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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 21, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Ashley Feickert,	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	
	)	**Supreme Ct. Case No. 20220102**
Cheryl Feickert,	)	District Ct. Case No. 52-2021-CV-00017
	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF (REVISED)

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT AND JUDGMENT ENTERED ON FEBRUARY 16, 2022 OF THE WELLS COUNTY DISTRICT COURT, THE HONORABLE JAMES D. HOVEY

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

¶ 1. Whether the district court erred in failing to consider Defendant's claim for unjust enrichment.

¶ 2. Whether the district court erred in failing to consider the amounts Defendant paid to, or on behalf of, Plaintiff to reduce the amount of damages.

STATEMENT OF THE CASE

¶ 3. This case was initiated by Ashley Feickert (hereinafter "Ashley") upon filing and serving her Complaint. (R2). Cheryl Feickert (hereinafter "Cheryl") filed an Answer thereto (R13).

¶ 4. Trial was held on December 6, 2021.

¶ 5. The district court issued its Findings of Fact, Conclusions of Law and Order for Judgment on February 16, 2022. (R39). Judgment was entered that same day (R40), as was the Notice of Entry of Judgment. (R41).

¶ 6. Cheryl filed her Notice of Appeal on March 29, 2022. (R46).

STATEMENT OF FACTS

¶ 7. On March 26, 1988 Mark Feickert ("Mark") died intestate, at the age of twenty-four (24) years old. At the time of his death, Mark was married to Cheryl Feickert ("Cheryl"), and they had two (2) minor children together, Kayla Feickert ("Kayla") and Ashley Feickert ("Ashley"). At the time of Mark's death, Ashley was ten (10) months old, having been born in 1987. (R24:1:¶ 2).

¶ 8. Cheryl was appointed as the personal representative of Mark's estate on April 8, 1988. (R24:1:¶ 3).

¶ 9. On January 29, 1998 the probate court issued its *Order Approving Final Account, Determination of Testacy Status, Settlement and Affirmation of Distribution of an Intestate Estate by Personal Representative.* The probate court found that Cheryl, Kayla, and Ashley were the heirs of Mark. (R24:1:¶ 4).

¶ 10. At the time of his death, Mark owned a 100% interest in real property located in Sheridan County, North Dakota, described as follows:

Township 149 North, Range 74 West, Sheridan County, North Dakota
Section 8: S½SW¼
Section 12: SW¼ and South 10 rods of NW¼
Section 17: N½

(R24:2:¶ 5).

¶ 11. Mark also owned an undivided one-half interest in Sheridan County real property with his mother, Sharon Feickert, described as follows:

Township 149 North, Range 74 West, Sheridan County, North Dakota
Section 7: Lot 3, NE¼SW¼, E½SE¼NE¼ and E½NE¼SE¼

(R24:2:¶ 6).

¶ 12. Pursuant to the probate court's order, Cheryl was awarded an undivided one-half interest, and Kayla and Ashley were each awarded an undivided one-fourth interest in the following real property:

a. Farmland in Sheridan County, North Dakota owned in fee simple by decedent, more particularly described as follows:

Township 149 North, Range 74 West, Sheridan County, North Dakota
Section 8: S½SW¼
Section 12: SW¼ and South 10 rods of NW¼
Section 17: N½

b. Farmland in Sheridan County, North Dakota owned as tenants in common with Mark's mother, Sharon Feickert, more particularly described as follows:

Township 149 North, Range 74 West, Sheridan County, North Dakota
Section 7: Lot 3, NE¼SW¼, E½SE¼NE¼ and E½NE¼SE¼

(R24:2:¶ 7).

¶ 13. A *Petition for Appointment of Conservator* was made by Cheryl on December 18, 1989 because of the award of real property to Ashley and Kayla while under the age of majority. On January 26, 1990, the court issued its *Order Appointing a Conservator* appointing Cheryl as conservator for Ashley and Kayla. (R24:2:¶ 8).

¶ 14. Based upon her appointment as conservator for Ashley, Cheryl had a fiduciary duty to Ashley. (R24:3:¶ 9).

¶ 15. On February 2, 1990, a *Personal Representative's Deed of Distribution* was executed transferring the above property in accordance with the probate court's order. (R24:3:¶ 10).

¶ 16. On April 4, 1989, Cheryl entered into a *Farm Lease* with Kelly Feickert to lease all of the property described above. Kelly Feickert leased the land throughout the years, and still does to this day. (R24:3:¶ 11).

¶ 17. On June 13, 2002, there was a purported transfer of real property located in Sections 8, 12, and 17 when Cheryl, Kayla, and Ashley, in their individual capacities, signed a *Quit Claim Deed* conveying said property to Cheryl. At the time of the transfer, Ashley was still a minor child, being fifteen (15) years old. The deed was prepared by Trosen Law Firm. (R24:3:¶ 12).

¶ 18. Ashley knew of should have known of her rights to the property and compensation in June 2002 when she signed the Quitclaim deed to Cheryl for all of the

property, less Section 7. (R29:24-26). Although she was under 18 at the time, Ashley testified that she had been signing checks her whole life, which were for land rent payments received on such property. (R53:105:15-106:6).

¶ 19. In 2005 Ashley turned eighteen (18) years old. Upon turning eighteen (18) years old, Cheryl did not transfer to Ashley her interest in the real property located in Sheridan County, North Dakota. (R24:3:¶ 13).

¶ 20. On March 17, 2009, Cheryl and Ashley, in their individual capacities, and Kayla, and her husband, James Weinmann, Jr., executed a *Warranty Deed* transferring all of their interest in Section 7 to Kelly S. and Mary Jo Feickert for the sum of $78,000.00. Upon information and belief, the deed was prepared by Schulz Geiermann Bergeson & Guler, Attorneys. (R24:3:¶ 14).

¶ 21. On March 3, 2010, Cheryl executed a *Conservator's Deed* transferring Ashley and Kayla's interest in Section 7 to them. The deed was prepared by Schulz Geiermann Bergeson & Guler, Attorneys. (R24:3:¶ 15).

¶ 22. On November 27, 2013, Cheryl executed a *Conveyance of Easement for Waterfowl Management Rights* to the United States Department of the Interior U.S. Fish and Wildlife Service for $37,250.00 relating to property in Sections 8, 12 and 17. (R24:4:¶ 16).

¶ 23. Ashley was over the age of 18 at the time of the land sale to Kelly and Mary Jo Feickert (R29:27-29 and 52-54) in 2009 and 2010, as well as the Conveyance of Easement for Waterfowl Management Rights to the United States Department of the Interior U.S. Fish and Wildlife Service (R27:46-51).

¶ 24. Ashley signed the Warranty Deed conveying the land to Kelly and Mary Jo Feickert (R29:27), as well as the Earnest Money Receipt and Agreement and Closing Statement for the purchase (R29:52-54). Ashley was approximately 22 at the time.

¶ 25. On April 7, 2014, Cheryl executed a *Deed of Conservatorship* transferring all of Kayla and Ashley's interest in the property in Sections 7, 8, 12, and 17 to herself. The deed describes Ashley as a "minor child[]" even though at the time of the transfer, Ashley was twenty-seven (27) years old. The deed was prepared by Walter M. Lipp, Attorney at Law. (R24:4:¶ 17).

¶ 26. On January 29, 2020, a *Notice to Appear* was issued in regard to an order to show cause relating to the status of the conservatorship. On February 24, 2020, the court issued a *Notice*, that in accordance with N.D.C.C. § 30.1-29-08, a hearing was set to review the status of the conservatorship including the requirement for annual reports under N.D.C.C. § 30.1-29-18. (R24:4:¶ 18).

¶ 27. On July 2, 2020, the court held a hearing and on July 7, 2020, the Court issued an *Order* requiring Cheryl "to provide a full report of accounting of the conservatorship to the court, to be filed with the Court on or before September 2, 2020." On September 2, 2020, Cheryl filed and served her *Summary of Accounting* and supporting documents in the conservatorship case. (R24:4:¶ 19).

¶ 28. On October 6, 2020, the court held a second hearing in regard to the status of the conservatorship. At the hearing, the court ordered that Cheryl provide information regarding the assets currently being held for Ashley's benefit, a proposal as to the distribution of said assets, and whether the conservatorship could be terminated. (R24:4:¶ 20).

¶ 29. On November 13, 2020, Cheryl, in her individual capacity, executed a *Quit Claim Deed* transferring Kayla and Ashley's undivided one-fourth (1/4) interest in the property in Sections 8, 12, and 17 to Kayla and Ashley. (R24:4:¶ 21).

¶ 30. On November 16, 2020, Cheryl filed and served her *Amended Summary of Accounting,* the *History of Conservatorship Assets,* and her proposed *Findings of Fact, Conclusions of Law, and Order to Close Conservatorship.* In her *Amended Summary of Accounting*, Cheryl advised the Court that the remaining real property had been transferred to Ashley and Kayla "[t]herefore all assets of the conservatorship had been distributed." Because Cheryl alleged that no assets were left to be distributed, she requested that "the Court determine that the conservatorship should end, and order the conservatorship closed." (R24:5:¶ 22).

¶ 31. In speaking of all of the deeds executed, Cheryl testified that she "just did what [she] was told," after seeking guidance from attorneys. (R53:46:9-12, 54:5-55:13, and 56:21-57:21).

¶ 32. Cheryl provided testimony and evidence at trial to show she kept suitable records for her administration of the conservatorship. (R53:54:12-14 and 59:24-77:18)

¶ 33. As shown on Exhibit 16, the net income received for Ashley after she reached the age of 18 was $119.994.97, which is undisputed. (R29:56).

¶ 34. As explained in the Amended Summary of Accounting, Cheryl has been raising Ashley's son, A.F., since 2014 (R31:4:¶12). Cheryl further testified that, during the time she was providing care for A.F., Ashley had been receiving child support and failed to provide Cheryl compensation for her care of A.F. or to provide any care herself for her son. (R53:84:20-24). Cheryl further testified that she felt that using Ashley's

portion of the land rent for such care was a wash for not receiving the child support. (R53:84:20-24). In the accounting, Cheryl estimated that the expense for raising A.F. is $70,848. (R31:4: ¶12). She also provided that her motel business forewent $30,500 for Ashley to live there for about two years. (R31:4: ¶12)

¶ 35. At trial, Cheryl provided evidence of additional monies expended on Ashley. (R:30:Exhibit 23-28, R:32, and R33). The exhibits amount to $34,411.56.

¶ 36. The total amounts that Cheryl expended after Ashley reached the age of 18, therefore, amounts to $135,759.56. (R30:Exhibit 23-28, R31:4: ¶12. R:32, and R33).

¶ 37. Cheryl testified that she was not made aware at any time by the attorney representing her when the conservatorship was put into place, any of the attorney's she subsequently consulted with, or by the court that she was to file an annual accounting for the conservatorship. (R53:53:5-54:8).

ARGUMENT

A. Introduction

¶ 38. Appellant respectfully requests that this Court reverse and remand the Judgment of the district court. The district court erred in failing to consider Cheryl's claim for unjust enrichment. Further, the district court erred in failing to consider the amounts that Cheryl paid to, or on behalf of, Ashley to reduce the amount of damages.

B. Standard of Review

¶ 39. "A trial court's findings of fact are not set aside unless clearly erroneous." Midland Diesel Service & Engine Co. v. Silverston, 307 N.W.2d 555, 557 (ND 1981), citing N.D.R.Civ.P. Rule 52(a). "A finding of fact is clearly erroneous if there is no evidence to support it, or if, based on the entire record, we are left with a definite and firm

conviction a mistake has been made." McDougall v. AgCountry Farm Credit Services, 2021 ND 98, ¶ 14, 960 N.W.2d 792, 797 (2021) quoting Nelson v. Mattson, 2018 ND 99, ¶ 17, 910 N.W.2d 171.

¶ 40. "Conclusions of law, however, are fully reviewable." Midland Diesel Service & Engine Co. v. Silverton, 307 N.W.2d 555, 557 (ND 1981). citing Saefke v. VandeWalle, 279 N.W.2d 415 (ND 1979). "A determination of unjust enrichment is a conclusion of law 'because it holds that a certain state of facts is contrary to equity' an therefor, a district court's determination whether there has been unjust enrichment is fully reviewable." Twete v. Mullin, 2019 ND 184, ¶ 35, 931 N.W.2d 198, 207-208 quoting Broten v. Broten, 2017 ND 47, ¶ 10, 890 N.W.2d 847 (internal citations excluded).

¶ 41. "This Court reviews a district court's evidentiary ruling under the abuse of discretion standard of review. State v. Leavitt, 2015 ND 146, ¶ 13, 864 N.W.2d 472, 478 citing State v. Streeper, 2007 ND 25, ¶ 11, 727 N.W.2d 759. "A trial court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law." Id. In ruling on the relevancy of evidence, a trial court has broad discretion to balance the probative value of the evidence against the risk of unfair prejudice, and its decision will not be overturned on appeal absent an abuse of discretion. State v. Valgren, 411 N.W.2d 390, 394 (N.D. 1987) citing State v. Newnam, 409 N.W.2d 79 (N.D.1987).

C. The District Court Erred in Failing to Consider Appellant's Claim for Unjust Enrichment

¶ 42. The district court erred in failing to consider Cheryl's claim for unjust enrichment. "The purpose of N.D.R.Civ.P. 8(a) is to give a [party] notice of the nature of a[nother party's] claims." Twete v. Mullin, 2019 ND 184, ¶ 38, 931 N.W.2d 198, 208. In

this case, Cheryl provided the Plaintiff of notice of the nature of her claims and defenses, including unjust enrichment. Cheryl specifically pled unjust enrichment as an affirmative defense. (R13:3:¶ 24). Although unjust enrichment is not specifically listed as an affirmative defense in N.D.R.Civ.P. 8(c)(1), such rule does not provide that those listed are the only ones available. Further, N.D.R.Civ.P. 8(c)(2) provides, "[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." Further,

> "Recognizing the purpose of our notice pleading requirements, we have stated the district courts 'have jurisdiction to provide a remedy where none exists at law – even if the parties have not specifically requested an equitable remedy – whenever the pleadings sufficiently give notice of the party's right and demand a judgment pursuant to Rule 8, NDRCivP.' Estate of Hill, 492 N.W.2d 288, 296 (overruled on other grounds). 'Therefore, if the original complaint shows reason to grant relief, the court may consider and determine all equitable matters that are properly incidental to the complete determination of the subject matter of the case and to do complete justice between the parties.' Id. at 296-297." Smestad v. Harris, 2012 ND 166, ¶ 11, 820 N.W.2d 363. In Smestad, we held the complaint had given the defendant fair notice the plaintiff may be entitled to recover money by equitable relief when the complaint, while not specifically demanding relief for unjust enrichment, had alleged the plaintiff was entitled to repayment of loans and demanded a money judgment and "such other and further relief as the Court deems just and equitable." Id. at ¶ 12.

Twete at ¶ 38. In this case, the Answer included unjust enrichment as an affirmative defense, asked that the action be dismissed, and "any other such relief that the Court deems just and proper." (R13). As such, even if unjust enrichment may have been mistakenly designated, Ashley was put on notice of such claim, and therefore, justice required that Cheryl be allowed to proceed with such claim.

¶ 43. At the time of trial, following admission of multiple exhibits (Rand significant testimony regarding expenses that Cheryl paid to, or on behalf of, Ashley,

Ashley's counsel asserted that the Cheryl had not properly pled unjust enrichment and that it, therefore, could not be considered by the court. (R53:111:14-113:23). Based on that argument, the district court then limited the questioning and testimony regarding such unjust enrichment. (R53:111:14-113:23).

¶ 44. Further, in its Findings, the court relied upon discovery documents it claimed were "contained in the record" alleging such documents "fail[ed] to allege any facts supporting a counterclaim of unjust enrichment." (R40:13-14:¶ 29). However, such reliance was in error, and the district court incorrectly referenced "Doc. 29 at 70." (R40:14:¶ 29). Document 29 is 56 pages long, and includes Exhibits 1 – 16. (R29). There is no page 70. Further, although the Plaintiff had listed Defendant's Answers to Plaintiff's Interrogatories, Request for Production of Documents, and Requests for Admissions to Defendant, Set No. 1 as potential Exhibit 17, the exhibit was not stipulated to by the parties for admission, neither party offered it as an exhibit at trial, and the district court never received the exhibit. (R53). As such, the court may not rely on this record or anything contained therein. Additionally, had the court reviewed the entire document, it would have found numerous answers therein explaining the expenses paid to Ashley, or on her behalf, that no amounts are owed to Ashley because of those expenses being paid.

¶ 45. In order to prevail on unjust enrichment, five elements must be established: "1) an enrichment, 2) an impoverishment, 3) a connection between the enrichment and impoverishment, 4) absence of a justification for the enrichment and impoverishment, and 5) an absence of a remedy provided by law." Twete v. Mullin, 2019 ND 184, ¶ 15, 931 N.W.2d 198, 204. The evidence in this case met all give elements as follows: 1) Ashley received an enrichment in terms of the $135,759.56 that Cheryl expended after Ashley

reached the age of 18 on Ashley's expenses, as well as those of her son, that she was responsible for; 2) Cheryl was impoverished by expending those funds, if the court finds that Ashley is entitled to damages under the conservatorship; 3) the connection between the enrichment and impoverishment is self-explanatory; 4) if the court finds that Cheryl's expenditure of such funds was not part of the conservatorship and Ashley is entitled to any compensation of them, there is no justification for the enrichment and impoverishment, and 5) because the district court's finding that laches was an appropriate remedy, there is no other remedy provided at law.

¶ 46. Based on the above, Cheryl respectfully requests that the Court find that the district court erred in not allowing her claim of unjust enrichment to proceed. She requests that this Court reverse the Judgment and remand this case to the district court for findings on Cheryl's unjust enrichment claim and an offset to the judgment awarded by the amounts that Cheryl expended, under the remedy of unjust enrichment.

D. The District Court Erred in Failing to Consider the Amounts Appellant Paid to, or on behalf of, Appellee to Reduce the Amount of Damages.

¶ 47. The district court erred in failing to consider the amounts Cheryl paid to, or on behalf of, Ashley to reduce the amount of damages. As explained above, the district court limited the questioning and testimony regarding the unjust enrichment and payments made to Ashley or on her behalf. Even if the court did not consider the unjust enrichment claim, monies expended on or on behalf of Ashley should have been considered an offset to the damages.

¶ 48. At trial, Ashley requested that she be awarded $119,994.97, representing the total amount of income for her portion of the real property from the time she turned 18 until the property was transferred to her. As explained above, and in the Amended

Summary of Accounting, Cheryl has been raising Ashley's son, A.F., since 2014 (R31:4:¶12). Cheryl further testified that, during the time she was providing care for A.F., Ashley had been receiving child support and failed to provide Cheryl compensation for her care of A.F. or to provide any care herself for her son. (R53:84:20-24). Cheryl further testified that she felt that using Ashley's portion of the land rent for such care was a wash for not receiving the child support. (R53:84:20-24). In the accounting, Cheryl estimated that the expense for raising A.F. is $70,848. (R31:4: ¶12). She also provided that her motel business forewent $30,500 for Ashley to live there for about two years. (R31:4: ¶12). At trial, Cheryl provided evidence of additional monies expended on Ashley. (R:30:Exhibit 23-28, R:32, and R33). The exhibits amount to $34,411.56. The total amounts that Cheryl expended after Ashley reached the age of 18, therefore, amounts to $135,759.56. (R30:Exhibit 23-28, R31:4: ¶12. R:32, and R33).

¶ 49. This amounts Cheryl expended for and on Ashley's behalf should have been used to offset the judgment; however, the district court failed to consider any of the expenses. It held that the $34,411.56 was expended after Ashley turned 18, with no authority that she was required to pay them, nor evidence of the amounts she actually expended for A.F.'s benefit or lost in business income. (R40:6:¶ 18). First, Cheryl testified that she used the income from Ashley's portion of the property to pay towards the expenses, as well as those of A.F.'s, since Ashley was not providing her any of the child support she was receiving for him. (R53:84:20-24). As such, Ashley directly received those payments, or the benefit therefrom, and they should have been considered to reduce the judgment. Further, Cheryl provided the Summary of Accounting (R31) as an estimate of what she spent on A.F.'s care. Finally, Cheryl did not claim that she lost business income of

$30,500, but rather, that is what the cost for Ashley and her son to stay there for the two years that they did, which was not paid by Ashley.

¶ 50. Additionally, the district court abused its discretion in not allowing testimony relevant to the issues of the case, which would have been used as additional evidence of the amounts expended on A.F., which should have been used to offset the amount of the Judgment. In ruling on the relevancy of evidence, a trial court has broad discretion to balance the probative value of the evidence against the risk of unfair prejudice. State v. Valgren, 411 N.W.2d 390, 394 (N.D. 1987). When Cheryl's counsel attempted to examine Ashley to provide additional support for such expenses and them being used to offset the judgment, the district court sustained Ashley's counsel's objection as to relevance, not allowing any testimony on the issue. (R53:111:14-23). The court had taken testimony and allowed exhibits regarding other expenses throughout the trial, showing that everyone knew they were relevant. Further, there was no risk of unfair prejudice. This was not a jury trial, and, again, the court had been taking similar testimony throughout the entire trial. As such, Cheryl respectfully requests that this Court reverse the Judgment and remand this case for further proceedings to determine the full amounts paid to, or on behalf of, Ashley for a reduction to the amount of damages ordered.

CONCLUSION

¶ 51. The district court's denial of Cheryl's unjust enrichment claim, as well as failure to consider amounts paid to, or on behalf of, Ashley to reduce the amount of damages was clearly erroneous. As such, the Appellant respectfully requests that the Judgment be reversed and remanded to the district court to consider a reduction of the

judgment for the amounts paid to, or on behalf of Ashley, as well as consideration of Cheryl's claim for unjust enrichment.

ORAL ARGUMENT REQUESTED

¶ 52. Appellant respectfully requests oral argument. Oral argument would be helpful to the court as it would allow further clarification of the facts and legal issues, as well as provide the ability for the parties to answer any questions that the Court may have.

CERTIFICATE OF COMPLIANCE

¶ 53. The undersigned, as the attorney representing Appellant, Cheryl Feickert and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 16 pages.

DATED this 22nd day of July, 2022.

/s/ Jennifer M. Gooss
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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Ashley Feickert, Plaintiff/Appellee, vs. Cheryl Feickert, individually and in her capacity as Conservator for Ashley Feickert, Defendant/Appellant.	)	**Supreme Ct. Case No. 20220102** District Ct. Case No. 52-2021-CV-00017

[¶ 1] I hereby certify that on July 21, 2022, a true and correct copy of the following documents were served the North Dakota Supreme Court E-Filing Portal:

1. **Appellant's Brief (Revised)**
2. **Certificate of Service**

[¶ 2] A copy of the foregoing was sent to the following email address:

Micheal A. Mulloy	**Clerk of the Supreme Court**
mike@mulloylaw.com	**supclerkofcourt@ndcourts.gov**

[¶ 3] To the best of this affiant's knowledge, the email addresses above are the actual email address of the parties intended to be so served. That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil and Appellate Procedure.

Dated this 21st day of July, 2022.

By: *Jennifer M. Gooss*

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[¶ 2] A copy of the foregoing was sent to the following email address:

Micheal A. Mulloy	**Clerk of the Supreme Court**
mike@mulloylaw.com	**supclerkofcourt@ndcourts.gov**

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