IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

EDWIN GURULE, individually,
and as personal representative of the estate of
SAMMY GURULE, deceased,

Plaintiff-Appellee,

vs.

FORD MOTOR COMPANY,

Defendant-Appellant.

No. 29,296

(D. Ct. No. D-0117-CV-2007-00214)

Appeal from the First Judicial District Court
Rio Arriba County, New Mexico

The Honorable Timothy Garcia

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 15-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 4209 words. This brief was prepared and the word count determined using Microsoft Office Word 2003.

Transcript citations: Citations to the trial transcript are by page and line numbers. Citations to hearing transcripts are by the date of the hearing and by page and line numbers. Citations to deposition designations are by the name of the witness and page and line numbers.

A hearing on motions in limine was held on the morning of August 11, 2008, immediately before jury selection. That hearing is cited by the hearing date and the time notation from the court monitor's log.

TABLE OF AUTHORITIES

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I. ARGUMENT

A. Ford is Entitled to Judgment As A Matter of Law Because Plaintiff Presented No Evidence That The Alleged Defect Caused The Fatal Injuries.

1. Plaintiff presented no evidence that roof crush over three inches caused the fatal injuries.

Ford demonstrated in its Brief in Chief that Plaintiff submitted no evidence that the alleged roof defect – which his expert defined as "excessive" roof crush that exceeds three inches – caused Sammy Gurule's fatal injuries. On the contrary, Plaintiff's causation expert testified that the fatal injuries occurred during the "initial" two or three inches of roof crush and that the additional "residual" roof crush did not contribute to those injuries. (Appellant's Brief in Chief at 8, 14.)

Plaintiff accuses Ford of "mischaracterizing" and "reinventing" Dr. Peles's testimony to reach this conclusion. (Appellee's Answer Brief at 8, 14.) This is an ironic accusation given that Plaintiff now admits Ford's "characterization" of Dr. Peles's testimony – that the injury was caused by the first two or three inches of roof crush. (Answer Brief at 12 ("[I]f the roof had been stronger no V buckling would have occurred . . . and the forces acting on Sammy's head from a two or three inch deformation, which would have conformed to the shape of the ground instead of buckling into a V shape, would not have been fatal." (emphasis added)).) The amount of roof crush that caused the injuries is the material fact from Dr. Peles's testimony that defeats Plaintiff's causation claim.

Plaintiff's focus on Dr. Peles's attribution of the injury to whatever "buckling" occurred during the first two or three inches of roof crush, and the roof's failure to conform to the ground, avails Plaintiff nothing, because this was not part of Dr. Huerta's defect opinion. Dr. Huerta, who was allowed to serve as Plaintiff's design expert at trial, never identified buckling from two or three inches of roof crush as a defect. He never mentioned the need to design a roof that would conform to the ground. The only alleged roof defect at issue in this case was an excessive amount of roof crush, which Dr. Huerta defined as roof crush exceeding three inches:

> Q. When you were giving your opinions about the Ranger, you were comparing it to a standard, I assume, of some sort, when you said this is below which constitutes some type of weakness or failure of the roof.
>
> A. Yes. The standard is that there is excessive intrusion into the passenger compartment.
>
> * * *
>
> Q. What's excessive?
>
> A. Well, it has identifiable failure points that result in intrusion on the order of six, eight, ten inches into the passenger compartment.
>
> Q. So a pass is five inches, then, for you, as you applied it to this Ranger?
>
> A. Well, I – I would like to see less. Personally, I would like to see less.
>
> * * *

> Q. And what standard did you apply on that? What inch did you apply when you were measuring this Ranger in your test? Two inches?
>
> A. I would say that two to three inches – in the head area – is something that could be tolerated – in terms of intrusion.

(Tr. 685:20-686:1; 687:25-688:19.) Although Dr. Huerta also mentioned the need to eliminate "the kinds of buckling" observed in the Ranger roof (Tr. 688:15-689:4), this was only a reference to excessive roof crush:

> A. I think that's pretty much it. The end goal is to make the roof reasonably strong so that you do not get large amounts of roof intrusion that can then lead to head injuries.

(Tr. 689:9-12 (emphasis added).)

Dr. Huerta never opined that a roof, no matter how much it deforms, must conform to the ground and allow no buckling at all in order to be safe and non-defective. Indeed, Dr. Huerta never testified that such a roof design is even possible. To the extent this was the basis of Dr. Peles's causation opinion, there was a complete disconnect between it and Plaintiff's defect theory.

By relying on Dr. Peles's testimony that "buckling" during the initial three inches of roof crush caused the injury, Plaintiff effectively seeks to change his defect theory in order to conform to Dr. Peles's causation opinion. He seeks to substitute "V-buckling" from less than three inches of roof crush as the definition of excessive roof crush, in place of the definition given by his design expert – roof crush exceeding three inches. (Appellee's Answer Brief at 14 ("Dr. Peles testified

that the excessive roof crush that killed Sammy Gurule was V buckling, or caving in, which occurred because the roof was too weak.").) This Plaintiff cannot do. Plaintiff cannot change his defect theory on appeal in order to avoid the absolute failure to connect the defect alleged at trial to Sammy Gurule's fatal injuries. *See Garcia v. County of Bernalillo*, 114 N.M. 440, 442, 839 P.3d 650, 652 (Ct. App. 1992) ("[N]ew theories or defenses will not be considered when raised for the first time on appeal."); *accord, Wolfley v. Real Estate Commission*, 100 N.M. 187, 668 P.2d 303 (1983).

Significantly, in denying Ford's motions for directed verdict and judgment notwithstanding the verdict, the trial court did not rely on a "buckling" or "failure to conform to the ground" causation theory – no doubt recognizing that this did not match Plaintiff's defect theory. Rather, the court erroneously concluded that Dr. Peles had testified that Sammy Gurule was outside the initial impact zone and was not injured by the first two or three inches of roof crush. (Tr. 841:11-842: 1 ("He said no, he wouldn't have been in that initial impact zone if the roof hadn't crushed as far as it did . . . ."); Tr. (12/29/08) 6:23-24, 11:8-10 ("He said there would have been no force if it had not crushed more than two inches . . . . That's what my understanding is. He would not have been within that two-inch region against the rail.").)

Plaintiff does not even attempt to defend this erroneous conclusion by the trial court, instead choosing to ignore it. Plaintiff's Answer Brief, however, confirms that the trial court erred by interpreting Dr. Peles's statement that Sammy Gurule would have "walked away" with minor injuries if roof crush had been limited to two or three inches to mean that the injury was caused by excessive roof crush. As Plaintiff now admits, Dr. Peles's explanation of this statement during his colloquy with the trial court was not that Sammy Gurule was outside the initial impact zone and injured by the excessive roof crush. On the contrary, Dr. Peles confirmed his testimony before the jury that the injury occurred when "lateral and vertical forces coincided" – i.e., during the initial three inches of roof crush – not when the vertical roof crush became excessive. (Appellee's Answer Brief at 11.) Instead, Dr. Peles claimed that a stronger roof would have reduced the impact forces during the initial two or three inches of roof crush by conforming to the ground. (Answer Brief at 12.) Regardless of the validity of that theory, a need to conform to the ground or reduce impact forces from three inches of roof crush was not the defect identified by Dr. Huerta, and Dr. Peles conceded that "[w]e did not discuss [the alleged difference in force] in the testimony" before the jury. (*Id.*)

It is plain then, and Plaintiff's Answer Brief confirms, that the trial court clearly erred by taking Dr. Peles's single statement out of context and interpreting it as evidence that the injuries were caused by excessive roof crush. *Salazar v.*

D.W.B.H., Inc., 2008-NMSC-054, ¶ 6, 144 N.M. 828, 192 P.2d 1205 ("[D]rawing inferences from statements that have been taken out of context would be unreasonable."). Plaintiff never submitted any evidence that the fatal injures were caused by the defect identified by his design expert. Accordingly, the trial court erred in denying Ford's motions for judgment as a matter of law because there was no evidence that the alleged defect caused the fatal injuries.

2. Plaintiff presented no evidence that an alternative roof design would have limited roof crush to three inches or less.

Even if Plaintiff were allowed to rely on Dr. Peles's causation theory, that theory still depended on limiting roof crush to less than three inches. (Appellee's Brief at 4 ("The fatal 'V buckling' . . . would not have occurred if overall intrusion of the roof structure had been limited to 2-3 inches.").) In order to establish causation, therefore, Plaintiff had to present evidence that a non-defective roof design would have limited roof crush to three inches or less in this accident and, thereby, prevented Sammy Gurule's fatal injuries. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 35, 132 N.M. 631, 53 P.3d 398 ("The degree of enhancement may be established by proof of what injuries, if any, would have resulted had an alternative, safer design been used."). Although Dr. Peles gave conclusory testimony that Sammy Gurule would have suffered only "minor" injuries if roof crush had been limited to two or three inches, he did not testify – and was not

qualified to testify – that a non-defective roof design would have limited roof crush to two or three inches in this accident. Significantly, neither did Plaintiff's designated design expert, Dr. Huerta. This hole in Plaintiff's evidence also defeats the causation element of Plaintiff's case.

In responding to this issue, Plaintiff argues that Ford's challenge "ignores an ample mass of evidence belying that assertion." (Appellee's Answer Brief at 32.) But Plaintiff cites no such evidence. (*See id.*) The reason for this is obvious – there is none. Plaintiff's own appeal brief thus establishes that Plaintiff failed to present any evidence on this critical element of his causation case.

Plaintiff's lengthy recitation of Dr. Huerta's testimony to establish defect or negligence (*see* Appellee's Answer Brief at 26-31) begs the causation issue raised by Ford. The causation issue is not whether the roof was defective or whether an alternative roof design would have reduced roof crush to some extent. The causation issue is whether an alternative design would have reduced the roof crush to three inches or less in this accident. Dr. Huerta never gave such an opinion and admittedly never did any testing to support such an opinion.

In fact, the only test run by Dr. Huerta on an alternative design – an 18-inch drop test on his reinforced Ranger roof – produced four to five inches of roof crush at the junction of the A-pillar, roof rail, and header near where Sammy Gurule's head would have been. (Tr. 605:22-25 ("There is some deformation downward at

the area of the top of the A pillar and the header, on the order of maybe four or five inches . . . .").) Plaintiff characterizes this test as limiting roof crush to two or three inches "above the driver's head." (Appellee's Answer Brief at 29.) But this referred to where a driver normally would sit in an upright, driving position. (Tr. 606:13-17.) That is not where Sammy Gurule's head was at impact, as Dr. Peles repeatedly made clear. (Tr. 286:25-287:16; 385:7-20; 478:12-23.) Dr. Huerta did no testing at all on the Mustang roof – Plaintiff's other alternative design – to determine how much crush it would have suffered in this accident.

Accordingly this critical element of Plaintiff's causation theory was not supported by any evidence and Ford is entitled to judgment as a matter of law.

B. Ford Is Entitled To A New Trial Because Of The Erroneous Admission Of Prejudicial Evidence.

1. The trial court abused its discretion by admitting Dr. Huerta's unqualified opinions on automotive design and safety.

a) Ford preserved this error.

Plaintiff seeks to avoid review of the trial court's erroneous admission of Dr. Huerta's unqualified opinions on whether the 1993 Ranger roof was unreasonably dangerous and the feasibility and superior safety of alternative designs by arguing that Ford failed to preserve this error. This argument is wholly without merit. When Plaintiff's counsel first attempted to elicit an opinion from Dr. Huerta regarding the safety of the Ranger roof, Ford immediately objected that Dr. Huerta

was not qualified to render opinions about whether a roof design was "safe or unsafe." (Tr. 634:22-635:4, 636:9-11.) The trial court overruled Ford's objection, finding that Dr. Huerta's lack of qualifications regarding these matters was "just foundational," "go[ing] to weight, not to the ability to give the opinion." (Tr. 636:17-20, 638:12-13.) This was error as *Alberico* makes clear that an expert may never give an opinion that he is not qualified to give. *State v. Alberico*, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993) ("We discern three prerequisites in Rule 702 for the admission of expert opinion testimony. The first requirement is that the expert be qualified."). Foundation is a separate and distinct requirement. *Id.*

Ford did not need to renew its objection to Dr. Huerta's lack of qualifications at the time his "unreasonably dangerous" opinion ultimately was given. The objection already had been definitively overruled. The subsequent questions and rulings by the trial court related to foundation, not qualifications. "The purposes of the preservation rules were served by [Ford's] objection after [Plaintiff's counsel's] first question." *State v. Soto*, 2007-NMCA-077, ¶ 14, 142 N.M. 32, 162 P.3d 187; *see* Rule 12-216(A) NMRA ("To preserve a question for review[,] it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required[.]"). Accordingly, Ford preserved for this Court's review its argument that Dr. Huerta was not qualified to give opinions on automotive design and safety.

b) Dr. Huerta was not qualified to give opinions about automotive design and safety.

The trial court erred by permitting Dr. Huerta to opine on motor vehicle design and passenger safety without ever finding him qualified by his education, training, or experience to give such opinions. *Alberico*, 116 N.M. at 166, 861 P.2d at 202 (finding three prerequisites for the admission of expert testimony, "the first [of which] is that the expert be qualified"). In response to Ford's objection to Dr. Huerta giving opinions on the safety of roof designs, as opposed to simply their strength, Plaintiff argued that other evidence in the case permitted Dr. Huerta to give such opinions, not that his background qualified him to do so. (Tr. 635:19-25, 638:3-10 ("I believe actually . . . the other notices and . . . the document from NHTSA . . . that talks about the roof crush is a bigger problem in trucks than cars . . . would enable a structural engineer to talk about whether it's unreasonably dangerous.").) The trial court then made Dr. Huerta go through a so-called "hazard analysis" to lay an evidentiary foundation for his "unreasonably dangerous" opinion, but the court never evaluated whether Dr. Huerta's education or experience in automotive design and safety — or complete lack thereof — qualified him to give such an opinion in the first place. (Tr. 647:17-22.)

This was manifest error as "a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible." *State v. Torres,* 1999-NMSC-010, ¶ 45, 127 N.M. 20, 976 P.2d 20. Plaintiff never

proved, and the trial court never found, that Dr. Huerta had any qualifications to assess the automotive design trade-offs between roof strength, energy absorption, and occupant safety that would permit him to opine that the Ranger roof was "unreasonably dangerous."

Plaintiff argues that Dr. Huerta's education as a mechanical engineer and experience analyzing the strength and integrity of structures, such as towers, shipping casks, and military weapons systems, somehow qualifies him to give such an opinion. But a mechanical engineer is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex. 1998) (holding mechanical engineer with experience designing and testing fighter planes and missiles unqualified to testify about design defects in motor vehicles). An engineer still must have expertise in the particular subject about which he is offering an opinion to be qualified to give such an opinion. *See Torres,* 1999-NMSC-010, ¶ 45.

While Dr. Huerta was qualified to opine about structural integrity and general engineering principles, he had no specialized knowledge or professional experience related to motor vehicle design and passenger safety that would qualify him to opine that the Ranger roof was "unreasonably dangerous." He had no qualifications that would permit him to assess how design changes to reduce or eliminate roof crush would affect the usefulness of a motor vehicle or ultimately

impact occupant safety. Therefore, the trial court erred by admitting his unqualified testimony.

Doubts about Dr. Huerta's qualifications to opine about automotive design and safety should not have been "'resolved in favor of admission, rather than exclusion,'" as Plaintiff contends. (Appellee's Answer Brief at 26 (quoting *State v. Hughey*, 2007-NMSC-036, ¶ 17, 142 N.M. 83, 163 P.3d 470 (internal quotation marks & citation omitted)).) The holding in *Hughey* that Plaintiff cites relates to Rule 11-702 NMRA's requirement that expert testimony assist the trier of fact — not that the expert be qualified. It is not surprising that trial courts should err on the side of admissibility with regard to that requirement as it primarily concerns relevance — not reliability — and the standard of relevance is a liberal one.

2. The trial court abused its discretion by admitting Patterson's so-called expert opinions on the value of life.

a) Ford preserved this error.

Plaintiff similarly seeks to avoid this Court's review of the erroneous admission of economist William Patterson's "expert" opinions purporting to quantify the value of life by arguing that Ford failed to preserve its objections. This argument is as baseless as Plaintiff's other preservation argument. Ford filed a pre-trial motion to exclude Patterson's testimony regarding hedonic damages, and

it renewed its objections at trial. (R.P. 1692; Tr. 891:20-892:1, 904:16-23.) That is sufficient to preserve an objection.

In its motion *in limine*, Ford presented the same arguments to the trial court that it raises now on appeal. (R.P. 1692-1702.) At a pre-trial hearing, the trial court categorically denied Ford's motion, ruling that Patterson would be allowed to testify as an expert and to present a range of benchmarks and dollar figures. (Tr. (8/11/2008) 11:25:54 to 11:26:31.) Ford renewed its objections at trial, that Patterson was unqualified to testify as an expert on hedonic damages and that his value of life opinions lacked a reliable basis, but the trial court dismissed these objections. (Tr. 891:20-892:1, 904:16-23.) On these facts, Ford cannot be held to have waived this error.

The authority Plaintiff cites to support his argument that Ford's motion *in limine* failed to preserve its objection is inapposite. Plaintiff cites *Reddin v. Robinson Property Group Ltd. Partnership*, 239 F.3d 756 (5th Cir. 2001), and *Kostelec v. State Farm Fire and Casualty Co.*, 64 F.3d 1220 (8th Cir. 1995), for the proposition that an objection is required to preserve claimed error relating to evidence admitted in violation of a granted motion *in limine*. (Appellee's Answer Brief at 36.) These cases are irrelevant because the trial court here denied Ford's motion and ruled the evidence admissible.

Plaintiff's reliance on Judge Hartz's dissent in *Buffett v. Jaramillo*, 1996-NMCA-040, 121 N.M. 514, 914 P.2d 1011 (filed 1993), *rev'd on other grounds by Buffett v. Vargas*, 1996-NMSC-012, 121 N.M. 507, 914 P.2d 1004, is also misplaced. In finding that the plaintiff's motion *in limine* failed to preserve his objection to the admission of evidence, Judge Hartz distinguished the case before him from those cases in which "'there was nothing in the manner or context in which the [evidence was] introduced at trial that was unforeseen or that cast any doubt on the applicability of the trial court's *in limine* ruling.'" *Jaramillo*, 121 N.M. at 530, 914 P.2d at 1027 (quoting *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986)). This case is like that distinguished by Judge Hartz.

Although Ford's motion *in limine* was sufficient to preserve its objections to Patterson giving expert opinions on the value of life, Ford also renewed its objections at trial. (Tr. 891:20-892:1, 904:20-21.) Plaintiff argues that Ford's objections to "lack of foundation" were too general to preserve its claimed errors for this Court's review. But the cases Plaintiff cites hold that an objection to lack of proper foundation is insufficient only "in the absence of something more to alert the mind of the trial court to the particular point of the objection." (Appellee's Answer Brief at 37 (quoting *State v. Favela*, 79 N.M. 490, 493, 444 P.2d 1001, 1004 (1968)).) Plaintiff would have this Court ignore the "something more" here that expressly alerted the trial court to the nature of Ford's objections: Ford's pre-

trial motion *in limine*. (Tr. 891:20-892:1, 904:16-23; R.P. 1692.) Ford's "foundation" objections at trial thus alerted the trial court of Ford's grounds for challenging the admissibility of Patterson's "expert" testimony on hedonic damages.

Ford also did not waive its objections to Patterson's testimony by not renewing them once the trial court definitively ruled on its admissibility. Formal exceptions are not required to preserve error for appellate review. *See* Rule 12-216(A) NMRA. The case Plaintiff relies on to argue waiver, *State v. Flanagan*, 111 N.M. 93, 98, 801 P.2d 675, 680 (Ct. App. 1990), does not stand for the general proposition Plaintiff implies: that a party is required "to make specific objections to each question he [does] not want answered," in the absence of a continuing objection. (Appellee's Answer Brief at 38.) In *Flanagan*, the defendant was required to object to each question because the trial court denied his request for a continuing objection based on its uncertainty about the issue he was trying to raise and directed him to "take it one step at a time." 111 N.M. at 98, 801 P.2d at 680. The request, therefore, failed to preserve his claimed error because it never invoked a ruling on the admissibility of the evidence.

Here, unlike the defendant's request for a continuing objection in *Flanagan*, Ford's motion *in limine* and renewed objections at trial preserved its objections to

Patterson's testimony as it invoked an informed and definitive ruling by the trial court on the admissibility of Patterson's testimony about hedonic damages.

b) Patterson was unqualified and his testimony and underlying methodology were unreliable.

Even now, on appeal, Plaintiff cannot point to any specialized education, training, or experience that would render Patterson qualified to testify as an expert on the value of the "loss of enjoyment of life." Plaintiff argues that because the various willingness-to-pay studies on which Patterson based his opinions use "cost-benefit analyses," and Patterson, as an economist, has a basic command of cost-benefit analysis, Patterson was qualified to testify as an expert about "value-of-life analyses." (Appellee's Answer Brief at 39.) But Plaintiff's argument assumes too much. It assumes, wrongly, that the cost-benefit analysis used in the willingness-to-pay studies measures what Patterson claims that it measures — fair compensation for the lost value of life.

This assumption has been strongly criticized both in the economic community and by the vast majority of courts to address the issue. *See* Kip Viscusi, *Misuses and Proper Uses of Hedonic Values of Life*, 13 J. FORENSIC ECON. 111, at 117 (2000); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1244 (10th Cir. 2000). As Patterson testified, the cost-benefit analysis used in the willingness-to-pay studies actually measures the statistical risk-money tradeoff relevant to setting an efficient level of safety. (Tr. 898:15-901:14, 904:25-905:17.) That is

considerably different from the "lost value of life" the jury is compensating in a wrongful death case. *See* Viscusi, *supra* p. 16, at 117. "[S]cientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). Because of this "mismatch" between the meaning of the cost-benefit analyses Patterson used in forming his opinions and the purposes of compensation in tort cases, Patterson's competency in cost-benefit analysis does not qualify him as an expert on the value of life as it relates to hedonic damages. As Plaintiff proffers no other basis for finding Patterson uniquely qualified to opine on the value of fair compensation for the "loss of enjoyment of life," the trial court erred by permitting Patterson to testify as an expert on such matters.

Moreover, Plaintiff curiously fails to respond to Ford's attacks on the methodology Patterson used to formulate his all-important "benchmarks." Plaintiff does not contend that the "method" used in the survey Patterson relied on to calculate his $100,000 benchmark meets the *Alberico* standard of scientific reliability. Nor does Plaintiff defend Patterson's "method" of "moving over the decimal and adding [or subtracting] a zero" (Tr. 960:1) to calculate his $10,000 benchmark. Because neither method "is capable of supporting opinions based upon reasonable probability rather than conjecture," the trial court abused its

discretion by admitting Patterson's opinions purporting to quantify the value of life. *See Alberico*, 116 N.M. at 167, 861 P.2d at 202.

II. CONCLUSION

For these reasons, as well as those fully stated in its Brief in Chief, Ford respectfully requests that this Court **REVERSE** the judgment entered for Plaintiff and **REMAND** to the district court to enter judgment in favor of Ford, or alternatively, grant Ford a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served by first-class mail to the following counsel of record this 3rd day of November, 2009.

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