No. 98866-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SUSAN CHEN, as parent and natural guardian of J.L., a minor, and L.L., a minor, and NAIXIANG LIAN, as parent and natural guardian of J.L., a minor, and L.L., a minor:

Petitioner,

v.

DARREN MIGITA, M.D.; IAN KODISH, M.D.; JAMES METZ, M.D.; SEATTLE CHILDREN'S HOSPITAL,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

RULES AND REGULATIONS

I. INTRODUCTION

The superior court properly dismissed the petitioner's claims against respondents for their purported negligence in providing medical care to her younger son and for these individual respondents' reports to Child Protective Services, based on the lack of evidence of negligence or proximate cause, and respondents' statutory immunity for their reports of suspected abuse. After a subsequent judge vacated the summary judgment of dismissal, Division One, in an unpublished decision, properly reinstated the judgment of dismissal.

The Court of Appeals' decision is wholly consistent with settled law holding that final judgments cannot be vacated under CR 60 for alleged errors of law, and limiting appellate review to the propriety of the order granting or denying a motion to vacate, not the propriety of the underlying judgment. As Division One's unpublished opinion does not conflict with any decision of this Court or the Court of Appeals, raises no constitutional issues, and raises no issues of substantial public interest for determination by this Court, this Court should deny review.

II. RESTATEMENT OF THE CASE

A. Respondent Physicians examined petitioner's younger son as part of a child abuse investigation.

Petitioner Susan Chen and Naixiang Lian, parents of their two minor sons, J.L. and L.L. (collectively, "Plaintiffs"), sued respondents Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D. (collectively, "Physicians"), and their principal respondent Seattle Children's Hospital ("SCH").[1] The lawsuit arose from J.L.'s evaluation and treatment for malnutrition at SCH. J.L. was placed into state custody following his discharge based on a report by his primary care physician (who was neither a SCH physician nor a defendant in this litigation) that J.L. was the victim of his parents' suspected abuse and/or neglect. (*See* CP 187-89, 204-06, 216-19, 426)

Respondents Dr. Migita and Dr. Metz evaluated J.L. for possible child abuse and neglect at SCH, as part of its "Child Protection Team" on October 27, 2013. (CP 426-29) Dr. Metz reported that J.L. was "severely malnourished and is admitted for evaluation of malnourishment, developmental delay" (CP 428), and

[1] Respondent Physicians incorporate the facts presented by respondent Seattle Children's Hospital in its answer to the petition, pursuant to RAP 10.1(g).

that "it does seem that there is an element of neglect given his current nutritional status." (CP 429) Dr. Migita requested a psychiatric consultation of J.L. "to evaluate for the patient's exposure to trauma and for the presence of trauma related disorders." (CP 432) That consultation was performed on October 28, 2013 by respondent Dr. Kodish at SCH. (CP 432) Dr. Kodish observed J.L. as having a "severe speech delay" (CP 434), exhibiting features "for reactive attachment disorder, which may stem from the failure of strong nurturing attachment formed with his primary caregiver." (CP 435)

Following J.L.'s discharge from SCH, Child Protective Services placed J.L. into foster care along with his older brother, L.L., then age 5, while CPS investigated his mother, petitioner Susan Chen. (*See* CP 206, 218, 411) L.L. was returned home a few days later, but J.L. remained in foster care. (*See* CP 263) The dependency action for J.L. was eventually dismissed in September 2014 and J.L. returned to his parents' care. (*See* CP 264)

B. Petitioner, her husband, and their minor sons sued Physicians and respondent SCH for alleged negligence in providing medical care to the younger son, and their reports to Child Protective Service.

Ms. Chen and Mr. Lian filed three Complaints, as "parents and natural guardians" of J.L. and L.L., against the Physicians and SCH.

(CP 185, 202, 215) The complaints also identified J.L. and L.L. as plaintiffs. (*See* CP 187, 204, 217) All three Complaints were filed under the same cause number. (*See* CP 185, 202, 215) Plaintiffs filed their first Complaint against Dr. Migita and SCH on October 24, 2016 (CP 185); they then filed unsigned Complaints against Dr. Metz and SCH, and Dr. Kodish and SCH two days later on October 28, 2016. (*See* CP 202, 208-09, 215, 220-21)

Each of the three Complaints alleged the direct liability of the Physicians, and the vicarious liability of SCH. (*See* CP 190-91, 207-08, 220) Plaintiffs alleged the Physicians made a "misdiagnosis" of J.L.; "breached [their] standard of care"; "failed to deliver an accurate information to CPS"; and "failed to meet the applicable standard in 'good faith' of being expert witness," which resulted in J.L. being removed from the home by CPS, causing "conscious pain and suffering." (CP 185-90, 203-06, 216-19) Plaintiffs alleged SCH's vicarious liability because Physicians were acting "within the scope of [their] employment and agency with Defendant Seattle Children's Hospital." (CP 191, 208, 220)

On December 8, 2016, plaintiffs filed a single Summons under the same cause number directed at all three physicians and SCH. (CP 227-28) On December 12, 2016, plaintiffs served SCH with the

Summons and the Complaints against each physician (CP 245-50), but failed to personally serve the Physicians, who never authorized SCH to accept service on their behalf. (CP 194-95, 211-12, 223-24)

C. The superior court dismissed the claims against Physicians and SCH on summary judgment.

In February 2017, Physicians jointly filed a motion for summary judgment, seeking dismissal of plaintiffs' claims, both because the claims failed on the merits and because plaintiffs' failure to effect personal service deprived the court of personal jurisdiction. (CP 288-89) The Physicians expressly sought a dismissal "with prejudice" (CP 288, 309), and their motion for summary judgment asserted the following bases for dismissal of the complaints:

> Lack of personal jurisdiction for failure to effect service on Physicians;
>
> Failure to file within the statute of limitations for Dr. Kodish and Dr. Metz, as the Complaints directed to them were unsigned and void *ab initio*;
>
> Failure of proof under RCW 7.70.040 because no qualified expert has been retained who believes the Physicians' actions fell below the standard of care, or that such actions proximately caused harm;
>
> Immunity under RCW 26.44.060 for physicians who make a good faith report of alleged child abuse or neglect.

(*See* CP 288-89) As SCH had been served with a summons and complaint, SCH joined in Physicians' motion, solely on the substantive grounds for dismissal on the merits. (CP 409-15)

King County Superior Court Judge Hollis Hill denied plaintiffs' request for continuance under CR 56(f) and granted summary judgment "based on the record before the Court" on March 3, 2017. (CP 553) Judge Hill noted that plaintiffs presented no evidence that "could justify the party's opposition" to the grounds asserted "for dismissal of claims against the three doctors and Children's Hospital which appear to involve pure issues of law. Those being the failure of personal service within the statute of limitations and the immunity statute regarding reports to Child Protective Services." (CP 551-52) Judge Hill stated "that the failure of personal service on the doctors and the theory of liability against the hospital are fatal to plaintiffs' claims." (CP 554, 559-60)

Plaintiffs filed a motion for reconsideration asking Judge Hill to clarify whether the dismissal was with or without prejudice, and "[a]s to the minors' claims only, the dismissal should be without prejudice for re-filing, as they are still in their minority, and the statute of limitations is tolled until they reach majority." (CP 563) Alternatively, plaintiffs asserted for the first time that the failure to

appoint a guardian ad litem for the minors to bring the action, made the order a "nullity" as to the minors' claims. (CP 563)

Physicians responded that their "motion expressly sought dismissal with prejudice," and the court had agreed that dismissal was warranted on all grounds asserted in the motion, which included not only the issues of service and statute of limitations, but also "statutory immunity and lack of evidence." (CP 568) SCH likewise opposed the motion for reconsideration. (CP 634)

Judge Hill denied the motion for reconsideration (CP 659-60), the Court of Appeals dismissed plaintiffs' appeal, and this Court denied review of the dismissal under Cause no. 97015-7.

D. The trial court vacated the dismissal order against Physicians, twenty months after it was entered, because it found it ambiguous as to whether dismissal was with or without prejudice, but rejected the other grounds alleged by plaintiffs as reasons to vacate the order.

On March 2, 2018, plaintiffs filed a motion to vacate Judge Hill's judgment of dismissal alleging they did not have a "fair hearing;" that the order dismissing their claims was based on "false and/or highly misleading information;" that the orders were "void;" and because of the "failure of appointment of guardian ad litem for the minor children." (CP 8-16) Plaintiffs subsequently amended

their motion to additionally argue that defendants did not properly serve the motion for summary judgment (CP 111), and "newly discovered evidence" established a factual dispute as to whether Physicians acted in "good faith" under RCW 26.44.060 for purposes of immunity. (CP 114, 118)

King County Superior Court Judge Ken Schubert ("the trial court") appointed counsel for minor plaintiff J.L. (CP 161), denied the motion to vacate (CP 777-79), but then reconsidered its decision. (CP 887-90) The trial court questioned Judge Hill's failure to specify the ground upon which she based her order dismissing the claims because "[i]f the Court *did not* have personal jurisdiction over Defendants then it had *no* power to rule on the merits of the claims asserted against them and the dismissal could *not* have been with prejudice as a matter of law." (CP 888, emphasis in original) The trial court reasoned that Judge Hill's failure to state whether dismissal was with or without prejudice "creates a question of regularity of the proceedings that justifies relief from operation of those orders." (CP 888) However, the trial court refused to vacate the order of dismissal against SCH because SCH "did not move for dismissal based on lack of personal jurisdiction and thus, there is no

ambiguity as to the legal effect of the dismissal of plaintiffs' claims against" the Hospital. (CP 889)

The Physicians appealed the order vacating the summary judgment order dismissing plaintiffs' claims against them. Plaintiff Susan Chen appealed the order rejecting the other grounds raised as a basis to vacate the summary judgment order dismissing the claims against both Physician and SCH. The minor plaintiff, J.L., through his appointed counsel, appealed the trial court's original decision denying the motion to vacate, but eventually abandoned his appeal.

E. The Court of Appeals reinstated the summary judgment order of dismissal in an unpublished decision.

In an unpublished decision, Division One reversed, holding that the trial court erred in vacating the summary judgment based on its perception that the dismissal was ambiguous as to whether the dismissal was with or without prejudice, and its conclusion that Judge Hill was required to address the personal jurisdiction issue before the merits. (Op. 12) First, the Court held the "the legal effect of the court's order granting summary judgment is not ambiguous" because Judge Hill had expressed her intent to dismiss the claims with prejudice by denying plaintiffs' motion for reconsideration asking that the dismissal be without prejudice. (Op. 12) Second, the

Court held whether the issue of personal jurisdiction should been decided first by Judge Hill goes to the merits of her decision dismissing the action with prejudice and "that a judgment or order is legally erroneous is a ground for appeal, but not a basis to set aside the judgment or order." (Op. 13)

Division One affirmed on Ms. Chen's cross-appeal, noting that her "arguments do not address the standards to vacate under CR 60, but merely challenge the underlying orders granting summary judgment dismissal." (Op. 15) Nevertheless, the Court addressed each of Ms. Chen's challenges and held none required the trial court to vacate the summary judgment order. (Op. 15-17)

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals properly concluded that any "perceived legal error" in the dismissal order was not a proper ground for vacating it.

Judge Hill properly dismissed plaintiffs' claims against Physicians because they were immune under RCW 26.44.060 for their good faith report of alleged child abuse or neglect, and because, among other reasons, plaintiffs failed to present any competent expert testimony to survive summary judgment showing that the Physicians failed to act within the applicable standard of care, and that any alleged failure caused the alleged injuries to plaintiffs. *See*

Yuille v. State Dep't of Soc. & Health Servs., 111 Wn. App. 527, 533, 45 P.3d 1107 (2002), *rev. denied*, 148 Wn.2d 1003 (2003); *Morinaga v. Vue*, 85 Wn. App. 822, 831-32, 935 P.2d 637, *rev. denied*, 133 Wn.2d 1012 (1997). Judge Hill's order was not void (Pet. 11-12, 14-15) and the Court of Appeals properly held that CR 60 does not authorize vacation of a judgment for any of the perceived legal errors alleged by petitioner. Its decision follows settled law, and there is no basis under RAP 13.4(b) warranting review by this Court.

None of the grounds alleged by petitioner render Judge Hill's order "void." "[A] judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith." *Dike v. Dike,* 75 Wn.2d 1, 8, 448 P.2d 490 (1968). It is undisputed that the superior court had jurisdiction over the subject matter of plaintiffs' action for damages against the Physicians and SCH. *See In re Schneider*, 173 Wn.2d 353, 360, ¶ 14, 268 P.3d 215 (2011).

While the absence of personal jurisdiction provides a defense that is personal to a defendant, only the absence of subject matter jurisdiction deprives the superior court of the power and authority to act. *In re Ruff*, 168 Wn. App. 109, 116, ¶ 12, 275 P.3d 1175 (2012). None of the cases relied on by petitioner (Pet. 11-12, 14-15) support her claim

that a court must, at the behest of a plaintiff, vacate a dismissal as void because the court lacked personal jurisdiction over the defendant.

The Court of Appeals properly held that the trial court erred in vacating the judgment based on what the trial court believed was a "perceived legal error" by Judge Hill in dismissing plaintiffs' claims against Physicians on the merits, when Physicians had raised an affirmative defense based on a lack of personal jurisdiction. (Op. 13) Whether Judge Hill should have first addressed the procedural argument for dismissal before considering the substantive grounds was not a matter "affecting the regularity of the proceedings" warranting vacation under CR 60(b)(1). (Op. 12, quoting *Burlingame v. Consol. Mines & Smelting Co., Ltd.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986)) As this Court has held, "as a general rule," judges have the "discretion to rule on motions in whatever order the judge believes is most logical and efficient." *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 766, 575 P.2d 713 (1978).

In this case, Judge Hill apparently found it "most logical and efficient" to address the substantive grounds for dismissal since SCH indisputably was properly served and also sought dismissal on the merits. As the Court of Appeals recognized, Judge Hill's exercise of discretion in this manner did not affect the "regularity of the

proceedings." (Op. 12) No rule of procedure precludes a court from addressing substantive grounds for dismissing a case before it addresses any challenge by defendants to personal jurisdiction. *See e.g. Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571, 1575 (11th Cir.) ("We agree with the district court's personal jurisdiction conclusion, but it will not be necessary to discuss this point because we conclude that the trial court did not err in its alternative basis for dismissal – that Stephens' contentions on the merits may not survive a motion to dismiss."), *cert. denied,* 498 U.S. 998 (1990); *see also French v. Gabriel,* 116 Wn.2d 584, 806 P.2d 1234 (1991).

In *French,* defendants answered a complaint by asserting the affirmative defense of lack of personal jurisdiction due to a defect in service of the summons. When plaintiff moved for partial summary judgment, defendants asked the trial court to deny the motion, and dismiss plaintiff's CPA claim, but did not raise their affirmative defense of defective service. This Court held the trial court's order dismissing the CPA claim at the request of defendants did not preclude the court from later dismissing the entire action due to improper service of the summons on defendants. *French,* 116 Wn.2d at 592. In other words, as long as defendants have preserved their affirmative defense of lack of personal jurisdiction, a trial court can

rule on the substantive grounds for dismissal before it reaches any procedural grounds for dismissal.[2] *See also Butler v. Joy*, 116 Wn. App. 291, 296, 65 P.3d 671 (defendant did not have to raise the affirmative defense of defective service in her CR 56 motion for summary judgment requesting dismissal on substantive grounds), *rev. denied*, 150 Wn.2d 1017 (2003).

This Court's decision in *State v. N.W. Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947), does not compel a different result or warrant review. (Pet. 14-15) *N.W. Magnesite* is in fact consistent with the Court of Appeals' holding that any error by Judge Hill in reaching the substantive grounds for dismissal before addressing the procedural ground can only be remedied by a direct appeal, not a CR 60 motion to vacate. (Op. 13-14)

In *N.W. Magnesite,* two foreign corporations sought to set aside a summons and complaint that had been served on their subsidiary, which was also a co-defendant. The trial court reserved on the issue and proceeded with a trial, eventually ruling in favor of the defendants. As to the foreign defendants, the trial court

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[2] This policy makes sense as it would force a defendant to file successive motions for dismissal (first, on procedural grounds, and then later, on substantive grounds if the procedural defects raised in the first motion are cured), and would undermine judicial economy.

dismissed the action with prejudice, ruling that "the evidence discloses that no cause of action exists as to them," and because they "had not been properly served with process." 28 Wn.2d at 8.

On *direct appeal* from that order, this Court reversed both the judgment favoring the subsidiary co-defendant on the merits, and the order dismissing the foreign defendants. This Court held that "the court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties." *N.W. Magnesite,* 28 Wn.2d at 42.

The Court of Appeals' decision is not contrary to *N.W. Magnesite* because this is not a direct appeal from Judge Hill's order dismissing plaintiffs' claims against Physicians; rather, it is an appeal from the trial court's order vacating Judge Hill's order. Moreover, *N.W. Magnesite* does not hold that a court faced with alternate grounds for dismissal in a motion for summary judgment *must* address the jurisdictional grounds first. Instead, once a court concludes that it lacks personal jurisdiction over one of the defendants, the court cannot then address the merits of the action as to that defendant. Here, Judge Hill dismissed the claims against Physicians for the same reason she dismissed the claims against SCH

– on the merits. Contrary to petitioner's contention, Judge Hill did not "explicitly articulate that her decision was not based on the merits," nor does their citation to the record support this assertion. (Pet. 16, citing CP 545)

As no rule of procedure prevented Judge Hill from dismissing the claims against the Physicians on the merits while the question of personal jurisdiction was pending, the Court of Appeals properly reversed the trial court's order vacating the summary judgment order of dismissal. The Court properly held that by vacating the dismissal order based on a "perceived legal error," the trial court "treated CR 60(b) as a substitute for direct appeal. This was an abuse of discretion." (Op. 14) Its decision is wholly consistent with decisions from this Court and the Courts of Appeals holding that a judgment cannot be vacated under CR 60 because the judgment may be erroneous as a matter of law. *See e.g. Kern v. Kern,* 28 Wn.2d 617, 619, 183 P.2d 811 (1947) (Op. 13); *Burlingame,* 106 Wn.2d at 336 (Op. 10, 12, 14); *Port of Port Angeles v. CMC Real Estate Corp.,* 114 Wn.2d 670, 675-76, 790 P.2d 145 (1990) (Op. 13); *State v. Keller,* 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (Op. 13); *Marriage of Tang,* 57 Wn. App. 648, 654-56, 789 P.2d 118 (1990) (Op. 10).

B. The Court of Appeals properly concluded that petitioner's failure to request appointment of a guardian ad litem for the minor plaintiffs was not a reason to vacate the dismissal order.

The Court of Appeals also properly held that the failure to appoint a guardian ad litem for the minor plaintiffs, particularly in the absence of a timely request, does not render the order void. (Pet. 12) That holding is also consistent with settled law, and does not warrant review under RAP 13.4(b).

The absence of a guardian ad litem for minor parties has no impact on the court's jurisdiction to address the merits of a case. *See Newell v. Ayers*, 23 Wn. App. 767, 771, 598 P.2d 3, *rev. denied*, 92 Wn.2d 1036 (1979); *Dependency of A.G.*, 93 Wn. App. 268, 280, 968 P.2d 424 (1998). Judge Hill had no duty to sua sponte appoint a guardian ad litem for the minor plaintiffs in the absence of a request to do so prior to dismissing the action. Petitioner complains that "Division One suggested that RCW 4.08.050 places initial burden upon minor's parents to request appointment of Guardian ad litem" (Pet. 20), but this is entirely consistent with this Court's decision in *Kelley v. Centennial Contractors Enterprises, Inc.*, 169 Wn.2d 381, 236 P.3d 197 (2010), which held that RCW 4.08.050 "makes it clear that the obligation to make such a request rests with the minor children

or a relative or friend of the children." 169 Wn.2d at 389, ¶ 16.

Petitioner's claim that the Court of Appeals has sanctioned the "unauthorized practice of law" by granting "pro se litigants privilege to act on minors' behalf" is entirely without merit. (Pet. 17-20) The Court of Appeals did not address whether a parent can act as *pro se lawyer* for their minor children, as that issue has never been previously raised. Instead, in addressing petitioner's contention that Judge Hill should have sua sponte appointed a guardian ad litem, the Court of Appeals merely recognized that "[a] parent may initiate a lawsuit as a guardian on behalf of a minor child." (Op. 17, citing *Taylor v. Enumclaw Sch. Dist. No. 216*, 132 Wn. App. 688, 694, 133 P.3d 492 (2006))

None of the cases relied on by petitioner to argue that orders dismissing claims should be without prejudice to minors when the action is brought on their behalf by a pro se parent are inconsistent with the decision here. The cases cited (Pet. 19) all arise from a direct appeal of the order purportedly binding the minors, and not as here, an appeal from an order denying a motion to vacate that order. *See e.g. Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2nd Cir. 1990); *Osei-Afriyie by Osei-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876 (3rd Cir. 1991); *Johns v. Cnty. of San Diego*, 114 F.3d 874 (9th Cir. 1997). Further, petitioner ignores that

the minor plaintiff J.L. had in fact been appointed counsel to represent him in the hearing on the motion to vacate, and abandoned his appeal of the trial court's refusal to vacate Judge Hill's order on the ground that he was not appointed a guardian ad litem.

C. The Court of Appeals properly recognized that petitioner's other challenges to the dismissal order go to its merits, and did not warrant vacation.

Petitioner's other challenges to Judge Hill's order raised in the petition do not warrant review of the Court of Appeals' decision because those challenges, including that Judge Hill did not sua sponte recuse from the case, and denied their motion to continue the hearing on the summary judgment (Pet. 13), go to the merits of the decision, and not to the trial court's order denying the motion to vacate on those grounds.[3] In affirming on petitioner's cross-appeal, the Court of Appeals properly recognized that these challenges did not implicate any CR 60 grounds warranting vacation of Judge Hill's order. (Op. 15: the Court will "not consider [petitioner's] arguments that are solely directed at the underlying 2017 summary judgment order because those arguments cannot be raised in this appeal from

[3] Respondent Physicians also incorporates the arguments presented by respondent SCH in its answer to the petition for review, pursuant to RAP 10.1(g).

the court's decision on her motion to vacate") The Court of Appeals' decision is wholly consistent with decisions from both this Court and the Courts of Appeals holding that in reviewing an order denying a motion to vacate, the court "is limited to the propriety of the denial not the impropriety of the underlying judgment." *Bjurstrom v. Campbell,* 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980) (Op. 15); *Burlingame,* 106 Wn.2d at 336 (Op. 10); *see also Haley v. Highland,* 142 Wn.2d 135, 158, 12 P.3d 119 (2000) (appellant cannot use the appeal of a motion to reach the merits of an issue that was not appealed). Petitioner's collateral attack on the judgment of dismissal continues to ignore this settled law.

IV. CONCLUSION

This Court should deny review.

Dated this 29th day of October, 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 29, 2020, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 29th day of October, 2020.

Andrienne E. Pilapil

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October 29, 2020 - 3:21 PM

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