IN THE SUPREME COURT OF FLORIDA

GWENDOLYN GOLDEN YOUNG, as Personal Representative of WILLISHA GOLDEN YOUNG, Deceased.
Petitioner,

v.

ST. VINCENT'S MEDICAL CENTER, INC.,
Respondent.

Case No. 85,707

Certified Question from the District Court of Appeal, First District

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC.

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STATUTES

MISCELLANEOUS

CERTIFIED QUESTION

Whether there is a right of recovery under section 768.19 of the Florida Wrongful Death Act ("the Wrongful Death Act" or "the Act") on behalf of a stillborn that died as a result of injuries received while in utero.

STATEMENT OF THE CASE

PROCEEDINGS AND DISPOSITION BELOW

The certified question arises out of an action for damages under the Wrongful Death Act in connection with a pregnancy that ended in stillbirth. The original complaint was filed in the Duval County Circuit Court by Gwendolyn Golden Young, as the personal representative of Willisha Golden Young ("Petitioner"). Ms. Young sued St. Vincent's Medical Center ("Respondent" or "St. Vincent's"), alleging that its negligence resulted in the stillbirth of her fetus. St. Vincent's moved for summary judgment on the basis that the complaint failed to state a claim because it did not allege that the fetus was born alive.

The trial court granted St. Vincent's summary judgment on the ground that Florida law permits a cause of action for wrongful death only for those born alive. Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Stern v. Miller, 348 So. 2d 303 (Fla. 1977). The District Court of Appeals for the First District affirmed the trial court in a per curiam decision. Young v. St. Vincent's Medical Ctr., 653 So. 2d 499, 20 Fla. L. Weekly D1020 (Fla. 1st DCA Apr. 24, 1995). Although recognizing the issue to

have been extensively addressed in five earlier decisions, the District Court of Appeals certified to this Court the question whether a fetus is a person within the meaning of Florida Statute section 768.19.

STATEMENT OF FACTS

In June 1989, Gwendolyn Young learned she was pregnant with twins. In November 1989, Ms. Young experienced premature labor pains and was admitted to St. Vincent's. While at St. Vincent's, Ms. Young underwent an amniocentesis to determine the maturity of her fetuses. The complaint alleges that during the procedure, the placenta was punctured, triggering bleeding. Ms. Young was subsequently discharged. On the following day, Ms. Young experienced labor pains and returned to St. Vincent's. One of the fetal monitors used initially was allegedly malfunctioning. Upon discovering the malfunction, the physicians transferred that fetus to a functioning monitor and discovered that the fetus had no heart rate. Thereafter, Ms. Young underwent an emergency cesarean section. She delivered a daughter and a stillborn infant.

SUMMARY OF ARGUMENT

The question here is not whether Gwendolyn Young's loss should be compensated, but rather, how it should be compensated. Amici curiae contend that the compensation need only and should only run to the prospective parent, who should be compensated for the loss of her child and the harm she suffered when her choice to continue a pregnancy to term was frustrated. The

understandable impulse to compensate the loss of a fetus does not warrant the recognition of a cause of action under the Wrongful Death Act by a stillborn fetus.

This Court has consistently held that Florida law does not recognize a fetus to be a "person" and thus has rejected wrongful death actions brought on behalf of stillborn fetuses. This Court should not abruptly reverse its well-reasoned course: were this Court to recognize a cause of action on behalf of the stillborn, thereby separating the interests of the fetus from those of the woman carrying it, the right of reproductive choice under the Florida Constitution could well be needlessly compromised. Instead, a prospective parent's loss should be compensated as it presently can be, within Florida's existing tort law framework, which recognizes a unified legal interest between the woman and her fetus.

ARGUMENT

I. A STILLBORN FETUS IS NOT A "PERSON" UNDER FLORIDA'S WRONGFUL DEATH STATUTE.

When interpreting the Wrongful Death Act as well as other statutes, this Court has consistently and correctly refused to construe the term "person" or "minor child" to encompass one not born alive. This Court should not change that course. Although having had ample opportunity over the years, the legislature has not acted to provide that the remedy of the Wrongful Death Act extends to stillborns. Where the state legislature has intended statutes to reach those not born alive, it has made that intention clear by explicit reference. This Court should not now

assume the role of the legislature and in effect rewrite the Wrongful Death Act to encompass a stillborn.

When the legislature enacted the Wrongful Death Act in 1972, that portion of the statute establishing those persons whose death was actionable was not significantly changed from that of the now-repealed Wrongful Death of Minors Act. Compare Fla. Stat. § 768.03 with Fla. Stat. § 768.19 (1994). Four years earlier, this Court had construed the term "minor child" as used in then-operative Wrongful Death of Minors Act, Fla. Stat. § 768.03, not to include a stillborn. Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968). The legislature's failure to change the language is significant. As this Court reasoned, "Since the legislature did not materially change the language of the prior section, it must be presumed that the legislature intended to carry forward into the new section the terms 'person' and 'minor child' as previously construed." Stern v. Miller, 348 So. 2d 303, 307 (Fla. 1977). The legislature is presumed to be aware of any judicial construction of existing law, and the reenactment of statutory language following a definite judicial construction "may be held to amount to legislative approval of the judicial construction." Id. at 308. This Court has accordingly held the term "person" under the current Wrongful Death Act does not encompass the stillborn. Id.; see also Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980) (refusing to interpret "person" in the Wrongful Death Act to include a

stillborn fetus); Duncan v. Flynn, 358 So. 2d 178, 178 (Fla. 1978) (same).

In the eighteen years since Stern was decided, the Florida Legislature has never changed the language of the Act to include the stillborn, nor has it otherwise expressed disapproval of the holdings in Stern, Duncan, or Hernandez. As the concurring opinion in the court below noted, "discerning no legislative intent to include an unborn child within the definition of 'person,' our supreme court continues to wait for legislative action on this subject. To this date, legislative action has not been forthcoming." Young, 20 Fla. L. Weekly at D1022 & n.10 (citing failure of recent efforts to amend the Wrongful Death Act).

The Florida Legislature's failure to amend the Act to provide expressly for actions on behalf of stillborn fetuses must be construed as tacit approval of this Court's reading of the Act. Indeed, the legislature's failure to act must reflect its intent that the Wrongful Death Act exclude stillborns. Whenever the legislature has intended legislation to be applicable to those not yet born or not born alive, it has made that intention clear through the plain language of the statute. Thus, the feticide statute criminalizes the "willful killing of an unborn, quick child." Fla. Stat. § 782.09 (1994). The Probate Code provides that orders in probate proceedings may in certain circumstances be binding on "an unborn or unascertained person." Fla. Stat. § 731.303(2)(c) (1994). The public health provisions

governing termination of pregnancies use the terms "fetus," "unborn child," "premature infant," and "live child" to make application of the statute perfectly clear. Fla. Stat. § 390.001(5)-(9) (1994). Florida's former abortion law proscribed, with narrow exceptions, the abortion of "a quick child." Fla. Stat. § 782.10 (repealed in 1972) (quoted in State v. Barquet, 262 So. 2d 431, 433 (Fla. 1972)).

Recognizing that the legislature specifies a statute's application to the "unborn" when it intends such legislation to reach fetuses, this Court and the lower courts of this state have declined, both in the context of the Wrongful Death Act and elsewhere, to interpret words such as "person" or "child" to include fetuses. In State v. Gethers, 585 So. 2d 1140 (Fla. 3d DCA 1991), for example, the Third District Court of Appeal declined to interpret Florida's child abuse statute as criminalizing the "transfer of an illegal drug derivative metabolized by the mother's body, in utero." Id. at 1142. In so doing, the Gethers court implicitly refused to read the criminal child abuse statute's proscription against injury to a "child" to include injury to a fetus. See Fla. Stat. § 827.04(1) (1994) (criminalizing conduct that "permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child"). Similarly, in Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992), this Court held that a woman could not be convicted of delivering a controlled substance to "a person under

the age of 18 years" by ingesting the substance prior to giving birth. Noting that "no other jurisdiction has upheld a conviction of a mother for delivery of a controlled substance to an infant through either the umbilical cord or an in utero transmission," the Court "decline[d] the State's invitation to walk down a path that law, public policy, reason and common sense forbid it to tread." Id. at 1297. This Court's ruling, were it to create a wrongful death action for the stillborn, will have implications in these innumerable other contexts in which legislation addresses "persons," "children," and so on. This Court should heed the warning in Johnson and decline Petitioner's invitation to walk down that hazardous path.

As shown above, the Florida Legislature has demonstrated that, when a statute is intended to apply to those not born alive or not yet born, it will provide so expressly. Because the legislature at no time has chosen to amend the Wrongful Death Act to include actions on behalf of the stillborn, this Court has properly refused to read the Act to encompass such actions. There is no reason for the Court now to reverse its well-settled and carefully reasoned position.

II. PETITIONER'S LOSS IS COMPENSABLE WITHIN FLORIDA'S EXISTING TORT LAW FRAMEWORK.

It is unnecessary for this Court to embark on the perilous course of creating a right of action on behalf of a stillborn, since Florida's existing tort law already provides a basis for compensating a prospective parent for the stillbirth. In Stokes,

this Court implicitly acknowledged the right to such recovery in the context of holding that the Wrongful Death Act does not provide a cause of action for the stillborn. 213 So. 2d 695. As the Court emphasized, one rationale for so holding is "that a child 'en ventre sa mere' has no independent existence apart from its mother, and that in most instances the wrong may be corrected if the mother sues and recovers for her injuries." Id. at 700. The Stokes Court emphasized that its holding "should not be construed to preclude such recovery in an action by the mother for the personal injury suffered by her." Id.

Relying on this language in Stokes, Florida's district courts of appeal have consistently recognized that a fetus "is living tissue of the body of the mother" and the prospective mother therefore has a cause of action "for the negligent or intentional tortious injury" to the fetus, "the same as she has for a wrongful injury to any other part of her body." Singleton v. Ranz, 534 So. 2d 847, 848 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1334 (Fla. 1989); see also Hilsman v. Winn Dixie Stores, 639 So. 2d 115, 117 (Fla. 4th DCA) (holding jury should have been instructed that "a fetus, while in the mother's womb, is living tissue of the body of the mother for injury to which the mother may recover damages"), review denied, 649 So. 2d 236 (Fla. 1994); McGeehan v. Parke-Davis, Div. of Warner-Lambert Co., 573 So. 2d 376, 376-77 (Fla. 2d DCA) (holding wrongfully caused loss of fetus is a legally cognizable bodily injury to the woman

whose body suffers the loss), review denied, 583 So. 2d 1036 (Fla. 1991).

A woman who delivers a stillborn may recover "damages for her physical and mental pain and anguish occasioned by the malpractice upon her and by the stillbirth of her child." Simon v. United States, 438 F. Supp. 759, 763 (S.D. Fla. 1977). Where the death of a fetus is caused by malpractice of the physician treating the plaintiff's pregnancy, the woman may also recover for "her mental pain and anguish resulting from the loss of her child." Id.; see also McGeehan, 573 So. 2d at 376 (a woman may recover for both her bodily injury and "her mental suffering associated" with the wrongfully caused stillbirth of her fetus).[1]

Florida's recognition of a cause of action by the prospective parent of a stillborn for damages in tort is consonant with the basic principles underlying tort law. The purpose of tort law is to fulfill society's primary interest in compensating those who are wrongfully injured and its secondary

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[1] As in all actions, a cause of action by a woman for personal injury resulting from the loss of her fetus must be properly pled. The woman may not recover if she alleges physical pain or mental suffering without specifically alleging that the stillbirth of the fetus was a bodily injury to her. Compare, e.g., McGeehan, 573 So. 2d at 377 (woman who alleged bodily injury to herself had personal injury cause of action; "the wrongfully caused loss of the fetus is a legally cognizable bodily injury to the woman whose body suffers the loss") and Singleton, 534 So. 2d at 848 (same) with Henderson v. North, 545 So. 2d 486, 488 (Fla. 1st DCA 1989) (denying recovery where woman alleged only mental suffering and physical pain, but no bodily injury) and Abdelaziz v. A.M.I.S.U.B. of Fla., Inc., 515 So. 2d 269, 271-72 (Fla. 3d DCA 1987) (same), review denied, 525 So. 2d 876 (Fla. 1988).

interest in punishing the wrongdoer and deterring further misconduct. "The civil action for tort . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 7 (5th ed. 1984).

Florida's tort law appropriately recognizes the grave loss a prospective parent suffers when the wrongdoing of others frustrates her choice to have a child. Acknowledging and compensating the parent for this loss directs recovery to the right place. Both the legal bases and the tools for quantifying an award to compensate the prospective parent's loss currently exist under Florida law. See, e.g., Hilsman, 639 So. 2d at 117; McGeehan, 573 So. 2d at 376; Singleton, 534 So. 2d at 848; Simon, 438 F. Supp. at 763. No such tools exist, however, for a cause of action directing recovery toward a stillborn.

III. THE RECOGNITION OF A CAUSE OF ACTION BY A STILLBORN COULD COMPROMISE CONSTITUTIONALLY PROTECTED RIGHTS.

By asking this Court to reverse its long-standing interpretation of the Wrongful Death Act and create a right to recovery by a stillborn, Petitioner is advancing a framework that not only would reach the tortious conduct of third parties toward a pregnant woman and her fetus, but could also encompass the conduct of a pregnant woman that affects her fetus. Such a framework runs counter to Florida's treatment of the relationship

between a woman and her fetus and risks intrusion on women's constitutionally protected privacy rights.

This Court has wisely refused to deny the interdependence between a fetus and the woman carrying it. Indeed, this Court has noted that "[t]he mother and fetus are so inextricably intertwined that their interests can be said to coincide." In Re T.W., 551 So. 2d 1186, 1193 (Fla. 1989). Moreover, this Court has held that a fetus does not become a person until it has established an existence separate and independent from its mother. Duncan, 358 So. 2d 178, aff'g 342 So. 2d 123, 126 (Fla. 2d DCA 1977).[2]

The conferral of independent legal rights on behalf of fetuses opens the door to causes of action against pregnant women in violation of their autonomy and privacy. Indeed, the creation of independent causes of action for fetuses could result in the treatment of pregnant women and their fetuses as adversaries in innumerable contexts. As one commentator has noted:

> Given the fetus's complete physical dependence on and interrelatedness with the body of the woman, virtually every act of the pregnant woman has some effect on the fetus. A woman could be held civilly or criminally liable for fetal injuries caused by accidents resulting from maternal negligence, such as automobile or household accidents. She could also be held liable for any behavior during her pregnancy having potentially adverse

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[2] The independent existence necessary to assert a cause of action occurs only upon the "expulsion (or in a caesarian section the complete removal) of the child's body from its mother's birth canal with evidence that the [umbilical] cord has been cut and the infant has an independent circulation of blood." Id. at 123.

> effects on her fetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery.

Dawn E. Johnsen, Note, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights, Liberty, Privacy, and Equal Protection, 95 Yale L.J. 599, 605-07 (1986)(footnotes omitted). For example, the recognition of independent fetal rights might spawn actions like Grodin v. Grodin, 301 N.W.2d 869 (Mich. 1980), where a court held that a child could sue his mother for having taken tetracycline during pregnancy, allegedly resulting in the discoloration of the child's teeth.

Recognition of a cause of action for a fetus could result in scrutiny of and interference with a pregnant woman's medical choices. For example, recognition of a fetus' right to be free from harm, independent of the woman's well-being, could prompt actions seeking to require women to undergo cesarean sections to protect their fetuses. E.g., In re A.C., 573 A.2d 1235 (D.C. App. 1990) (en banc) (vacating a lower court order that required a dying woman to undergo a cesarean section against her will); Baby Boy Doe v. Mother Doe, 632 N.E. 2d 326 (Ill. 1st Dist. 1994) (affirming a lower court's refusal to order a cesarean section for asserted benefit of fetus against the will of a pregnant woman). Such claims would run contrary to the right of medical self-determination recognized by this Court. In Re Guardianship

of Browning, 568 So. 2d 4, 9 (Fla. 1990) (recognizing right to refuse medical treatment as encompassed in right to privacy). Indeed, granting a fetus autonomous legal rights would subject virtually all of a pregnant woman's actions to monitoring, questioning, and judgment, laying a foundation for civil liability and even punitive government action against the woman.[3] Moreover, the impulse to hold a pregnant woman accountable for any and all decisions that may, in some unforeseen manner, affect her fetus, could only lead to an arbitrary legal standard by which to assess the propriety of her actions.[4] The woman's

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[3] In Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988), the Illinois Supreme Court recognized the far-reaching and harmful implications of imposing a legal duty on a pregnant woman to effectuate a healthy prenatal environment. The court noted that creating such fetal rights would

> have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities . . . . Any action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus. Mother and child would be legal adversaries from the moment of conception until birth.

Id. at 359.

[4] The Stallman court noted the practical impossibility of developing a consistent and objective standard by which to judge a woman's actions during pregnancy:

> By what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a

privacy and autonomy would thus be drastically reduced.

This Court and the lower courts of this state wisely have recognized the dangers implicit in efforts to use fetal rights to punish women based on their actions during pregnancy. Thus, the courts have consistently dismissed criminal charges brought against pregnant women based upon their prenatal conduct. E.g., Johnson, 602 So. 2d 1288; Gethers, 585 So. 2d 1140. In Johnson, this Court reversed a lower court's ruling holding a woman criminally liable for "delivering" drugs to a minor when the alleged transfer of such drugs occurred through the umbilical cord. 602 So. 2d at 1297. In Gethers, the Fourth District Court of Appeal rejected the State's contention that criminal child abuse was intended to reach not only harm to children, but also injuries sustained by fetuses during gestation. 585 So. 2d at 1141. Accordingly, the court affirmed the dismissal of the prosecution of a woman charged with child abuse based on her alleged cocaine use during pregnancy. Id. at 1143.

Implicit in these decisions is the courts' recognition that a fetus and the woman who carries it have a unified interest. In fact, this Court has acknowledged the harmful results that could occur were it to hold otherwise.[5] In both Johnson and Gethers,

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particular woman was negligent at any point during her pregnancy?

531 N.E.2d at 360.

[5] In Johnson, for example, this Court noted that the only way in which Ms. Johnson could have prevented the delivery of a controlled substance to another person under the State's theory "would have been to have severed the cord before the child was

the courts acknowledged that criminalizing drug-dependent mothers, for example, could ultimately deter women from seeking prenatal care and treatment for fear of prosecution, thereby disserving the well-being of pregnant women and potentially harming fetal health. See Johnson, 602 So. 2d at 1296; Gethers, 585 So. 2d at 1143.

Based upon careful consideration of the legislature's intent and the state's underlying public policies, this Court has followed a consistent course in which it has refused to acknowledge a theory of separate and independent fetal personhood that would give rise to actions against the woman carrying it. Any departure from this view could "impermissibly invad[e] 'the constitutional protection a woman has in deciding what to do about a pregnancy.'" Gethers, 585 So. 2d at 1142 (citation omitted). This Court cannot countenance any such intrusion upon women's reproductive decisions. This is especially the case given the Florida Constitution's independent protection of the right of reproductive choice. T.W., 551 So. 2d at 1192. As this Court has recognized, the state constitution cannot abide restraints on pregnant women in the interest of the fetus absent a compelling state interest. Id. at 1194.

The notion of independent fetal rights runs counter to well-established constitutional principles. The potential results

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born which, of course, would probably have killed both herself and the child. This illustrates the absurdity of applying the delivery-of-a-drug statute to this scenario." 602 So. 2d at 1292.

that would flow from treating fetuses and the women carrying them as independent entities, and thus possible adversaries, are reason enough to refrain from creating the cause of action Petitioner proposes.[6] The better course, and the one to which the Florida courts have strictly adhered to date, is to recognize the harm as running to the prospective parent. A woman may then recover for the unauthorized conduct of others that interferes with her reproductive choice without her own conduct being subject to scrutiny and sanction. This Court should once again "decline[] the . . . invitation to walk a path that the law, public policy, reason and common sense forbid it to tread." Johnson, 602 So. 2d at 1297.

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[6] Should this Court decide to interpret the Wrongful Death Act to recognize an independent right to sue by a stillborn fetus, it must make certain that such a cause of action applies only to the tortious conduct of third parties. The courts of this state already distinguish actions taken by a pregnant woman toward her fetus from the wrongful conduct of third parties that may give rise to civil or criminal liability upon the child's birth. Compare, e.g., Johnson, 602 So. 2d 1288 (rejecting the prosecution of a woman under drug delivery statutes for taking drugs while she was pregnant where the drugs were passed to her child through the umbilical cord) with Day v. Nationwide Mut. Ins. Co., 328 So. 2d 56 (Fla. 2d DCA 1976) (holding that a child who was born alive has a cause of action in tort for prenatal injuries inflicted by a third party). The state's feticide statute also applies a penalty against a third party who forces a woman to lose her fetus against her will, without constructing an unworkable theory based on fetal personhood that would attempt to include the offense within the murder statute. Fla. Stat. § 782.09 (1994) (criminalizing the "willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother") (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should not follow the course of action Petitioner proposes, but should answer the certified question in the negative.

DATED: September 1, 1995

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. mail to William E. Kuntz, Esq. and Earl E. Googe, Jr., Esq., Smith, Hulsey & Busey, First Union Bank Tower, 225 Water Street, Suite 1800, Jacksonville, Florida 32201; James T. Terrell, Esq., Annette J. Ritter, Esq., and Michael S. Sharrit, Esq., Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel, P.A., 804 Blackstone Building, Jacksonville, Florida 32202; Richard A. Barnett, Esq., Richard A. Barnett, P.A., 4651 Sheridan Street, Suite 325, Hollywood, Florida 33021; and Edna L. Caruso, Esq. and Philip M. Burlington, Esq., Caruso, Burlington, Bohn & Compiani, P.A., 1615 Forum Place, Suite 3A, West Palm Beach, Florida 33401 this 19 day of September, 1995.

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