

A Summary of Recent Appellate Decisions From Pennsylvania Appellate Courts & The U.S. Supreme Court

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REPORTING DECISIONS THROUGH FEBRUARY 5, 2010

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Allocatur Granted

The Pennsylvania Supreme Court has granted allocatur in the following cases on the stated issues:

A. [*Thierfelder v. Wolfert*, No. 410 MAL 2009 \(November 24, 2009\)](#)

- Whether, for purposes of determining professional negligence, a general practitioner who provides mental health treatment to a patient is held to the same higher duty as a specialist in psychiatry or psychology?

B. [*Williams v. Geico Government Employees Insurance Co.*, No. 147 WAL 2009 \(November 18, 2009\)](#)

- Whether, under the MVFRL and the Pennsylvania Supreme Court's decision in *Burstein v. Prudential Property & Casualty Insurance Co.*, 809 A.2d 204 (Pa. 2002), the "regular-use" exclusion to underinsured motorist coverage in an automobile insurance policy is valid where the insured is a police officer, who has sustained bodily injury in the course of performing his duties while driving a police vehicle, for which vehicle he could not have obtained underinsured motorist coverage?

C. [*Breneman v. Stonemor Operating LLC*, No. 174 MAL 2009 \(November 5, 2009\)](#)

- Whether this Court should adopt Section 868 of the Restatement (Second) of Torts, permitting recovery for negligent infliction of emotional distress resulting from the mishandling of a family member's corpse?

D. [*In Re Estate of John E. DuPont*, No. 181 MAL 2009 \(November 5, 2009\)](#)

- Whether the burden of persuasion is on the party offering, or the party opposing, a motion to modify an order placing documents under seal?
- Whether the lower courts erred in denying Petitioner's motion to unseal the records of Respondent's incapacitation hearing?

All decisions are "hyperlinked" to the slip opinion. All you have to do is "click" (or "ctrl + click") on the title of the case, and if connected to the Internet, your browser will open up the decision for you to read in its entirety. Try it and see!

E. [*Helpin v. Trustees of the University of Pennsylvania*, No. 266 & 267 EAL 2009 \(November 13, 2009\)](#)

- Did the trial court properly grant a nonsuit on Petitioner's claim for tortious interference with prospective economic relationships?

F. [*Department of Labor & Industry v. Workers' Compensation Appeal Board \(Crawford & Co.\)*, No. 18 MAL 2009 \(December 17, 2009\)](#)

- Whether the Supersedeas Fund may deny reimbursement of medical treatment rendered before an insurer requested supersedeas, where the Workers' Compensation Act only permits reimbursement of amounts paid as a result of a denial of supersedeas?

II. Causes of Action, Civil Procedure & Trials

A. *Public Officials - Ethics*

[*Rendell v. Pennsylvania State Ethics Commission*, Nos. 82 & 83 MAP 2008 \(Pa., November 30, 2009\)](#)

- **Holding:** The term "business," as defined in Pennsylvania's Public Official and Employee Ethics Act, 65 Pa.C.S. §§ 1101-1113, includes non-profit entities. Under the Ethics Act, public officials may not engage in conduct that constitutes a conflict of interest, which arises when a public official or employee uses his or her authority for the private pecuniary benefit of himself, a family member, or a business with which he or an immediate family member is associated.

B. *Releases*

[*Maloney v. Valley Medical Facilities, Inc.*, No. 58 WAP 2008 \(Pa., November 24, 2009\)](#)

- **Holding:** The release of a principal whose potential liability was vicarious, does not automatically release the agent from liability, particularly when the release contains specific reservations of rights. The Court offered several reasons why the inflexible common-law rule should not be extended, including the complexity of medical malpractice actions, resulting from the potential involvement of multiple caregivers, insurance schemes, and the high stakes involved, as well as the threat of impeding settlement negotiations.

[**Justice Greenspan filed a concurring and dissenting opinion**](#), suggesting that this exception to the common-law rule should be expressly limited to medical malpractice cases in which the parties draft a clear, express reservation of rights against a physician while releasing the vicariously liable hospitals.

C. *Medical Records Fees*

[*Liss & Marion, P.C. v. Recordex Acquisition Corp.*, No. 42 EAP 2008 \(Pa., November 16, 2009\)](#)

- **Holding:** A class of medical record requesters may recover, in a breach of contract claim, alleged overcharges from a copying service hired by medical care providers to fulfill their record requests under the Medical Records Act, 42 Pa.C.S.A. §6152. In this case, the copy service charged the microfilm rate rather than the applicable lower

“default” rate. Of note, the Pennsylvania Medical Society has advised its members that the Act specifies the maximum fees that a provider may charge.
<http://www.delcomedsoc.org/articles/other/medical-records-copying/2009/pdf.pdf>

D. Asbestos

□ [*Estate of Hicks v. Dana Cos., LLC, 2009 PA Super 220 \(November 18, 2009\)*](#)

- **Holding:** The trial court properly denied post-trial motions when plaintiff presented sufficient evidence that (1) the Defendant’s products were causally connected to Plaintiff’s injury, (2) Plaintiff worked frequently or regularly in close proximity to asbestos-containing products manufactured or supplied by Defendant, (3) Plaintiff testified that throughout his 41 years as a construction laborer, he was exposed to asbestos-containing gaskets and asbestos-containing rope packing, the types of products manufactured by Defendant, and (4) Plaintiff’s medical expert testified that all three types of asbestos fibers are carcinogenic with no way of being made safe.

E. Bad Faith

□ [*Johnson v. Progressive Insurance Co., 2009 PA Super 255 \(December 28, 2009\)*](#)

- **Holding:** The trial properly granted summary judgment in favor of the defendant insurer in a bad faith action that involved nothing more than a normal dispute between an insured and insurer over the value of an UIM claim. The Court ruled that, to permit this action to proceed under these facts would invite a floodgate of litigation any time an arbitration award is more than an insurer’s offer to settle, even though the award is substantially below the insured’s demand.

F. Discrimination

□ [*Cobbs v. SEPTA, 2009 PA Super 221 \(November 18, 2009\)*](#)

- **Holding:** Under the Pennsylvania Human Relations Act (PHRA), 43 P.S. § 962, a litigant must pursue an action with the Pennsylvania Human Relations Commission or by filing a new claim in the Court of Common Pleas. Where, as here, the Complaint seeks Common Pleas Court review of a PHRC determination, and does not assert an independent claim for relief, the trial court properly dismissed the Complaint. Review of a PHRC determination is within the exclusive province of the Commonwealth Court.

G. Motor Vehicle Insurance

□ [*Erie Insurance Exchange v. Larrimore, 2009 PA Super 236 \(December 8, 2009\)*](#)

- **Holding:** Under Sections 1731 and 1734 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1701 *et seq.*, an insured whose application for insurance did not request in writing lower limits for UM or UIM coverage, can recover the amount of UM or UIM coverage equal to the amount of bodily injury coverage provided for in the policy.

H. *Sovereign Immunity*

- [*Snead v. Society for the Prevention of Cruelty to Animals, No. 5 EAP 2009 \(Pa., December 29, 2009\)*](#)
 - **Holding:** The Society for the Prevention of Cruelty to Animals is not immune from suit pursuant to either the Sovereign Immunity Act or the Political Subdivision Tort Claims Act. The defense of sovereign immunity is available only to a Commonwealth Agency. [**Justice Saylor filed a concurring opinion.**](#)
- [*Phillips v. Washington County Transportation Authority, No. 358 C.D. 2009 \(Pa.Cmwlth., December 14, 2009\)*](#)
 - **Holding:** The Motor Vehicle exception to sovereign immunity under the Tort Claims Act, 42. Pa.C.S.A. § 8541, does not apply when the motor vehicle in operation at the time of injury was not a government vehicle, and the government vehicle present at the time of injury was parked.

I. *Preemption*

- [*Atwell v. John Crane, Inc., 2009 PA Super 246 \(December 17, 2009\)*](#)
 - **Holding:** Because federal law specifically does not supersede or affect any state law regarding employers' duties with respect to injuries, disease, or death of employees, the litigation of state tort claims based on work related asbestos exposure is not preempted when the employment and exposure occur in a railroad maintenance facility

J. *Welfare*

- [*E.D.B. v. Clair, No. 78 MAP 2008 \(Pa., December 29, 2009\)*](#)
 - **Holding:** Pursuant to the Fraud and Abuse Control Act (FACA), 62 P.S. §§ 1401-12, a Medicaid (Department of Public Welfare) beneficiary has a cause of action against his or her tortfeasor to recover and reimburse DPW for Medicaid benefits received during the beneficiary's minority. This is consistent with the legislature's intent that the "entire amount of any settlement of a beneficiary's claim would be subject to DPW's claim for reimbursement." Thus, in claims filed on behalf of minors, counsel must assert claims for reimbursement of medical expenses paid by DPW/Medicaid. The Court specifically concluded that a beneficiary is, first and foremost, any person who has received or will receive benefits under the Fraud and Abuse Control Act. [**Justice Saylor filed a concurring opinion.**](#)
[**Justice Baer filed a dissenting opinion, in which Justice Greenspan joined,**](#) asserting that under the FACA, the plaintiff was not the beneficiary of medical assistance payments from DPW during her minority year. Rather, because these payments were made to her parents to assist them in meeting their obligation to support their child during her years of minority, DPW cannot assert a lien against a settlement in a case such as this.

K. *Civil Procedure & Trial - Amendment of Pleadings*

□ [*Piehl v. City of Philadelphia, No. 5 EAP 2008 \(Pa., December 28, 2009\)*](#)

- **Holding:** The trial court erred by refusing to allow the plaintiff to amend the caption of their Complaint alleging negligence against the City of Philadelphia and the Commonwealth of Pennsylvania after the statute of limitations had expired to include the Department of Transportation when, in the caption, the Complaint named only the Commonwealth generally but where, in the body of the complaint, the Department of Transportation was named as a defendant. In the decision, the Court affirmed that a complaint naming only the Commonwealth could not be amended to include a discrete agency after the statute of limitations had expired. In this case, however, “DOT, a discrete Commonwealth agency that does not enjoy the same sovereign immunity as the Commonwealth, was named throughout the body of the complaint and was served with process along with the Commonwealth.” The court ruled that it could not “conclude that prejudice will result to the Commonwealth if amendment is permitted because the Attorney General, who is charged with representing both the Commonwealth and DOT, was aware of DOT being named in the suit and served, but, rather than enter an appearance on behalf of DOT, chose to appear solely on behalf of the Commonwealth.” **Justice Eakin filed a dissenting opinion. Justice Saylor also filed a dissenting opinion.**

□ [*Graham v. Campo, 2010 PA Super 5 \(January 15, 2010\)*](#)

- **Holding:** A plaintiff was properly permitted to amend her Complaint to name the previously unknown driver of the vehicle involved in the accident at issue because the defendant failed to file preliminary objections to the Complaint asking for a more specific pleading; thus, the requested amendment merely added or amplified the original complaint. It must be noted that the facts here were highly relevant in the Court's decision.

L. *Medical Malpractice - Certificate of Merit/Non Pros*

□ [*Estate of Aranda v. Amrick, 2009 PA Super 233 \(December 3, 2009\)*](#)

- **Holding:** The trial court properly granted relief from a judgment of non pros under Pa.R.Civ.P. 3051 when plaintiff's counsel mistakenly failed to file one of fifteen certificates of merit within the 60-day time period. The Court concluded that plaintiff's excuse of oversight was sufficient to satisfy Rule 3051.

M. *Medical Malpractice - MCARE Fund Jurisdiction*

□ [*Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Assoc., No. 41 MAP 2008 \(Pa., December 15, 2009\)*](#)

- **Holding:** The Commonwealth Court has original jurisdiction over MCARE Fund coverage disputes brought by a party challenging the MCARE Fund's coverage determination because no sufficient Insurance Department administrative review process is available to provide the relief sought.

N. *Medical Malpractice - Trial*

- [*Whitaker v. Frankford Hospital of Philadelphia, 2009 PA Super 216 \(November 12, 2009\)*](#)

- **Holding:** The trial court properly denied a motion for judgment notwithstanding the verdict when the evidence showed that a defendant doctor was aware of and relied upon another doctor's incorrect assessment of MRA/MRI results when making treatment recommendations.

O. *Statutes of Limitation - Discovery Rule*

- [*Simon v. Wyeth Pharmaceuticals Inc., 2009 PA Super 263 \(December 31, 2009\)*](#)

- **Holding:** The trial court erred by granting summary judgment in this pharmaceutical case. Rather, the Court held that the discovery rule applied, explaining that the determination is a factual one as to whether the party, despite the exercise of reasonable diligence, was unaware of the injury and unable to determine its cause. Thus, when the rule's application involves a factual determination regarding whether the plaintiff exercised due diligence in discovering his injury, the jury must decide whether the rule applies.

P. *Trial - New Trial*

- [*Behney v. Bolich, No. 1106 C.D. 2009 \(Pa.Cmwlth., December 18, 2009\)*](#)

- **Holding:** The trial court erred by directing a verdict as to liability when the Defendant was not negligent *per se*; thus, the issue of negligence was for the jury.

Q. *Venue*

- [*O'Hara v. The First Liberty Insurance Corp., 2009 PA Super 214 \(November 9, 2009\)*](#)

- **Holding:** The trial court properly granted preliminary objections on the issue of venue when the insurance policy at issue included a forum selection clause requiring that any suit "must be brought in a court of competent jurisdiction in the county and state of [the policy holder's] legal domicile at the time of the accident."

R. *Evidence - Expert Witnesses -- Scope of Testimony*

- [*Tucker v. Bensalem Township School District, No. 851 C.D. 2009 \(Pa.Cmwlth., December 17, 2009\)*](#)

- **Holding:** The trial court properly precluded plaintiff's expert witness, an architect, from testifying about snow and ice removal because such knowledge is within the common knowledge and experience of a lay person, and the architect had no experience or training in parking lot maintenance or snow and ice removal.

III. Unemployment Compensation

A. *Necessitous & Compelling Reason*

- [*Dopson v. Unemployment Compensation Review Board, No. 1129 C.D. 2009 \(Pa.Cmwth., November 13, 2009\)*](#)

- **Holding:** Claimant's reason for leaving employment, *i.e.*, to provide childcare to a newborn grandson, was not a necessitous and compelling reason and, instead, constituted a personal preference. Thus, denial of unemployment compensation benefits was proper.

B. *Reasonable Assurance of Work*

- [*Slippery Rock Area School District \(Hill\) v. Unemployment Compensation Board of Review, No. 14 WAP 2008 \(Pa., November 30, 2009\)*](#)

- **Holding:** A substitute school teacher, who did not have "reasonable assurance" of returning to work, was entitled to receive unemployment benefits for the summer vacation period between the academic school years under Section 402.1(1) of the Unemployment Compensation Act, 43 P.S. §§ 751-914.

C. *Substantial Change*

- [*LaChance v. Unemployment Compensation Board of Review, No. 438 C.D. 2009 \(Pa.Cmwth., December 15, 2009\)*](#)

- **Holding:** Claimant's increase in sideline business activity from zero to 20 hours per week after separation from his employer constituted a "substantial change" in the sideline business, thus removing Claimant from the sideline activity exception to the general self-employment exclusion and barring Claimant from receiving Section 402(h) unemployment compensation benefits.

IV. Workers' Compensation

A. *Coming & Going Rule*

- [*Leisure Line Adventure Trails, Coach USA Co. v. Workers' Compensation Appeal Board \(Walker\), No. 2174 C.D. 2008 \(Pa.Cmwth. November 18, 2009\)*](#)

- **Holding:** Injuries sustained while commuting to work are not compensable under the "coming and going" rule. This decision also affirmed that the issue whether a claimant is within the scope of his employment is a legal conclusion, and that *Yellow Freight* would not apply (even though the employer filed an untimely answer).

B. *Evidence - Competency of*

- [*Lancaster General Hospital v. Workers' Compensation Appeal Board \(Weber-Brown\), No. 1482 C.D. 2009 \(Pa.Cmwth., December 15, 2009\)*](#)

- **Holding:** The testimony of two medical experts, both opining that the Claimant's loss of vision resulted from an infection contracted in the scope of her employment, constituted competent evidence to prove that the injury was work-related. The testimony was competent although neither expert was able to review Claimant's medical records, which were never found, and both experts based their testimony on Claimant's consistent statements about how she contracted the infection.

- [*Southwest Airlines/Cambridge Integrated Service v. Workers' Compensation Appeal Board \(King\)*, No. 1150 C.D. 2009 \(Pa.Cmwlth., December 4, 2009\)](#)
 - **Holding:** Testimony by a Claimant's medical expert was not competent to prove that the cause of the Claimant's disability was work-related because the expert had no knowledge about the Claimant's prior head and neck injuries, history of headaches, dizziness, concentration problems, blurred vision, and other treatment..
- C. *Impairment Rating Examination (IRE)*
 - [*Barrett v. Workers' Compensation Appeal Board \(Sunoco Inc.\)*, No. 665 C.D. 2009 \(Pa.Cmwlth. February 2, 2010\)](#)
 - **Holding:** Under Section 306(a.2) of the Act, 77 P.S. §511.2, an Impairment Rating Evaluation is valid if the level of impairment is established using the most recent edition of the AMA Guides.
- D. *Job Availability -- Labor Market Surveys*
 - [*Presby Homes and Services v. Workers' Compensation Appeal Board \(Quiah\)*, No. 978 C.D. 2009 \(Pa.Cmwlth., November 5, 2009\)](#)
 - **Holding:** A modified duty job offer to an injured worker constituted a bona fide offer even though the employer reserved the right to revise the duties of the job and offered the job on an "at will" basis.
- E. *Medical Examinations*
 - [*Giant Eagle Inc. v. Workers' Compensation Appeal Board \(Givner\)*, No. 813 C.D. 2009 \(Pa.Cmwlth. November 18, 2009\)](#)
 - **Holding:** Under Section 314 of the Act, only wage loss/indemnity benefits, and not medical benefits, may be suspended as the result of an employee's refusal to submit to a court-ordered physical examination. Where a WCJ would suspend both wage losses and medical benefits, the WCJ must expressly state that the medical benefits are suspended in addition to the wage loss benefits.
- F. *Notice of Ability to Return to Work (NARW)*
 - [*Ashman v. Workers' Compensation Appeal Board \(HelpMates, Inc. and State Workers' Insurance Fund\)*, No. 1492 C.D. 2009 \(Pa.Cmwlth., January 11, 2010\)](#)
 - **Holding:** The failure to issue a Notice of Ability to Return to Work does not preclude modification of a claimant's benefits when the claimant actually returns to work.
 - [*Bentley v. Workers' Compensation Appeal Board \(Pittsburgh Board of Education\)*, No. 1560 C.D. 2008 \(Pa.Cmwlth., November 18, 2009\)](#)
 - **Holding:** A Notice of Ability to Return to Work is timely unless an injured worker shows that he is prejudiced by the delay in issuing the document. The Court also held that the correction of a technical error in the date of modification of the Claimant's benefits did not entitle claimant to reimbursement of litigation expenses.

G. Reinstatement

□ [Polis v. Workers' Compensation Appeal Board \(Verizon Pennsylvania, Inc.\), No. 1549 C.D. 2009 \(Pa.Cmwlt. February 5, 2010\)](#)

- **Holding:** When a claimant returns to work under a suspension with restrictions attributable to a work-related injury (that is, the claimant returns to a modified position rather than his time of injury position), is subsequently laid off and then petitions for the reinstatement of benefits, the claimant is entitled to the presumption that his loss of earning power is causally related to the continuing work injury. Because Claimant was on modified-duty at the time his job was eliminated, his reinstatement petition was properly granted. In this case, Claimant was forced to leave the workplace when the Employer told him that his job was being eliminated and no other work was available within his medical restrictions. Claimant did not receive a pension but was a party to a collective bargaining Enhanced Income Security Plan for being forced out of his job.

H. Retirement/Removal from the Workforce

□ [Duferco Farrell v. Workers' Compensation Appeal Board \(Zuhosky\), No. 1304 C.D. 2009 \(Pa.Cmwlt., January 14, 2010\)](#)

- **Holding:** An employer is entitled to a presumption that an injured worker has voluntarily removed himself from the workforce if the claimant has mentioned to the employer that he would like to retire, has taken Social Security retirement benefits, and has taken a union pension, thus permitting the employer to suspend the claimant's benefits. Judge Friedman dissented, arguing that the Court "should reconsider its elimination of the element of voluntariness in [*Southeastern Pennsylvania Transportation Authority v. Workmen's Compensation Appeal Board (Henderson)*, 543 Pa. 74, 669 A.2d 911 (1995), and *Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal)*, 948 A.2d 907 (Pa.Cmwlt. 2008)]." She noted "that, when jobs are difficult to find, fewer and fewer people near or at retirement age voluntarily retire. In tough times, more people take a pension or Social Security retirement benefits out of necessity, not because they want to leave the workforce. In addition, I submit that this court should reconsider the requirement in *Hensal* that claimants taking a pension establish entitlement to continuing benefits by actually applying for jobs, when suitable jobs may not exist. In other words, I submit that *Hensal* ignores the realities of today's economy and needs to be overruled."

I. Suspension for Refusing Medical Care

□ [Bereznicki v. Workers' Compensation Appeal Board \(Eat' N Park Hospitality Group\), No. 1047 C.D. 2009 \(Pa.Cmwlt., January 12, 2010\)](#)

- **Holding:** A Workers' Compensation Judge may suspend a claimant's benefits for refusing reasonable medical treatment, in this case, a detox program to reduce toxic doses of medication, that would improve the claimant's ability to function and return to work.

J. Subrogation

- [*City of Philadelphia v. Clayton*, No. 433 C.D. 2009 \(Pa.Cmwlt., December 24, 2009\)](#)
 - **Holding:** In a lawsuit for breach of contract and unjust enrichment, the Court properly required an injured worker to reimburse his employer for disability pension benefits received during the same period that the worker also received workers' compensation benefits.

K. Supersedeas Fund Reimbursement

- [*Department of Labor and Industry v. Workers' Compensation Appeal Board \(Excelsior Insurance\)*, No. 2012 C.D. 2008 \(Pa.Cmwlt., January 11, 2010\)](#)
 - **Holding:** An insurer is entitled to Supersedeas Fund reimbursement for compensation paid from the date supersedeas was requested to the date of the Third Party settlement, and also for payments made during the insurer's grace period, when the Compromise & Release Agreement, which was approved a Third-Party settlement, deliberately left open the resolution of a pending modification petition, which was later granted. Thus, in the context of Supersedeas Fund reimbursement, an insurer is not required to assume the costs of recovering a third party settlement for periods where compensation was not in fact payable.

L. Third Party Actions - Immunity

- [*Hain v. Borough of West Reading*, No. 1059 C.D. 2009 \(Pa.Cmwlt., December 23, 2009\)](#)
 - **Holding:** When a general contractor hires a subcontractor, and the subcontractor's Employee suffers a work-related injury, the injured worker is precluded from suing the general contractor for injuries compensable under the Worker's Compensation Act.

M. Third Party Immunity - Disclaimers

- [*Bowman v. Sunoco, Inc.*, 2009 PA Super 242 \(December 16, 2009\)](#)
 - **Holding:** A Workers' Compensation Disclaimer, by which a worker who receives workers' compensation benefits waives the right to file claims for damages against the employer's clients, is valid. This decision may lead to the increase in such disclaimers and is certainly an issue that should be decided by the Pennsylvania Supreme Court.

N. Unreasonable Contest

- [*Yespelkis v. Workers' Compensation Appeal Board \(Pulmonology Assocs. Inc. and AmeriHealth Casualty\)*, No. 1150 C.D. 2009 \(Pa.Cmwlt., December 4, 2009\)](#)
 - **Holding:** In this case, the employer filed a penalty petition against the claimant. The Court, in an issue of first impression, ruled that because there was no statutory basis for the petition, the case should be remanded for reconsideration of unreasonable contest attorney's fees..

UNITED STATES SUPREME COURT OPINION

A. *Ethics & Professional Responsibility*

□ [***Mohawk Industries, Inc. v. Carpenter, No. 08-678 \(U.S., December 8, 2009\)***](#)

- **Holding:** A disclosure order, which requires an attorney to produce information that is or may be adverse to the attorney-client privilege, does not qualify for immediate appeal under the collateral order doctrine, because discovery orders implicating the attorney-client privilege can be adequately reviewed on appeal from a final judgment. Rather, the limited benefits of allowing interlocutory appeals like Mohawk's are outweighed by the burden that hearing such appeals would place on the courts.

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