THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

9th Judicial Circuit Court Judge

S.C. Court of Appeals Case No. 2020-000968
Circuit Court Case No. 2002-CP-10-1448
and after change of venue:
Circuit Court Case No. 2007-CP-10-1444

Cynthia Holmes, M.D.,

Respondent/Appellant,

v.

Haynsworth Sinkler Boyd, P.A.,
successor to Sinkler & Boyd, P.A.,
Manton Grier, and James Y. Becker,
Defendants,

Of which Haynsworth Sinkler Boyd, P.A.,
successor to Sinkler & Boyd, P.A., is

Appellant/Respondent.

INITIAL RESPONSE BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

In 2002, the respondent-appellant, Dr. Holmes, filed suit against the appellant-respondent, a law firm which has changed names over time, but is commonly known as Sinkler & Boyd. (Summons and Complaint April 2002; Amended Complaint 4-6-07) The caption in this case also includes two individual attorneys from Sinkler & Boyd, Mr. Becker and Mr. Grier. Dr. Holmes hired the law firm and the attorneys to represent her regarding claims against a hospital, East Cooper, which was attempting to deny Dr. Holmes medical privileges to perform surgery in the hospital. Dr. Holmes, in her lawsuit against the appellant-respondents, alleged that they had committed legal malpractice when they lost a temporary injunction preserving the doctor's privileges, held off on responding to the motion by the hospital in federal court while demanding more money from Dr. Holmes until the deadline had passed to respond, losing the federal lawsuit claims, and then drafting a State Court complaint and advising the doctor how to file it, abandoning Dr. Holmes when the State law claims were declined by the Federal Court and needed to be filed in the Charleston County Circuit Court. (Summons and Complaint April 2002; Amended Complaint 4-6-07).

The appellant-respondents successfully convinced the Court to transfer jurisdiction in the legal malpractice case against them to Richland County in July of 2002. (Order for change of venue to Richland 7-22-02) Eventually, on April 6, 2007, the Richland County Circuit Court changed venue again and returned the case to the Charleston County Circuit Court. (Order changing Venue to Charleston 4-6-07) The Defendants moved for Summary Judgment, which was denied. (Form 4 Order denying Summary Judgment; Order granting post-trial motions, 11-18-09 page 3) The Court granted a directed verdict, ending the jury trial before a verdict could be rendered. (Order granting Directed Verdict 7-14-09) After the directed verdict, the appellant-respondents moved for sanctions against the respondent-appellant and invoked the revised S.C. Code 15-36-10, the South Carolina Frivolous

Proceedings Sanctions Act (FPSA). Plaintiff responded, arguing that her claims could not be considered frivolous when the Court had found that the record presented a genuine issue of fact for trial by denying summary judgment under the applicable FPSA. (Plaintiff's return to motion for sanctions 9-21-09) The same judge who had denied summary judgment found the action to be frivolous and, applying the incorrect version of the FPSA statute, granted $200,000.00 in sanctions including interest, retroactively applying the inapplicable 2005 revised version of the FPSA. (Order granting Sanctions 11-18-09) Respondent-appellant appealed the directed verdict and the sanctions award, but these issues were not addressed on the merits.

In 2011, the Appellate Court issued an opinion in a case called *Southeastern Site Prep Llc v. Atl. Coast Builders*, 394 S.C. 97, 713 S.E.2d 650 (S.C. App., 2011). in which it held that the 2005 revised FPSA, which allowed the Court to judge whether an action was frivolous or not based on a "reasonable attorney" standard (even when applied to non-attorneys) only applied to actions which arose after July of 2005. The respondent-appellant had filed her action in 2002. Respondent-appellant filed Rule 59(e) request for reconsideration (Motion for Reconsideration 7-2-15) and a Rule 60 motion to alter or amend. (Rule 60 motion 8-5-15). Neither were ever set for a hearing by the Court and both are currently pending.

Several months later, the appellant-respondents mailed a petition and rule to show cause to the respondent-appellant on December 19, 2016 and filed for supplemental proceedings. (Petition 1-3-17) Respondent-appellant timely filed Motion to Dismiss and Rule 59(e), SCRCP, motion. A certified true copy of the Order of Reference (attached) shows it was not complete and not final pending disposition on those motions challenging the efficacy of the incomplete order of reference. On January 12, 2017, respondent-appellant moved for sanctions against the appellant-respondents who, she alleged, had

submitted false statements in the documents. (Motion for Sanctions 1-12-17) On February 1, 2017, respondent-appellant also moved to alter or amend due to the pending dispositional motions. Without valid order of reference, the master then issued an ex parte sua sponte order on February 9, 2017, asserting that a hearing was held. The record reflects there was no notice and no actual hearing. The ex parte hearing was unauthorized, invalid, and/or improper. The purported ex parte hearing on February 9, 2017, resulted in an unauthorized order un-filing and confiscating filing fees for respondent-appellant's previously filed motions, citing to an unnamed, unspecified December 2009 South Carolina Supreme Court Order. A review of the published and unpublished Orders for the date of the purported Order resulted in no sign of any such Order being recorded. The South Carolina Advance Sheets also indicate that there is no published Order from December 2009, from the South Carolina Supreme Court in the case. Pursuant to Rule 268,SCACR, unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Rule 268(d)(2). Nevertheless, Appellant produced a document which purported to be an Order directing the clerk of court not to file respondent-appellant's pro se filings relating to the hospital dispute. (Order 2-9-17) Respondent-appellant appealed the February 9, 2017 Order on the basis, including but not limited to, untrustworthy hearsay and that prohibiting her from defending herself, filing any motions, or taking any action to defend her assets and family home affected her substantial rights and constitutionally protected rights to self-representation and due process. Despite the pending appeal, the appellant-respondent and the lower court went on to require the respondent-appellant to submit to hearings and discovery (Order of 3-10-17), and granted motions to quash her attempts to present evidence, call witnesses, and depose the appellant-respondents' witnesses. (Order 3-14-17) It also sanctioned her, holding her in contempt when she tried to explain that the Circuit Court did not have jurisdiction while the appeal was pending. (Motion to compel and for sanctions 6-5-17; Order 6-21-17; Order 6-23-17) Jurisdiction was returned to the Circuit Court in November of 2017 by remittitur (Order and Remittitur 11-30-17) after the Court

had sanctioned the respondent-appellant another $2,500.00 without jurisdiction to do so. On April 19, 2019, the respondent-appellant filed a motion requesting relief on several grounds from the Circuit Court, enumerating the violations of due process and her constitutional rights which she alleged had been denied. (Respondent-appellant's motion 4-19-19) The Court's response was to issue an Order entitled "Order Denying Filing." (Order 5-24-19) In a one paragraph Order, the Court cites to an unrelated *John Doe* case with different case number, different parties, and unrelated issues, quoting, "Clerks of Court in this state to refuse to accept further filings from *plaintiff John Doe* in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, other than *plaintiff John Doe*, licensed to practice law in this state (emphasis supplied)." The brief Order simply refuses to acknowledge anything that respondent-appellant filed, thus denying her rights to due process and self-representation, yet again. Respondent-appellant has timely appealed, challenging the consistent denials of her due process and self-representation rights throughout this case, as all orders in the underlying action are now appealable.

On November 18, 2019, the Order granting sanctions to the Appellant expired, having been in existence for ten years. The Appellant's continuing attempts to collect on the expired judgment were denied in an Order from Circuit Court Judge, Jennifer McCoy filed June 11, 2020, as the 2009 judgment had expired and Appellant did not have standing to take any action regarding the expired judgment. Appellant has appealed Judge McCoy's Order.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record as provided by Rule 220(c), SCACR. Rule 208(b)(2), SCACR. The issue of interpretation of statutes is a question of law for the court. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

I. Under South Carolina law, a judgment creditor lacks standing to bring an action under any guise to enforce a judgment after 10 years from date of entry.

"A judgment represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money." *Wells v. Sutton*, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct.App.1989) (citing *Ducker v. Standard Supply Co., Inc.*, 280 S.C. 157, 311 S.E.2d 728 (1984)). Judgments, however, are time-limited. Pursuant to S.C. Code § 15-39-30:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

In keeping with this statute, the South Carolina Supreme Court has ruled that a judgment is "utterly extinguish[ed]... after the expiration of ten years from the date of entry." *Hardee v. Lynch*, 212 S.C. 6, 17, 46 S.E.2d 179, 183 (1948); see also *Garrison v. Owens*, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972) (stating that "[a] judgment lien is purely statutory[;] its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried.").

The Appellant argues that it should be allowed to bypass or circumvent the 10-year deadline for collection of judgments enacted by the South Carolina Legislature in SC Code § 15-39-30, by re-defining its claim as "in rem." The cases on this point cited by the Appellant are inapposite because in those cases the judgment had not expired. Specifically, Appellant's reliance on the *Dendy* case is misplaced:

> "Thus, if a creditor does not have an in rem interest in a debtor's property *(due to expiration of the judgment)* or if that interest was voided in bankruptcy, the creditor simply has a debt with no right to collect from the debtor or his property. See *Johnson*, 501 U.S. at 84, 111 S.Ct. 2150." *In re Dendy*, 396 B.R. 171 (Bankr. S.C. 2008) (emphasis supplied).

Appellant asserts a purported right to foreclose on Dr. Holmes' family home under a federal bankruptcy code subsection in lieu of established South Carolina law. The Appellant asserts that its position is a question of first impression for South Carolina. It is not. In *Carr v. Guerard*, 616 S.E.2d 429 (S.C. 2005), the South Carolina Supreme Court held that a judgment creditor lacks standing to bring an action under any guise to enforce a judgment after 10 years from date of entry. Even timely, indirect actions are void when the ultimate goal is to collect on a judgment because it is the judgment that gives the moving party standing. After 10 years, a judgment creditor no longer has standing to enforce the judgment under any guise.

Dr. Holmes' attorney in the instant case, the undersigned, happens to be familiar with the *Carr* case, as he argued the case before the Supreme Court on Carr's behalf. Mr. Carr had a judgment against Mr. Guerard. Mr. Guerard, an attorney, had spent over nine years claiming that he did not have the assets to pay the confessed judgment and resisting all of Mr. Carr's efforts to review the accounts from Mr. Guerard's law firm. Finally, right at the 10 year mark, the Court compelled Mr. Guerard to disclose his checking account records, which showed that he had, over the last decade, been writing checks to his children and wife in order to make his business appear to be penniless. The ten year deadline then ran. Mr. Carr's attorney, Chalmers Johnson, sought to make use of an old, but still good law, the codified version of the Statute of Elizabeth, which allowed a plaintiff to compel the parties to a fraudulent transaction to reverse the transaction. The statute of limitations for a claim brought under the Statute of Elizabeth is three years. Guerard moved to dismiss on a statute of limitations argument. Carr argued that he had discovered the fraudulent transactions when the checks were revealed, invoked the discovery rule, and asserted that he had filed the case within the three year statute of limitations for the relief he was seeking, i.e., reversal of the fraudulent transaction as opposed to collection on a judgment. The case was dismissed at the trial court and Carr appealed. Before the Supreme Court, Chief Justice Toal cut right to the chase and asked Carr's attorney whether the Statute of Elizabeth action was

pointless, since, even if the money was returned to the firm, a collection action was time barred. Mr. Carr's attorney asserted that collection was not part of the action before the Court; that issue was for another day. The Chief Justice was unpersuaded. The Court even devoted a footnote of the opinion to addressing Mr. Johnson's perhaps clever, but ultimately ill-fated, attempt at an "end-run" around the collection deadline:

> 5. Carr argues that the respondents are not entitled to summary judgment because there is a question of fact whether he brought this action within the time provided by the statute of limitations. Carr is correct that a three-year limitations period and the discovery rule apply to Statute of Elizabeth claims… Carr overlooks that Code section 15-39-30 also applies, rendering the statute of limitations inapposite in this particular case.
> *Carr v. Guerard*, 616 S.E.2d 429, 431 (S.C. 2005).

Accordingly, pursuant to the statute of repose, S.C. Code § 15-39-30, Appellant lacks standing because the judgment is expired.

The passing of ten years changes the status of the former creditor, rather than just putting a limitation on a person's ability to enforce that right. It extinguishes the connection between the parties which had existed during the ten-year period. The former creditor is a creditor no longer, and therefore does not have standing to bring any action. "'[A] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy' and that '[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.' *Holden v. Cribb*, 349 S.C. 132, 136, 561 S.E.2d 634, 637 (Ct.App.2002)." *Eagle Container v. County of Newberry*, 622 S.E.2d 733, 366 S.C. 611 (S.C. 2005).

In *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008), the Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of- the injury has to be fairly . . .

trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. **Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.** (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted)); *id.* at 196, 669 S.E.2d at 339 ("'[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.'" *Tennant v. Bd. of Zoning Appeals for the City of Georgetown,* Unpublished Opinion No. 2012-UP-462 (S.C. App. 2012) (quoting *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (emphasis added)).

The Supreme Court recognized, in the *Carr* Opinion, that "Carr is correct that a three-year statute of limitations and the discovery rule apply to Statute of Elizabeth Claims." *Carr* at 431. However, the Court schooled Mr. Carr's attorney on the fact that whether he had the right to bring the claim under the Statute of Elizabeth, even if the relief sought was not collection of the debt, that right was overridden when the 10-year statute of repose regarding judgments applied because it deprived him of standing. "Carr overlooks that Code section 15-39-30 also applies, rendering the statute of limitations inapposite in this particular case." *Id.* The Court has said, over and over again, that, when it comes to judgments, ten years is ten years, is ten years. The Judgment at issue in this case has expired. A judgment creditor lacks standing to bring an action under any guise to enforce a judgment after 10 years from date of entry because, after that time, it is no longer a judgment creditor.

II. S.C. Code § 15-39-30 is a statute of repose, not subject to equitable tolling.

The Appellant has argued that the South Carolina Courts should subvert the statute of repose to a subsection of the Federal Bankruptcy Code. Setting aside the fact that this case has been brought in a State Court, under South Carolina State law (negating any need for an Erie Doctrine choice of law

discussion), it is well settled that state law governs property rights under the Federal Bankruptcy Code. The Bankruptcy Court in its January 2020 order recognized this principle and the holding from *Carr v. Guerard*. The Bankruptcy Court in *In Re DC Dev., Inc.*, 572 B.R. 171 (Bankr. S.C. 2017) specifically addressed the *Carr* decision stating:

> As the South Carolina Supreme Court has previously held, as soon as a judgment becomes more than ten years old, the creditor loses his judgment-creditor status. See *Carr v. Guerard*, 365 S.C. 151, 154, 616 S.E.2d 429, 430 (2005) ("First, as soon as his judgment became more than ten years old, Carr lost his judgment-creditor status."). *In Re DC Dev., Inc.*, at 175.

The Bankruptcy Court in *In re DC Dev., Inc.*, went on to recognize S.C. Code § 15-39-30 as a statute of repose as opposed to a statute of limitations and to discuss the difference between the two:

> (T)he statute operates as a statute of repose and a "statute of repose is typically an absolute time limit beyond which liability no longer exists and **is not tolled for any reason** because to do so would upset the economic balance struck by the legislative body."
> (Emphasis in original) *Id.* At 176.

Other Federal Courts, as well, have found that the Federal Court lacks jurisdiction as a result of a lack of standing where a South Carolina judgment has expired, even in fraudulent transfer cases brought under federal statutory law. In *RRR, Inc. v. Toggas* (D.D.C. 2015), the District Court dismissed a fraudulent transfer case brought under Federal Statutory law. In that case, Judge Howell offers a well written discussion of the *Carr* holding and its effect on jurisdiction, noting that one other State, Oregon, has addressed the issue of standing when a judgment had expired with the same result. In *RRR, Inc. v. Toggas,* the U.S. District Court Judge found that the United Sates Constitution precluded federal jurisdiction in cases where the judgment had expired because of a lack of standing. "Absent standing by the Plaintiffs, the Court lacks subject matter jurisdiction to hear the claim and dismissal is mandatory." See FED. R. CIV. P. 12(h)(3)" *Id.* at p. 6. Even assuming a Federal Code subsection and a Bankruptcy Court Order could grant the Appellant the right to pursue collection of the debt, the *In Re*

DC Dev., Inc., opinion with Judge Howell's review of the lack of jurisdiction of Federal Courts in this situation concludes that the Appellant would not be any more effective in pursuing an action in State Court against Dr. Holmes to take her family home under those auspices than *Carr* was in asserting a right he had under the Statute of Elizabeth. Notably, in its brief, Appellant admits the federal case of *HSB, PA v. Holmes*, 610 B.R. 551 (Bankr. D.S.C. 2020). In that case, the federal court ruled that the judgment expired on June 11, 2020. Appellant-Respondents' Brief, fn. 3, p. 12. Appellants did not appeal that ruling. Both the State Court Order filed June 11, 2020, on appeal herein, and the federal court order ruled the judgment is expired. Accordingly, the trial court did not err in deciding the judgment is expired.

III. Equitable tolling of the statute of repose, S.C. Code § 15-39-30, is inconsistent with legislative intent, South Carolina statutory and case law, and public policy.

Legislative intent and the letter and spirit of the statute of repose, S.C. Code § 15-39-30, with expiration of judgments after 10 years, is consistent with the public policy of upholding the statute of repose in order to establish and maintain certainty in the marketplace, for example, regarding title searches and expiration of liens. In *Hardee v. Lynch,* 212 S.C. 6, 46 S.E.2d 179 (1948), the South Carolina Supreme Court dismissed the argument that the statutory period in which an execution may issue served as a statute of limitations, which would be considered waived unless pleaded. The South Carolina Supreme Court in that case stated:

> In order for a law to be a statute of limitations, it must contain within itself a specific statement limiting the time within which an action is to be brought.... [The statute at issue] provides no limitation period, but completely destroys any right of action upon judgments. The logical result of the [statute] was to utterly extinguish a judgment after the expiration of ten years from the date of entry.

Hardee, 212 S.C. at 16–17, 46 S.E.2d at 183. Thus, South Carolina law "completely destroys" the ability to bring "any right of action upon judgments." Simply put, Appellant's claims have been

"utterly extinguished."

In the case of *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010), the South Carolina Supreme Court created a narrow exception to the statute's historic interpretation. In the case of *Gordon v. Lancaster*, 425 S.C. 386, 390, 823 S.E.2d 173, 175 (2018), before the court on certiorari, the narrow issue of whether a creditor may execute on a judgment more than 10 years after its entry **when that time period expired during the course of litigation**. The South Carolina Supreme Court reversed the holding in *Linda Mc Co*. Specifically, the Supreme Court states, "[a]ccording to the statute's plain language, a creditor has ten years to execute on the judgment from the date of its entry, a time period that cannot be renewed." 390 S.C. at 555; 703 S.E.2d at 499. The Court went on to state "[w]e note *Linda Mc* represents a departure from this Court's historic approach in analyzing section 15-39-30, and while we appreciate the compelling facts at issue therein, the decision has created confusion in what was heretofore a well-settled area of the law. Accordingly, we overrule it and return to the traditional bright-line rule." 425 S.C. at 391, 823 S.E.2d at 175. Thus, pursuant to the bright line rule, the judgment of appellant-respondents is "utterly extinguished." This Court should decline to consider Appellant's urging to ignore the Supreme Court's holdings and governing South Carolina precedent.

IV. Even assuming the South Carolina statute of repose could be equitably tolled, which is denied, Appellant has not met its burden of proof.

To the extent Appellant asserts equitable tolling, Appellant has not met its burden of proof. The record reflects Appellant waited seven years. This is hardly evidence of immediate and diligent efforts. A statute of repose confers upon a party a substantive right to be shielded from liability after a legislatively-determined period of time. *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). A statute of limitations, on the other hand, is a "procedural device that operates as a defense to limit the remedy available from an existing cause of action." *Id.* at 865. Consequently, "[t]he distinction between statutes of limitations and statutes of repose corresponds

to the distinction between procedural and substantive laws." *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987); *South Carolina Tel-Con, Inc. v. World Tower Co.* (D. S.C. 2012). The statute operates as a statute of repose and a "statute of repose is typically an absolute time limit beyond which liability no longer exists and **is not tolled for any reason** because to do so would upset the economic balance struck by the legislative body." *Id.* At 559. Equitable tolling is not applicable to the statute of repose codified in S.C. Code § 15-39-30.

Even the Old Testament, the Holy Bible provides a statute of repose of 7 years. Deuteronomy 15:1. Appellant had more than seven years under secular law, and it implores the court to overlook its lack of diligence, tardiness, failure to pursue relief from stay in the federal court, and unclean hands. "Unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998)." *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (S.C. 2000). Accordingly, the trial court did not err in denying Appellant's motion.

CONCLUSION

The South Carolina Supreme Court has held that a judgment creditor lacks standing to bring an action under any guise to enforce a judgment after 10 years from date of entry. Appellant's appeal should be denied and Judge McCoy's Order of June 11, 2020, affirmed.

Respectfully submitted,

9-29-2020

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THE STATE OF SOUTH CAROLINA
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9th Judicial Circuit Court Judge

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Appellant/Respondent.

PROOF OF SERVICE
Initial Brief of Respondent/Appellant
Designation of matter to be included in record on appeal

I certify that on this date I have served a copy of the foregoing on the Respondents via email: mcaskey@ hsblawfirm.com and by depositing a copy of it in the United States Mail, postage prepaid, addressed at Mary M. Caskey, Esq. 1201 Main St. #2200, Columbia, SC 29201, on this date.

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