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Wilma W. Wootton v. Combined Insurance Company of America : Brief of Respondent

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED
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WILMA W. WOOTTON,
Plaintiff and Respondent,

Supreme Court, Utah

vs.

**COMBINED INSURANCE COMPANY
OF AMERICA,**
Defendant and Appellant.

**CASE
NO. 10108**

RESPONDENT'S BRIEF

Appealed from the Judgment of the Fourth District Court
for Utah County
Honorable Joseph E. Nelson, Judge

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In the Supreme Court of the State of Utah

WILMA W. WOOTTON,
Plaintiff and Respondent,

vs.

COMBINED INSURANCE COMPANY
OF AMERICA,
Defendant and Appellant.

CASE
NO. 10108

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

Respondent adopts appellant's statement.

DISPOSITION IN LOWER COURT

Respondent adopts appellant's statement.

STATEMENT OF FACTS

The respondent believes that the appellant's statement of facts is substantially correct. The respondent, however, would add that the insurance agent, Mr. Bowen, was a long time friend and acquaintance of the decedent and was

well aware of his condition and physical disability. (R. 31)
(Bowen Dep. P. 9)

The respondent would further add that a full premium including the added cost for the accidental death rider was paid by the respondent. (R. 17) Another salient fact is that at the time of making the application, September 24, 1962, the respondent did not know (and does not now know, if such is the case) that her husband, Harold, had ever seen Dr. C. M. Smith, Jr. prior to the date of application.

ARGUMENT

POINT I

THE RECORD DISCLOSES NO GENUINE ISSUE
OF MATERIAL FACT, AND UNDER THIS CONDITION
THE COURT PROPERLY GRANTED RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT.

It is apparently the position of the appellant that so long as there is a material issue of fact, summary judgment cannot be granted. The appellant's entire brief is related to the fact question as distinguished from the law question. Although we do not admit that there is a material issue of fact and, on the contrary, believe that there is no substantial or material issue of fact, the respondent respectfully contends that the respondent is entitled to judgment on the pleadings. A summary perusal of the answer shows that the only defense raised by the appellant is that it was "induced to enter into the insurance contract with plaintiff and plaintiff's deceased husband by reason of intentional misrepresentation of materials facts

* * * ”.

Fraud is the only basis upon which the appellant can be relieved of its obligation under the policy. The appellant has completely and utterly failed to plead fraud with the particularity required by the statute. Rule 9 (b) requires fraud and the circumstances of fraud to be pleaded with particularity. This has not been done. See *A. W. Sewell v. Commercial Casualty Insurance Company*, 80 Utah 378; 15 Pac 2d., 327; *Davis Stock Company v. Hill*, 2 Utah 2d, 20; 268 Pac 2d, 988.

In this respect, the Court will note that the appellant has failed to plead that the misrepresentation, if one was made, was relied upon. The appellant has failed to allege with particularity the circumstances of the said fraud, setting forth the alleged misrepresentation and pleading the materiality or reliance upon said representation. The *Davis* case states that the materiality of the allegations must be alleged in the pleading with certainty; otherwise, there is no raising of the issue of fraud. The *Davis* case also states that the materiality of a false representation cannot be ascertained unless the true fact is alleged with particularity. Here the appellant has failed to allege the true fact which it supposedly relies upon. See *Stuck v. Delta Land and Water Company*, 63 Utah, 495; 227 Pac. 791. The last citation sets forth the elements of an allegation in fraud necessary to be pleaded under the Utah Statutes. The Court will note that the appellant has failed to make an allegation in fraud sufficient to give it a defense.

Even assuming the pleadings were sufficient to state a claim, the respondent respectfully contends that notwithstanding the arguments made in appellant's Point I, there

could not possibly be a misrepresentation. The language of the application is clear. Appellant contends that the misrepresentation was made in respondent's answer to questions 5, 6 and 7. These questions and answers are specifically set forth as follows:

5. Have you or any family dependent members, ever had or received medical advice or treatment for (circle condition Answer Yes if yes to any part of 5)
 (f) Any other sickness, injury or defect? (Give Name)
 Harold—Polio at age of 3 Yes
6. If Yes to any part of question 5, complete the following for each circled condition:
 Person—A—Polio at age of 3 yrs. Has slight limp. Still under doctors care?—No.
 Name and address of doctor who was in attendance
 Dr. is deceased.
 Complete Recover—No Recurrence
7. To the best of your knowledge are you and all family dependent members now in good health and free from any physical defect injury or disease and are not now under medical care? Yes.

The language and handwriting was that of the agent and not of the applicant or the insured. The claimed misrepresentation appears to be that the application said that Harold Wootton had polio at the age of three, that he had a slight limp resulting therefrom and that he had completely recovered from the said condition.

The appellant finds the inconsistency of the answer to question 6 a "misrepresentation." We respectfully say that where the insurance company was informed that the

insured had been afflicted with polio, that he had recovered but that the polio had left him with a limp, to further say in the same sentence that he was in good health and free from physical defect is not a misrepresentation.

The fact is that the company and its agent were completely informed as to the limitation of the insured. It was for this reason that they attached a rider to the policy eliminating coverage from "poliomyelitis or residual paralysis" and stamped the policy on the face of it, in red, "NOTICE! SEE ELIMINATION RIDER ATTACHED TO THIS POLICY".

The appellant does not contend by its Point I, its pleading or its argument that Mrs. Wootton, the applicant, knew, if such were the case, that Mr. Wootton had been to see a Dr. Smith in July of 1962. It does not contend that she made any intentional misrepresentation of fact. It admitted in its argument to the trial court that they had no evidence that she knew of any limitation of her husband, other than the polio mentioned in the application. The depositions taken by the appellant fail to show any knowledge on the part of Mrs. Wootton different than that shown in the application. There could not, therefore, be any misrepresentation by the applicant.

The appellant at no time talked with the decedent concerning his disability or condition of health. It is also interesting to note that the insurance company never made any effort to contact the decedent concerning his health or known disability. It would seem that the appellant should be estopped from claiming misrepresentation under these circumstances.

Authorities that establish that ambiguities in an in-

insurance contract are to be construed against the insurance company:

29 Am. Jur 640 to 650 and Sec. 258 to 264.

Gressler v. New York Life Ins. Co., 108 Utah 182, 163 P2d 374.

Browning v. Equitable Life Assur. Soc. of U. S., 72 P2d 1060, 94 Utah 532.

Richards v. Standard Accid. Ins. Co., 200 P. 1017, 58 Utah 622.

POINT II

STATEMENTS MADE IN AN APPLICATION FOR INSURANCE ARE REPRESENTATIONS NOT WARRANTIES.

Utah Code Annotated 31-22-1(4):

“A provision that the policy shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application therefor and a copy of such application shall be endorsed upon or attached to the policy when issued.”

Because appellant has cited the last sentence of the first paragraph of the Utah Code Annotated, 1953, 31-19-8, we deem it necessary that the entire provision be cited:

“31-19-8. Materiality of misrepresentations - Warranties - Presumptions and burden of proof. - (1) Except as provided in subsection (2), no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive.

The insured shall have the burden of proof that such misrepresentation or warranty was not made with intent to deceive.

(2) In any application for life or disability insurance made in writing by the insured, all statements therein made by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right to recovery under the contract unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.

As argued in Point I, we believe that it is obvious that there was and could be no misrepresentation under the application. This is especially true in light of the Interrogatories and Answers. (R. 9, 13)

"2. State in detail the misrepresentation of material facts alleged in paragraph 7 of the answer, and in this regard set forth who made the misrepresentation, how it was made, when it was made, and before whom it was made.

A. It was represented by plaintiff that the only sickness,, injury or defect of the deceased was that he had polio at the age of three years, that he had a slight limp at that time, that there was no recurrence of any difficulty, and that there had been a complete recovery from said condition. It was further represented that the deceased was not at that time under any doctor's care for such condition. Said representations were made by plaintiff, were made orally and in writing, made on September 24, 1962, and were made in the presence of Weston Cordner and Albert Bowen.

3. State in what way the representation made did not conform with the truth.

A. On July 13, 1962, the deceased was seen by Dr. Charles M. Smith, Jr., of Provo, Utah. The doctor found that there was an increasing weakness in the left leg and greatly diminished muscle power. Prior to this time, the deceased had noticed a great tendency for falling. The doctor advised him that because of this continuous falling, he should retire from his occupation. This the deceased did in July, 1962, for the reason that his leg was continually causing him trouble."

The answer to Interrogatory 2 indicates that the appellant is relying partially on an oral representation. This cannot be a basis for defense under Utah Code Annotated 31-22-1(4) cited above.

If the appellant is relying on a written representation, then it must be the answer to question 6 of the application (R. 17) which is partially set forth under A. 2 above. If this is so, and there can be no other conclusion under these interrogatories and answers, then there could be no misrepresentation for A. 3 sets forth the alleged true fact. Let us analyze the claimed misrepresentation as compared to the claimed truth.

Representation A. 2	Truth A. 3
1. Polio at age 3	1. Not denied
2. Had a slight limp	2. Not denied
3. No recurrence of difficulty (polio)	3. Not denied
4. Had been complete recovery from condition (polio)	4. Not denied

The appellant's answer number 3 does not negate any of the representations claimed under Answer number 2. It only adds some superfluous allegations, to-wit:

(1) That the deceased had seen Dr. Charles M. Smith, Jr., on July 13, 1962. This does not impugn the answers to the application. Suppose he had. It does not prove that he, on September 24, 1962, was under and doctor's care or that the applicant, Mrs. Wootton, knew that he was, or even that she knew he had seen the doctor on that date, if he did.

(2) That he had a tendency for falling. This was known to the insurance company on September 24, 1962. They knew he had a defective leg and limped. Bowen knew he had this physical disability. (R. 31)

(3) That the doctor advised him to retire because of his tendency to fall. This he did in July, 1962. This was before the application. What difference did it make to the appellant why he retired. Mrs. Wootton in her deposition explained why he retired. (R. 32, Wootton Dep. P. 14)

It is obvious that there was no misrepresentation. For sake of argument, even if there was, how could anything therein represented be deemed material, fraudulent or have materiality affected the acceptance of risk or hazard assumed by the company?

POINT III

UNDER THE UTAH STATUTE, AN INSURER, IN ORDER TO AVOID A POLICY ON GROUNDS OF FALSE STATEMENT OR MISREPRESENTATIONS, MUST SHOW THAT SAID STATEMENTS WERE MA-

TERIAL AND THAT THEY WERE MADE KNOWINGLY AND WITH INTENT TO DECEIVE OR DEFRAUD.

In this case, the application for the policy was filled out by the agent in his handwriting setting down the answers to questions asked by him and answered by Mrs. Wootton. See deposition of Albert Bowen, page 7. (R. 31) On page 8 of that deposition, he testifies as follows:

"Q. Now, in respect to No. 6, Question No. 6, what was the purpose of this notation? The notation is: 'Polio at age three years, has slight limp. Not under doctor's care. And the doctor is deceased. Complete recovery. No recurrence.' What was your understanding of that phrase?

A. Well, we wanted to let the Company know that Harold walked with a limp, and the reason he walked with a limp is because he had polio when he was younger, but that his polio had not recurred and that he was fully recovered, other than the limp.

Q. By 'fully recovered' did you mean whether he then had polio that was working on him, or if the polio had ceased to be active?

A. I meant that the polio had ceased to be active. It wasn't bothering him any more now than it had for the rest of his life.

Q. But you knew he had polio that had caused a limitation in his physical ability?

A. Yes. I never knew why he limped until she answered this question under 5 (f), that he had had polio. As long as I had known him he had limped. And she said he had had it at age three.

Q. Did you tell her there would be any reduction in coverage because of that in the policy?

A. We didn't know if the Company at this time would exclude polio or not. This is always up to the

company. They can usually charge an additional premium and cover it if they want. But the policy came back with an exclusion of polio.

.

"Q. Now, do you know of any representation or statement to you that was in fact false?

A. No. We asked the questions on the application. I asked the questions on the application just as they are written there, and we answered them just as she gave us the answers. And I am aware that the application becomes a part of the policy, and so it has to be as right as it can be.

Q. Well, as far as you know are there any false statements in that application?

A. No, there isn't any that I know about. Every question that is here that has been asked has been answered truthfully."

After looking at the deposition of Mr. Bowen and the particular extracts cited above, we refer the Court to the deposition of Mrs. Wootton. The particular portions of the depositions we believe are pertinent to the defendant's contention are:

"Q. Well, do you know whether he saw a doctor within a year prior to the time of his death or prior to the time this was signed?

A. I don't know. I am sure he — he seen a doctor. I don't know how to answer a question like that. I don't honestly know if he seen doctors or not. I go to the doctor without telling him. I have went to the doctor without telling him I had been to a doctor.

Q. Do you know that he saw Doctor Charles M. Smith, Jr., on July 13, 1962?

A. I don't.

Q. You don't even know that today?

A. I have heard that he did since that time, yes.

Q. When did Harold terminate his employment with the Provo River Water Users?

A. In July.

Q. Would that have been on July 15th?

A. That he terminated?

Q. Yes.

A. I think it was July 15th.

Q. Why did he terminate?

A. Well, I don't exactly know why he terminated, other than the change-over on the job up there. The job was too much for him.

Q. Did you and he discuss it?

A. Yes.

Q. Did you discuss why the job was too much for him?

A. Yes. When he first went up there he had control over the power house. That is all he had to do. And then they put him in charge of the chlorinating station and house cleaning and cutting the lawns. And in his condition he couldn't hold his end up.

Q. You say, 'in his condition'. What was there about his condition?

A. This condition existed then."

The Court will recall that the application was made on September 24, 1962, and the premium paid. The insured, Harold Wootton, died on December 31, 1962, as a result of injuries sustained in an automobile-pedestrian accident. The contention of the appellant is that the application was false because on December 3, 1962, Mrs. Wootton made a statement that her husband had been advised by Dr. Smith that "he might lose his good leg if he didn't stay off of it." Presumably, the insurance company be-

believes that this statement is proof that she knew at the time of the application that he had been to see a doctor and that his health was poor, or that his condition was bad, and that if she had been truthful, they would not have insured. The respondent respectfully contends that this alleged statement does not say that, and when read as stated in the deposition, says the absolute contrary. The statement is incapable of even suggesting the conclusion proposed by the appellant. Mrs. Wootton's explanation of the answer made to the insurance claim questionnaire on January 9, 1963, was based upon information that she had learned since the date of the application. See her deposition, page 13, line 19, (R. 32), as set forth above. This completely refutes any suggestion that she had made an intentional misrepresentation. But even if it were intentional, the respondent respectfully states that it was not material.

The leading case in Utah on this point is *Chadwick v. Beneficial Life Insurance Company*, 54 Utah, 443; 191 P., 448. In this case, plaintiff, the insured's wife, was seeking to collect the proceeds from a policy on the life of her deceased husband. The insurance company admitted the allegations of the complaint but alleged that the deceased husband had made false and fraudulent statements in his answers to questions asked in the application, to-wit:

"Q. Give name and address of physician last consulted.

A. None.

Q. Are you in good health as far as you know or believe?

A. Yes."

Testimony at the trial indicated that the husband was under a physician's care in Wyoming and that he was suffering from severe back pain at this time. The trial court directed a verdict for the defendant insurance company. Plaintiff appealed. The Supreme Court, in its opinion, had the following to say:

"The issuance of a policy by the defendant was admitted. The burden was on the defendant to void the policy by proving that it was procured by fraud. It was not sufficient merely to prove that the deceased made false answers to questions propounded by the medical examiner. It was incumbent upon the defendant to prove that the answers were not only untrue, but that the deceased knew or should have known them to be untrue. The question of good faith on the part of the insured by the defendant's answers is made the very gist of the controversy. Respectable authority can be found maintaining the view that false statements made and false answers given by the insured in his application for insurance concerning matters material to the risk will void the policy irrespective of the question of good faith or honest belief on the part of the insured, but as we have already shown when stating defendant's theory of the case, the issue here presented by the defendant is that the insured not only made false statements respecting his health at the time of applying for insurance and false answers relating thereto, but is alleged that at the very time he knew that they were false. In view of our statute and the cases we shall hereinafter cite, we are inclined to the view that in a case of this kind where an insurance company relies upon false statements and answers of the insured as a defense against an action on the policy, it must not only allege, as the defendant has done in this case, that that statements and answers are

untrue, but also that the insured knew or should have known them to be untrue at the time he made them. Not only this, but as a necessary corollary in judicial proceedings the truth of such allegations should be substantially established at the trial."

Another Utah case dealing with this point is *New York Life Insurance Company v. Grow*, 135 P. 2d, 120. Plaintiff insurance company in this case instituted an action to cancel the policy because of false statements and misrepresentations made by the defendant's deceased husband in his answers to questions concerning his medical history. Testimony at trial is replete with evidence that the husband knew that he had a rheumatic heart condition and yet when questioned on such matter by the agent of the insurance company, he made no mention of this fact. The Court said:

"It was the burden of the plaintiff to establish actual fraud on the part of insured that he made the material misrepresentations shown by the application knowingly and with intent to deceive and defraud the plaintiff insurance company. This it failed to do."

The Court then quotes approval from a case of *Zolintakis v. Equitable Life Assurance Society*, 97 F.2d, 583; 108 F. 2d, 902. This was a case in the Federal Court which dealt with an interpretation of Utah Law concerning material misrepresentations in an insurance application.

"By this decision Utah is committed to the liberal doctrine that before misrepresentations of material facts will void a policy of insurance, it must be established that they were not only knowingly made, but also wilfully and intentionally, with intent to deceive and defraud."

See *Fidelity and Casualty Company of New York v. Middlemiss*, 135 P. 2d, 275. Here the Court made a definition of material representation:

“A material representation is one which ordinarily would influence a prudent insurer in determining whether to accept or reject one risk, or in fixing the amount of premium in the event of such acceptance, or in excepting some risk or part thereof from coverage.”

Also quoting from the *Zolintakis* case above, the Court said:

“A material fact is any fact, the knowledge or ignorance of which would naturally influence the insurer's judgment in making the contract, in estimating the degree and character of the risk, or in fixing the rate of insurance.”

To void the policy the insurer must have relied on the misrepresentation.

29 Am. Jur., 966, Section 705:

“The rule that the intentional misrepresentation by the applicant of a material fact relied on by the insurer permits the latter to avoid the policy is not applicable where the insurer cannot be held to have relied thereon, having had actual knowledge of the true facts or of the falsity of the applicant's statements, or at least sufficient indications that would have put a prudent man on notice and caused him to start an inquiry which, if carried out with reasonable thoroughness, would have revealed the truth. Thus, an insurer cannot claim a misrepresentation as to facts of which he is fully informed, and if the expressions are ambiguous, the insurer should clear up the ambiguity by

asking for an explanation, and not by substituting its own conjectures therefor."

See *New York Life Insurance Company v. Strudel*, 243 F. 2d, 90, where it is said that the general rule is:

"That the intentional misrepresentations by an applicant of a material fact relied on by the insurer, the latter to void the policy, however, there are exceptions. If the insurer has actual knowledge of the truth or at least has sufficient indications that would have put a prudent man on notice and would have caused him to start an inquiry, which if carried out with reasonable thoroughness would reveal the truth, cannot blind himself to the true facts and used to rely on the misrepresentations."

See *Peterson v. Manhattan Life Insurance Company*, 91 N.E. 466. Here the insured answered a question in the negative when asked if he had been sick in the last ten years; however, in another part of the application it was clearly shown that he had malaria within this particular period of time, therefore, the Court held that the insurance company had knowledge of the insured's physical condition and said:

"An insurance company cannot insist upon forfeiture of an insurance policy for a cause of which it had knowledge when it issued the policy."

In the instant case, even the misrepresentations the defendant contend that the plaintiff made did not amount to fraud. Plaintiff cites to the Court questions 2 and 3 set forth in Point II above.

From the answers to interrogatories, read in the light of the cases cited above, the respondent respectfully con-

tends that there is no defense to the respondent's claim for payment. The appellant does not contend fraud based upon its answers.

POINT IV

AN AGENT'S KNOWLEDGE GAINED WITHIN THE ORDINARY SCOPE OF HIS DUTIES WILL BE IMPUTED TO THE INSURANCE COMPANY.

The respondent contends that the appellant knew of the physical condition of the insured, Harold Wootton, and that the knowledge of the agent is imputed to the appellant. The agent's knowledge is detailed in his deposition, page 3, line 23, to page 5, line 2. (R. 31)

A Utah case dealing with this point is *Farrington v. Granite State Fire Insurance Company of Portsmouth, et al.*, 232 P. 2d, 754. This action concerned four identical fire insurance policies issued by the defendants to the plaintiff on the same building, which building was destroyed by fire. The Court said:

"The insurance companies adopted and took the benefits of all his conduct favorable to them. It seems quite inconsistent for them to accept the advantages of everything he did for their benefit and yet insist that they are not responsible for the knowledge he acquired about the building within the necessary and ordinary scope of his duties in handling the transaction. From the facts stated he was their agent and they are charged with his knowledge."

The fact that an agent's knowledge is his principal's knowledge is particularly important when considered in regard to the situation where the agent interviews the in-

sured and fills in the application blank as he, the agent, asks questions of the insured. Certainly, any knowledge of material fact which the agent gathers at this time will be imputed to the insurance company unless there is collusion between the agent and the insured.

See *Turner v. Mutual Beneficial Health and Accident Association*, 24 N.W. 2d, 534. Here an accident and health policy, which provided for a death benefit from accident, was issued to the insured. The agent, in filling out the application, merely asked questions of the insured and furnished answers from his own observation. The insurance company now claims that false statements were made in the application, to-wit: The insured walked with a limp and had a short arm. The court held that no intent to deceive was shown and that apparently the insured assumed that the agent understood the situation and that she was capable of filling out the application properly. There was some question as to whether the insured read the application before signing it, thus the court said that even if the insured did read the application before signing it, he might logically conclude that the agent understood the interpretation placed by the company on the questions in the application and thus have written them accordingly. The burden is on the insurance company to show intent to deceive. The court also said that the knowledge of the agent on a material matter required within the scope of the agent is imputed to the principal.

See also annotation in 81 A.L.R., 833 and supplemental annotations in 117 A.L.R., 790 and 148 A.L.R., 507. This annotation is entitled "Insertion by Insurer's Agent in Application of False Answers to Questions Correctly An-

swered by Insured or Answers Suggested by Agent." In either situation the knowledge of the agent is imputed to the insurer and, therefore, the insurer is unable to void the policy because of such false misrepresentations.

The Utah Case of *Bednarek v. Brotherhood of American Yeomen*, 48 Utah, 67; 157 Pac., 884, is cited in support of this majority rule. The annotation says:

"The great weight of authority is that if an application for insurance is drawn by an agent of the insurer who fills in false answers to the interrogation contained therein which are truthfully answered by the insured without fraud, collusion or actual knowledge of the insured or the existence of circumstances from which constructive knowledge of such falsity might be imputed to him, the insurer cannot rely upon the falsity of such answers in seeking to avoid liability under the policy issued upon the application."

Where the agent suggests answers or construes questions, the annotation says:

"The act of the insurer's agent in assuming to interpret the questions in the application and to advise the insured of the propriety or necessity of recording certain answers amounts to an interpretation of the questions and answers by the insurer himself."

CONCLUSION

The respondent respectfully urges the Court to sustain the trial court's judgment. The respondent believes that there is no defense raised by the appellant's pleading; that there was in fact no misrepresentation; that the Utah Statute excludes any misrepresentation except that contained in the application, and that a misrepresentation, to

be grounds for avoidance of an obligation must be material and amount to fraud, and that such must be pleaded with particularity as required by the Statute. Under the circumstances of this case, the respondent respectfully submits that summary judgment is the appropriate relief.

Respectfully,

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