

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002011

RECEIVED

May 29 2020

SC Court of Appeals

Jane Doe

Appellant,

v.

Oconee Memorial Hospital; Greenville Health System; Upstate Affiliate Organization; Kevin Docyk, M.D.; Mary Beth Hendricks,

Respondents.

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF ISSUE ON APPEAL

- I. The Circuit Court Erred In Granting A Dismissal Pursuant to Rule 12(b)(6) On The Basis That Doe's Tort Claims Were Barred By The Statute Of Limitations.

STATEMENT OF THE CASE

This is an appeal of the circuit court's October 31, 2019 Order dismissing all tort claims asserted by Plaintiff. This action is related to another action that was previously appealed to this Court.¹ *See Doe v. Oconee Memorial Hospital, et al.*, Appellate Case No. 2018-001480. Appellant's claims all arise out of a visit Appellant made to Oconee Memorial Hospital after she was sexually assaulted in Atlanta, Georgia and subsequently sought testing and assistance from Respondents the following morning.

In the early morning hours of December 5, 2015, Doe was drugged and sexually assaulted in Georgia. *See Plaintiff's Complaint* at 3. Doe then drove herself to her hometown hospital, Oconee Memorial Hospital, and reported that she had been sexually assaulted. *Id.* She reported that she had been assaulted and believed she also had been drugged to various hospital employees, including the Respondents in this case. *Id.* After requesting that the hospital perform a sexual assault forensic exam and transfer the specimens collected to law enforcement, Doe was attended to by the individual Respondents, Dr. Docyk and Nurse Hendricks, whom Doe understood to be a sexual assault nurse examiner ("SANE"). *Id.* A sexual assault forensic examination was performed and specimens were collected from Doe's body. *Id.* Blood was drawn and included as

¹ This appeal is also related to Appellate Case No. 2019-002009, which is an appeal from the same circuit court order which dismissed both the tort claims asserted by the Appellant in this action as well as a separate medical malpractice action brought by Appellant in Civil Action No. 2019CP3700271. Appellant filed a separate appeal of the dismissal of her separate medical malpractice claims; however, all pending actions relate directly to the same events that occurred on December 5, 2015.

one of the specimens collected as part of the sexual assault forensic examination kit. *Id.* Medical tests were performed and Doe was subsequently prescribed a number of medications by Dr. Docyk. *Id.* at 4. Doe then requested that the Respondents transfer the specimens collected from her body to the appropriate law enforcement agency. *Id.* Accordingly, SANE Hendricks telephoned the Dekalb County Sheriff's Office in Georgia to report the assault and, upon information and belief, arrange for the transfer of the specimens currently in the possession and control of the Respondents. *Id.*

As alleged in Doe's Complaint, the Respondents did not preserve and securely maintain the specimens collected from Doe's body until such time as those specimens could be transferred directly to law enforcement for examination. *Id.* Instead, the sexual assault forensic examination kit ("rape kit") was given directly to Doe. *Id.* Doe, who had been drugged and sexually assaulted and undergone an invasive sexual assault forensic examination that same day, was instructed that she was to take the kit to law enforcement in Georgia. *Id.* Doe then left the hospital, went to her home to shower and obtain clean clothing, and then drove the kit back to DeKalb County, Georgia. *Id.* In February 2016, Plaintiff was contacted by the investigating officer in Dekalb County, Georgia, who informed her that the rape kit did not include the blood sample Doe provided to the Respondents. *Id.* at 5. As a result, there was a lack of blood evidence to corroborate or prove Doe's belief that she had been drugged by her assailant. *Id.* Moreover, the law enforcement officer indicated that the absence of this specimen, combined with the break in the chain of custody when the rape kit was given to Doe by the Respondents, resulted in the decision to close the case. *Id.* at 5-6.

Doe instituted her first action against the Respondents by filing a complaint on December 5, 2017, alleging that Respondents were negligent in failing to order necessary tests, in failing to

properly collect and protect medical evidence of a sexual assault and in failing to ensure that the chain of custody for said evidence was maintained. *See* July 9, 2018 Order, p. 1-2. Appellant also alleged a claim against Respondents for intentional infliction of emotional distress. *Id.* Appellant's claims all arose out of a visit Appellant made to Oconee Memorial Hospital after she was sexually assaulted in Atlanta, Georgia and sought testing and assistance from Respondents the following morning. *Id.*

Respondents filed a Motion to Dismiss Appellant's Complaint on January 10, 2018, arguing that Appellant had failed to plead facts sufficient to make out both the duty and damage elements of her various claims of negligence. *Id.* Respondents also argued that Appellant's claim for intentional infliction of emotional distress could not be recognized under the facts of this case. Appellant filed a Motion to Amend her Complaint on June 4, 2018 and a hearing on Respondents' Motion to Dismiss was held later that same day. *Id.* Following that hearing, on June 8, 2018, both Appellant and Respondents filed supplemental memoranda regarding Respondents' Motion to Dismiss

The court issued an order on July 9, 2018 granting Respondents' Motion to Dismiss Doe's Complaint, including all claims set forth therein. *See* July 9, 2018 Order, pp 1-9. The Court did not rule on Doe's motion to amend her complaint. *Id.* The court's order specifically provided, however, that its ruling was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action". *Id.* Doe timely appealed that Order and that appeal is still pending. Notice of Appeal, pp. 1-2.

Appellant Doe then instituted the present action by filing a second complaint on December 5, 2018, again asserting multiple causes of action against the Respondents relating to the handling of a sexual assault forensic examination kit at Oconee Memorial Hospital ("OMH") on December

5, 2015. Doe alleged that OMH breached its contract by failing to order necessary tests, failing to properly collect and protect medical evidence of a sexual assault and in failing to ensure that the chain of custody for said evidence was maintained. Doe further alleged that she transferred her personal property to Respondents, which included specimens of blood, collected as part of a sexual assault examination kit by the Respondents. Doe averred that the parties entered into a bailment agreement that provided for the transfer of Doe's personal property by the Respondents to a third party, specifically, law enforcement. Respondents failed to transfer the exact property that Respondents had collected from Doe and failed to transfer the property directly to third-party law enforcement. Appellant also alleged claims against Respondent for implied breach of contract and implied bailment.

Respondents filed a Motion to Dismiss Appellant's Complaint on December 21, 2018, arguing that Appellant's tort claims were barred by the two-year statute of limitations pursuant to the South Carolina Tort Claims Act. *See* Defendant's Motion to Dismiss, p. 3-4. Respondents also argued that Appellant had failed to state fact sufficient to support her claims for breach of contract and implied breach of contract. *Id.* Respondent's motion was heard by the court on March 9, 2019. Following that hearing, Respondents filed a supplemental memorandum regarding Respondents' Motion to Dismiss on March 25, 2019. *See* Defendants' Supplemental Memorandum in Support of Motion to Dismiss, pp. 1-5.

The circuit court entered an Order on April 11, 2019, denying Respondents' Motion to Dismiss. *See* April 11, 2019 Order, p. 1. Respondents then filed a Motion for Reconsideration of that order on April 17, 2019.² *See* Plaintiff's Motion for Reconsideration, pp. 1-4. Appellant filed a Memorandum in Opposition to Respondents' Motion for Reconsideration on April 22, 2019. *See*

² Respondents' motion also sought a stay of the present action pending resolution of the prior appeal. *See* Motion for Reconsideration, pp. 3-4

Plaintiff's Memorandum in Opposition, pp 1-3. After review of the pleadings, the circuit court entered an order on May 8, 2019 denying all issues in Respondents' motion to reconsider except that of the statute of limitations that the court indicated was to be treated as a motion for summary judgment and for which the court granted a *de novo* hearing. See May 8, 2019 Order, p. 1. On May 15, 2019, Respondents filed their Answer to Appellant's Complaint. See Answer, pp, 1-9. Therein, Respondents admitted that the Respondents had given Doe her own rape kit and instructed her to deliver it to Georgia by herself. *Id.*

Appellant served discovery on Respondents on January 17, 2019. Respondents failed to answer the discovery and on August 16, 2019, Appellant was forced to file a Motion to Compel. See Plaintiff's Motion to Compel, pp. 1-21. Respondents filed a Supplemental Memorandum in Support regarding Respondents' Motion to Dismiss/Motion for Summary Judgment on September 16, 2019. See Defendants' Supplemental Memorandum in Support, pp. 1-8. Appellant also filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment on September 19, 2019. A *de novo* hearing was held on September 23, 2019. See Transcript, pp. 1-35. Following that hearing, Appellant and Respondents filed supplemental Memorandum regarding Respondents' Motion to Dismiss on September 27, 2019 and October 1, 2019. See Plaintiff's Supplemental Memorandum in Opposition, pp. 1-9; Defendants' Reply Memorandum in Support, pp. 1-6.

The circuit court entered a form order on October 17, 2019, granting Respondents' motion to dismiss and stating that a formal order would follow. See October 17, 2019 Order, p. 1. Appellant then filed a Motion for Reconsideration of that order on October 25, 2019. See Plaintiff's Motion for Reconsideration, pp. 1-2. On October 31, 2019, a formal order was entered granting Respondents' motion to dismiss as to all causes of action except Appellant's breach of

contract and breach of implied contract causes of action. *See* October 31, 2019 Order, pp. 1-7. The circuit court summarily denied Appellant's Motion for Reconsideration on November 4, 2019. *See* November 4, 2019 Order, p. 1. This appeal followed with Appellant filing a Notice of Appeal on December 11, 2019. *See* Notice of Appeal, pp 1-10.

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC.³ *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.*; *see also Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Doe v. Marion*, at 395, 645 S.E. 2d at 248; *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014).

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011).

³ The circuit court's order from which this appeal derives states that the court was granting the Respondents "motions to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure." *See* October 31, 2019 Order at 1. The court had previously indicated to the parties that the Respondents' motion would be considered as a motion for summary judgment after the completion of discovery. *See* May 8, 2019 Order, p. 1. Nonetheless, because the court indicated that it was dismissing Doe's tort claims pursuant to Rule 12(b)(6), the standard of review on appeal is the standard applied for the appellate review of the dismissal of an action pursuant to Rule 12(b)(6).

Questions of law are reviewed de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

I. The Circuit Court Erred In Granting A Dismissal Pursuant to Rule 12(b)(6) On The Basis That Doe's Tort Claims Were Barred By The Statute Of Limitations.

The tort claims that were dismissed by the circuit court as barred by the statute of limitations "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings". Under the principles espoused by Rule 15(c), SCRCP, Doe's tort claims relate back to the original and timely December 5, 2017 pleading. Equity requires that the circuit court salvage Doe's tort causes of action where the court previously erred in failing to allow Doe to add these same claims to the original cause of action. As such, the circuit court erred when it granted Respondents' motion to dismiss on the grounds that Doe's claims were barred by the statute of limitations.

A. The Circuit Court Erred In Dismissing Appellant's Initial Complaint When Appellant's Motion to Amend Her Complaint Was Still Pending.

Appellant filed a motion to amend her December 5, 2017 complaint on June 4, 2018, prior to the hearing on Respondents' motion to dismiss later that same day. In her motion, Appellant sought to assert additional causes of action for bailment and contract, the very same claims articulated in the case at bar. This motion was still pending on July 9, 2018 when the circuit court entered its order granting Respondents' motion to dismiss. *See* July 9, 2018 Order. As Appellant articulated in her previously filed appeal of the circuit court's July 9, 2018, the circuit court should have considered and ruled on Appellant's motion to amend before dismissing this entire action. Appellant's motion to amend sought to address some of the concerns raised by Respondents regarding the sufficiency of the allegations set forth in Appellant's complaint. Unfortunately, no

such consideration was ever undertaken and no hearing was conducted on Appellant's motion to amend prior to entry of the circuit court's July 9, 2018 Order dismissing the entire action. Rather, in a footnote, the circuit court simply acknowledged the motion to amend had been filed, but stated:

In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider the merits of Plaintiff's motion to amend even it were inclined to do so, because no proposed amended complaint was ever submitted to the Court.

See July 9, 2018 Order.

The circuit court never ruled on Doe's motion to amend. While the South Carolina Supreme Court has consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion, a court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). Under Rule 15(a), the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it. Instead, the circuit court denied the motion to amend based solely on the fact that it was filed shortly before the hearing on Respondents' motion to dismiss. Again, the court's failure to grant Doe's motion to amend is currently on appeal along with the court's grant of Respondents' motion to dismiss.

While the circuit court did not grant Doe's motion to amend, it did dismiss Plaintiff's original complaint "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." *See* July 9, 2018 Order. Thus, the court indicated that Doe could assert in a separate action the additional claims for bailment and breach

of contract that she sought leave to add to her initial complaint by way of a motion to amend.

B. Plaintiff's Claims Are Not Barred By The Statute of Limitations.

The circuit court improperly dismissed Doe's tort claims on the basis that these claims were barred by the statute of limitations. See September 31, 2019 Order, at 4. Specifically, the Court ruled that a two-year statute of limitations applied to Doe's claims because the Respondents constituted a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Defendants Memorandum in Support of Motion for Summary Judgment, at 2 (citing *Murphy v. Richland Mem. Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995)). If Defendant is correct, a two-year statute of limitations applies. Doe's claims relate to conduct that occurred on December 5, 2015. On December 5, 2017, Doe filed her original complaint asserting causes of action for negligence, gross negligence, negligent supervision, and intentional infliction of emotional distress. Doe then filed a motion to amend her complaint on June 4, 2018. The proposed amendments included "two additional causes of action for breach of contract and bailment".

Rule 15(a) provides that when a party asks to amend her pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). "Rule 15(a) is substantially the same as the Federal Rule," Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's "freely given" provision as a

“mandate” that “is to be heeded,” *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). The *Foman* Court continued:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.”

Id. (citing Fed. R. Civ. P. 15(a)); accord *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

The tort claims pending before the circuit court, which were the subject of Plaintiff’s motion to amend, should relate back to the original action. South Carolina Rule of Civil Procedure 15(c) provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 15(c), SCRCPP.

The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations. See *Hiers by Hiers v. Mullens*, 310 S.C. 63, 425 S.E.2d 57 (Ct. App. 1992). The test to be used in determining whether or not an amendment should be allowed to relate back under Rule 15(c) to the date of the original pleading to avoid the statute of limitations, is found in the language of the Rule; specifically, whether the claim or defense asserted in the new pleading arose out of the conduct, transaction or occurrence set forth in the original pleading.

Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading. Wright & Miller, *Federal Practice and Procedure* § 1496 (1990); *see also Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980), cert. denied, 448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1141 (1980); *Slaughter v. Southern Talc Co.*, 949 F.2d 167 (5th Cir. 1991); *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982).

Rule 15(c) allows for the relation back of Doe's new complaint in order to assert the tort claims that she sought by way of an amendment to her previous action. While not technically an amendment of the original complaint, Rules of Civil Procedure 15(c) requires that this pleading now be permitted. Allowing Doe to bring these tort claims does not defeat the legitimate use of the statute of limitations. It does, however, prevent the Respondents from defeating Appellant's tort claims on a technicality in the pleading. Specifically, it prevents the Respondents to defeat Appellant's ability to assert her tort claims on the basis that these claims are barred by the statute of limitations because they were asserted in a separate action when the only reason these claims were not added to the original timely action was the circuit court's failure to grant Doe's motion to amend to add these very tort claims. In addition, when this technicality is considered in conjunction with the circuit court's statement that the dismissal of the original action was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action", it would work an injustice to disallow Doe's tort claims as now barred by the statute of limitations when these claims would have not been barred pursuant to Rule 15(c) had the circuit court appropriately ruled on Doe's motion to amend. As such, the relation back of

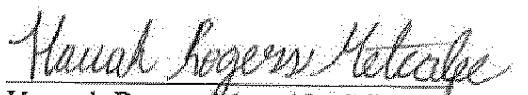
these tort claims should be allowed.

The Respondents' argument seems to be that Doe cannot now bring these new actions as provided in the court's order because the statute of limitations has passed. This argument should be rejected. As noted, the claims asserted in the current pleadings "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings", as such, the new action "relates back to the date of the original pleading." Doe's new claims arose out of the conduct previously set forth in the original 2017 complaint. The factual circumstances of the claims currently before the court have already been set out in the original 2017 complaint. No new information is required to assert those claims. The Respondents were aware of the facts and the asserted claims. Therefore, under the principles espoused by Rule 15(c), Doe's tort claims relate back to the date of the original timely December 5, 2017 pleading that was filed within the statute of limitations. *See also Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations). As such, the circuit court erred when it granted Respondents' motion to dismiss on the grounds that Doe's claims were barred by the statute of limitations.

CONCLUSION

For all of the reasons set forth above, Appellant respectfully requests that this Court grant Appellant's appeal in this matter and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents on Appellant's claims.

Respectfully submitted,


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THE STATE OF SOUTH CAROLINA
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APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002011

Jane Doe

Appellant,

RECEIVED

May 29 2020

SC Court of Appeals

v.

Oconee Memorial Hospital; Greenville Health System; Upstate Affiliate Organization; Kevin Docyk, M.D.; Mary Beth Hendricks,

Respondents.

PROOF OF SERVICE

I certify that I have mailed for filing the Appellant’s Brief, by placing a copy of it into the U.S. Mail, postage prepaid, to the South Carolina Court of Appeals on May 28, 2020. I further certify that I have mailed the Appellant’s Brief to the Respondents’ attorney by depositing a copy of it in the U.S. Mail, postage prepaid, address to Kenneth N. Shaw, Haynsworth Sinkler Boyd, P.A. at Post Office Box 2048, Greenville, SC 29602.

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May 28, 2020

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Dear Ms. Kitchings:

Enclosed please find the Appellant's Initial Brief and Proof of Service for filing in the above-referenced case.

Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,


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Note:

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