motion for JNOV, under Rule 50(b), SCRPC, is a renewal of the directed verdict motion. Glover v. N.C. Mut. Life Ins. Co., 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct.App.1988). When ruling on a JNOV motion, ***the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party.*** Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct.App.2000). ***"If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury."*** Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 325, 734 S.E.2d 177, 179-80 (Ct. App. 2012) (emphasis added).

Respondents presented ample evidence demonstrating that Appellants were the ones who first breached the Agreement with Respondents casting doubt upon Appellants' hard line position that there was a single breach by the Respondents. For these reasons, Respondents pray that the Court affirm the trial Court's denial of Appellants' Motion for Judgment Notwithstanding the Verdict as any inference, if made by the trial Court, should be made in favor of the nonmoving party, herein the Respondents.

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE PURSUANT TO RULE 59, SCRCP, AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS.

Appellants argued in their Post-Trial Motion that the Court erred in failing to grant their Motion for a new trial absolute pursuant to SCRCP 59 based upon the amount of the verdict awarded to the Respondents. In their Motion, Appellants argue that "[t]he jury's award of \$690,589.00 was 'shocking' and not supported by the evidence presented by the Plaintiffs." They further allege that Respondents best outcome would have been an award of \$500,000.00. (Defendant's Post-Trial Motions).

In Respondents' closing argument, Respondents concisely pray for \$377,000.00 in damages in addition to a declaration that Respondents own the amusement ride equipment/machines. (Transcript p. 526). Respondents request for damages in the amount of \$377,000.00 presumed that Respondents would also be entitled to ownership of the amusement rides. Ultimately, the jury found that Respondents were entitled to \$690,589.00 in damages, but that Appellants were the owners of the equipment. After trial, Michael Howard sold the amusement ride equipment in order to partially satisfy Respondents' judgment and obtained \$400,000.00 through the sale. When combining both the damages request and presumed ownership of the amusement rides, Respondent's plead for damages totaling at least \$777,000.00.

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). ***The jury's determination of damages, however, is entitled to substantial deference.*** Id. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. See Cock--NBull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996); McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995); Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993); O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993); Rush, supra. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute. Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993); Allstate, supra; O'Neal, supra; Proctor v. Dep't of Health & Env'tl. Control, 368 S.C. 279, 321, 628 S.E.2d 496, 519 (Ct. App. 2006).

A trial judge's order granting or denying a new trial upon the facts will not be disturbed ***unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.*** South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976). When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order. South Carolina Department of Highways & Public Transportation v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980). Folkens v. Hunt, 300 S.C. at 254-55, 387 S.E.2d at 267.

The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App.1996). An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Id. In deciding whether to assess error when a new trial motion is denied, this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. Vinson, supra; Welch v. Epstein, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000).

For the reasons stated herein, the trial Court did not err in denying Appellants' Post Trial motion for a new trial absolute as the jury verdict was supported by evidence presented by Respondents at trial as well as Respondents' damages request in closing arguments.

VI. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL *NISI REMITTITUR*, PURSUANT TO RULE 59, SCRPC, AS TO THE AMOUNT OF THE VERDICT AWARDED TO RESPONDENTS.

During Appellants' Post Trial Motion for *nisi remittitur*, Appellants allege that the verdict of \$690,589 is "clearly excessive and as a result of some caprice on the part of the jury." Appellants further argue by stating, "[y]our Honor, there is insufficient evidence in the record to support that verdict. Even their own argument in closing arguments didn't even submit that much money." (Transcript p. 565-566). For the reasons stated in Respondents' Argument Section V, Respondents aver that the jury award was not excessive or as a result of passion, caprice or prejudice. Moreover, the jury was provided copies of all documents Respondents relied upon in calculating Respondents' damages, referenced above. The jury was in a position to independently assess the calculations argued in Respondents' case in chief and Closing Arguments.

The trial court may grant a new trial *nisi additur* or *remittitur* when it finds the verdict is merely inadequate or excessive. *Id.* "[T]he trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice." *Id.* (citing Allstate Ins. Co., 314 S.C. at 530, 431 S.E.2d at 558). A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with conditions set by the court. Elliott v. Black River Elec. Coop., 233 S.C. 233, 104 S.E.2d 357, 372 (1958). "A motion for a new trial *nisi* because of excessiveness of the verdict contemplates not the striking down of the verdict in toto, but remission of part of it and the granting of a new trial in default thereof." *Id.* The trial court essentially gives the party against whom damages are assessed the option, by way of *additur* or *remittitur*, of avoiding a new trial.

The granting of a motion for new trial nisi additur or remittitur rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct.App.2003). Compelling reasons must be given to justify invading the jury's province in this manner. Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct.App.2005) (citing Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)). Howard v. Roberson, 376 S.C. 143, 154-55, 654 S.E.2d 877, 883 (Ct. App. 2007) (emphasis added).

"A motion for a new trial *nisi remittitur* asks the trial court to reduce the verdict because the verdict is merely excessive." James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). "***The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.***" *Id.* "If the amount of the verdict is grossly

inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial absolute.” *Id.* See also *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (“When a verdict is ‘grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.’”) (quoting *Small v. Springs Indus.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)). *Curtis v. Blake*, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011).

“The consideration of a motion for a new trial *nisi* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct.App.1997). “*The trial judge, who heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses a better informed view of the damages than [an appellate] court.*” *Id.* “*Accordingly, great deference will be given to the trial judge.*” *Id.* *V.E. Amick & Assocs., LLC v. Palmetto Envntl. Grp., Inc.*, 394 S.C. 538, 549, 716 S.E.2d 295, 300–01 (Ct. App. 2011) (emphasis added).

For the reasons stated herein, Respondents aver that the trial Court did not err in denying Appellants' motion for a new trial *nisi remittitur*.

VII. THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE, PURSUANT TO RULE 59, SCRPC, AS TO THE VERDICT AWARDED TO APPELLANTS.

Respondents have outlined the standard for granting a Motion for a New Trial Absolute pursuant to SCRPC 59 in Respondents Argument, Section V. With that said, Respondents aver that the damages award to Appellants in the amount of \$3,360.00 was not insufficient as it appears that the jury offset some of the debt owed by Respondents to Appellants in Respondents damages award. Respondents argued damages in excess of \$800,000.00 in their case in chief. (Transcript p. 156). The jury awarded Respondents \$690,589.00, without ownership of the amusement ride equipment. Appellants claimed that Respondents owed Appellants \$213,314.34 in unpaid payments under the Agreement. (Transcript p. 537).

Appellants argue as follows in their Closing Argument: "It's uncontested that he owes the money for the past due invoices. He owes the money for the 15 missed payments. And Mike

Howard is entitled to that money." (Transcript p. 535). The past due invoices totaled \$3,359.92 according to Appellants in their Closing Argument. Additionally, Appellants plead for return of the unpaid payments, reimbursement for the invoices and a declaration that Howard owns the amusement rides. (Transcript p. 537). The jury, more or less, appears to take into account all three requests in their Verdict. (Verdict Form).

A trial judge's order granting or denying a new trial upon the facts will not be disturbed *unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.* South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976).

For the reasons stated herein, Respondents aver that the trial Court did not err in denying Appellants' motion for a new trial absolute as to Appellants' verdict.

VIII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL *NISI ADDITUR*, PURSUANT TO RULE 59, SCRPC, AS TO THE VERDICT AWARDED TO APPELLANTS.

Respondents incorporate herein their argument outlined in Section 7 of its Argument regarding the award of Appellants' damages.

A trial court may grant a new trial *nisi additur* whenever it finds the amount of the verdict to be merely inadequate. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct.App.2003). "*While the granting of such a motion rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages.*" *Id.* To this end, the trial court must offer compelling reasons for invading the jury's province by granting a motion for additur. *Id.* *An appellate court will only reverse if the trial court abused its discretion in deciding a motion for new trial nisi additur to the extent that an error of law results.* *Id.* The denial of a motion for a new trial *nisi additur* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). "The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct.App.2000). A trial court does not abuse its discretion in denying a motion for new trial *nisi additur* where evidence in the record supports the jury's verdict. See Steele v. Dillard, 327 S.C.

340, 345, 486 S.E.2d 278, 281 (Ct.App.1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict). Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009).

Respondents aver that the Appellants have not set forth evidence in their Brief proving an abuse of discretion on the part of the trial Court regarding the denial of this motion. For the reasons stated herein, Respondents aver that the trial Court did not err in denying Appellants' motion for a new trial *nisi additur*.

IX. THE TRIAL COURT DID NOT ERR IN ALLOWING THE ADMISSION RESPONDENTS' EXHIBITS THREE (3) AND FOUR (4) AT TRIAL.

Lastly, Appellants argue that the trial Court erred in allowing the admission of Respondents' Exhibits 3 and 4 into evidence on the basis that Scott Wiener could not authenticate the documents because the exhibits were created with information contained in Appellants' bank statements.

Exhibits 3 and 4 are summaries of the bank statements Respondents received from Appellants through discovery which contain entries for amusement ride events Appellants played during the Agreement term. The bank statements were admitted into evidence as Exhibits 7-12.

In clarifying the correlation between Exhibit 3 and the bank statements, Respondents' counsel represented to the Court that "each one of the line items on that summary directly correlates to the bank records that were produced by the Defendant." (Transcript p. 40-41).

Respondents were ultimately successful in authenticating Exhibit 3 and so the Exhibit was therefore admitted into evidence. Thereafter, Respondent, Scott Wiener, answered questions about the same on direct examination. (Transcript p. 105-111).

Regarding Exhibit 4, Respondents assert to the court that the summary is created from Scott Wiener's recollection. Wiener further testified about the Exhibit as follows:

Well, all of these events actually ABC played at one time, or maybe multiple times, but we didn't play them on these particular dates. Mike played these. So, we knew they were cash events. Like for instance, say Ed Brown, that was a rodeo that we played up in Blacksburg and that -- we played it three years and it generated around 10,000.00 a year. (Transcript p. 113-117).

A summary of voluminous records prepared for use at trial is admissible if the records themselves are properly in evidence or made available to the adverse party. Zemp Const. Co. v. Harmon Bros. Const. Co., 225 S.C. 361, 82 S.E.2d 531 (1954).

Despite Appellants' objections, the Court held as follows: "It's his estimation of what he thinks it would have been. Whether they're accurate or not is going to be a matter of credibility and will be subject to cross-examination and will be subject to testimony from the Defendant as well. Whether the jury finds it credible or not is entirely up to them." (Transcript p. 115).

"The admission of evidence is within the [circuit] court's discretion." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). ***"The [circuit] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law."*** Id. "To warrant reversal based on the admission or exclusion of evidence, ***the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof.***" Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct.App.1988). Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014) (emphasis added).

The burden always rests upon the appellant to show an abuse of discretion [Baggett v. Strickland, 158 S.C. 60, 155 S.E. 237 (1930)]; and in determining whether an abuse of discretion occurred, the ***case must be considered in the light of its underlying circumstances.*** Rochester v. Holiday Magic, Inc., *supra*; Brown v. Weathers, 251 S.C. 67, 160 S.E.2d 133 (1968). Em-Co Metal Prod., Inc. v. Great Atl. & Pac. Tea Co., 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App. 1984).

An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Respondents created Exhibit 3 based upon Appellants' bank statements which were produced through discovery. Respondents created Exhibit 4 based upon Respondents recollection of events. The Court left the credibility of the documents up to the jury. Moreover, Appellants, in their Initial Brief, fail to assert any resulting prejudice due to the admission of the evidence, they only complain that such prejudice exists.

Based upon the foregoing, Respondents aver that the trial Court did not err in admitting Respondents' Exhibits 3 and 4.

CONCLUSION

For the reasons set forth above, Respondents pray that this honorable Court affirm the rulings of the Trial Court.

Respectfully submitted,



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March 1, 2017
Greer, South Carolina

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

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MAR 02 2017

SC Court of Appeals

Appellate Case No.: 2015-002648

ABC Amusements, Inc. and Scott Wiener,

Respondents,

v.

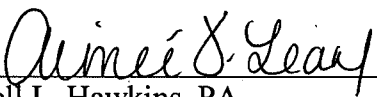
Michael O. Howard, High-Lite Rides, Inc.,
and MGR Rides, LLC

Appellants,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Initial Brief of Respondents and Designation of Matter along with this Certificate of Service were served upon counsel on **March 1, 2017** by First Class Mail as follows:

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: ABC Amusements, Inc. and Scott Wiener v. Michael O. Howard, et al
Appellate Case No.: 2015-002648

Dear Mrs. Kitchings:

Please find enclosed the original **Initial Brief of Respondents, Designation of Matter and Certificate of Service** for the above referenced case. By way of this correspondence I am serving opposing counsel, Daniel R. Hughes, Esq., with a copy of these documents.

With kind regards I remain,

Very truly yours,



Aimee V. Leary, Esq.

cc: Daniel R. Hughes, Esq.
Duggan & Hughes, LLC
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Enclosures

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MAR 02 2017

SC Court of Appeals

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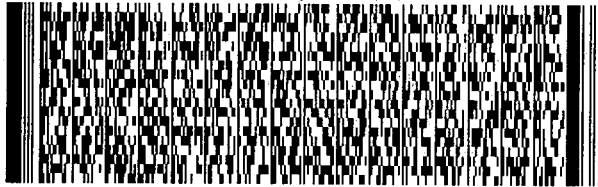
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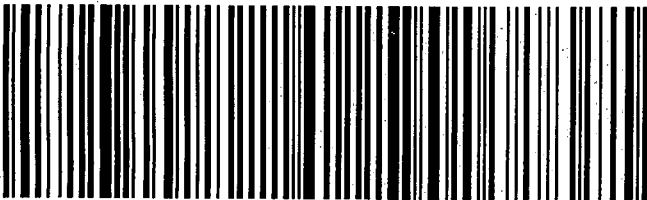
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