

No. 75021-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HEIDI MORGAN, an individual,

Appellant,

vs.

MICHAEL B. HEBERT and JANE DOE HEBERT, husband and wife
and the marital community composed thereof; WILLIAM HEBERT and
MARIA HEBERT, husband and wife and the marital community
composed thereof,

Respondents.

REPLY BRIEF OF APPELLANT HEIDI MORGAN

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A. Argument in Reply

In this case, there can be but one “reasonable conclusion drawn from the facts,” and the nature of the relationship between the Heberts and their son on the day of the collision is “a question of law.” See O’Brien v. Hafer, 122 Wn. App. 279, 284, 93 P.3d 930 (2004). Michael was acting as agent for the Heberts at the time of the collision. See id. The Heberts arguments based on facially distinguishable cases (e.g., theories of liability for allowing a car to be stolen), or the unrecognized privilege of “recapture” do not change the principal-agent analysis. The trial court erred by dismissing Ms. Morgan’s claims against the Heberts based on their vicarious liability, and by denying her request for judgment in her favor on this issue. Ms. Morgan respectfully asks the Court to reverse the trial court’s dismissal of her claims against the Heberts, to direct the trial court to enter judgment against the Heberts on the issue of their liability, and to remand the case for a trial against the Heberts on Ms. Morgan’s damages.

- 1. The Heberts ignore that all facts and all inferences drawn from them must be construed in favor of Ms. Morgan, not the Respondents: Ms. Morgan’s recitation of the facts underlying this appeal was accurate**

As an initial matter, Ms. Morgan takes exception to the Heberts’ claim that she made “factual misstatements” in her initial brief. [Br. of

Resps. at 7-8]. She accurately cited the records submitted to the trial court that support her recitation of the facts of this case. Moreover, the Heberts' "corrections" seems to ignore the fundamental principle that all the facts and **all reasonable inferences** from the facts must be viewed in the light most favorable to Ms. Morgan as the non-moving party. See Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). For example, the Heberts write, "Morgan cites CP 191-92 for the proposition the Heberts texted Michael 'the same message multiple times.' The record referred to does not discuss the content of any further text messages." [Br. of Respondent at 8]. While it may be true that the express content of each individual text was not described in the deposition testimony cited, there is certainly evidence that the message was the same, as Ms. Hebert explained, "We text, too, back and forth **telling him to get home**. We didn't want to have to call the police, but we would. **And he said he'd bring it.**" [CP 191:23-25].

Similarly, the Heberts write, "Morgan cites CP 146 for the proposition the Heberts did not view Michael's taking of the car as stealing. However, the portion of the record cited completely ignores that the question asked whether Michael had stolen anything previously..." [Br. of Resps. at 8-9]. Again, the deposition testimony provides a different inference. Ms. Hebert was not responding to a question about whether

Michael had stolen anything previously, she was commenting on his character for honesty when she testified, “I know that he had a drug problem. **But Mike has never stole from us, nor lied.**” [CP 146:19-25 (emphasis added)].

The Heberts also assert objections to citations to records submitted **by their own** attorneys to the trial court for consideration as part of the summary judgment motion. [CP 171]. For example, the Heberts object to citations to the police report as “hearsay” and because it did not “identify where the information was obtained or when the identification was issued.” [Br. of Resps. at 7]. **Their counsel** submitted the police report to the trial court as part of his declaration. [CP 171]. Similarly, the testimony of Ms. Hebert regarding what her husband said to Michael (“get the car home”) was introduced by the Heberts. [CP 170]. The Heberts waived any objection to this evidence by submitting it to the trial court as part of their motion for summary judgment. See Sevener v. Nw. Tractor & Equip. Corp., 41 Wn.2d 1, 15, 247 P.2d 237, 245 (1952).

2. The Heberts ignore the critical facts that show they exercised control over their son’s use of their vehicle at the time of the collision: at a minimum, there is a genuine issue of fact on the agency relationship

The Heberts fail to acknowledge that the existence of an agency relationship is a **fact specific inquiry** and fail to analyze the key factors

previously applied in similar cases. E.g., O'Brien, 122 Wn. App. at 281; Unruh v. Cacchiotti, 172 Wn.2d 98, 114, 257 P.3d 631 (2011). As noted in Ms. Morgan's opening brief, courts examine factors such as (a) the relationship of the parties, (b) the nature of the undertaking itself, and (c) whether the principal and agent had a mutual agreement where the principal controlled such things as (i) the timing, (ii) destination, (iii) purpose and, especially, (iv) the means of undertaking. E.g., id. at 285; Baxter v. Morningside, Inc., 10 Wn. App. 893, 896-99, 521 P.2d 946 (1974). As the Heberts acknowledge, [Br. of Resps. at 11], the crucial factor is **the right to control** the manner of performance that must exist to prove agency. O'Brien, 122 Wn. App. at 283-84. As noted by Division I previously,

One driving a motor vehicle at the request and for the purposes of the owner is usually treated as the servant or agent of the owner so as to impose on the latter liability for negligence in the operation of the vehicle.

Id. at 284 (emphasis added). In this case, applying the above factors to the facts shows Michael was the agent of his parents at the time of the collision.

a. Who: The Heberts' son

The Heberts ignore the importance of their relationship with Michael when determining whether an agency relationship existed. See,

e.g., Pagarigan v. Phillips Petroleum Co., 16 Wn. App. 34, 38, 552 P.2d 1065 (1976)(the “relationship of the parties” is among the “determinative factors” in the right to control analysis). The Heberts cite to Kroshus v. Koury, 30 Wn. App. 258, 633 P.2d 909 (1981) and McLean v. St. Regis Paper Co., 6 Wn. App. 727, 496 P.2d 571 (1972) as factually “similar” cases where the courts found no agency relationship. [Br. of Respondent at 19-20]. However, these cases only illustrate the importance of closely examining the relationship between the parties when determining whether an agency relationship exists. See McLean, 6 Wn. App. at 733 (finding “no error occurred in submitting to the jury the issue of vicarious liability based on agency” despite the non-existence of an employer/employee relationship). Both Kroshus and McLean involve persons without any direct relationship with the alleged principal.

By contrast, in this case the parent/child relationship is the foundation that led to the Heberts’ decision to give Michael permission to drive their car “home” versus treating him as a thief. Despite the Heberts’ attempts to explain away her testimony, Ms. Hebert testified at her deposition that Michael “**has never stolen from us.**” [CP 146; CP 196:21-23 (emphasis added)]. Mr. Hebert similarly testified that he did not call the police because “it was my son.” [CP 222:12-13]. Because Michael was not a stranger who stole their car, the Heberts instructed him to drive their

vehicle “home” and authorized his limited use of the car. [CP 191:18]. The relationship between the Heberts and Michael weighs in favor of finding an agency relationship.

b. What: The Heberts’ vehicle

The Heberts also ignore the import of Michael’s use of **their vehicle** at the time of the injury. See O’Brien, 122 Wn. App. at 285 (identifying factor (iv) “the means of undertaking”). Attempting to distinguish O’Brien, Baxter and Pagarian, the Heberts assert that “not only did the Heberts have no right to exercise control over their son’s actions, they also exercised no control.” [Br. of Resps. at 24]. There is simply no reasonable dispute that the Heberts possessed a “right to control” the use of their own vehicle. The real inquiry is whether they exercised that right and whether Michael assented to their control.

Under the undisputed facts of this case, the Heberts exercised their control by instructing their son to drive their car to them. Michael manifested his assent to the Heberts’ right of control by explicitly agreeing to return the car, and later by attempting to drive it back to them before the crash. See O’Brien, 122 Wn. App. at 283-84. Though the Heberts’ brief repeats an inaccurate factual statement made to the trial court: that their son “refused” to return the car, [Br. of Resps. at 14; CP 18:2-4], the testimony submitted actually shows the opposite: Michael agreed to return

the car to his parents, texting the Heberts when they told him to return the car, “Okay.” [CP 191:19-21]. Ms. Hebert described the communications as follows:

Q So what was your understanding of how that conversation between Michael and your husband ended?

A Get the car home.

Q And **what do you understand what Michael said in response to that?**

A Okay.

Q That’s what you understood him to have said?

A We text, too, back and forth **telling him to get home.** We didn't want to have to call the police, but we would. **And he said he’d bring it.** We text for days...

The Heberts instructed their son to drive their car “home,” Michael agreed, and, on the way home, crashed into Ms. Morgan.

c. **When/Why: On a trip authorized by the Heberts, agreed to by Michael, and to benefit the Heberts**

The Heberts further ignore that the timing of the collision and purpose of Michael’s trip is critical. The crash occurred **when Michael was driving his parents’ car to their home and for their benefit.** See O’Brien, 122 Wn. App. at 285 (identifying factors (i) the timing, (ii) destination, and (iii) purpose). Focusing almost exclusively on their son’s initial taking of their vehicle, the Heberts ignore that their **later**

instructions to their son led to Michael's use of the vehicle **at the time of the collision**.

The Heberts controlled the timing, destination, and purpose of their son's use of the car. At the time of the collision, Michael was **not on a detour** for his own benefit, he was en route to his parents' home to return the car, and only a few blocks from the Hebert home. [CP 153, 204 and 239]. As Michael explained at his deposition, he was "[j]ust driving [the car] back to my parents' when the accident happened." [CP 205:3-4; CP 204 ("I was driving to my parents' house to return the car.")]]. The timing of the collision further demonstrates the principal-agency relationship between the Heberts and their son, Michael. See O'Brien, 122 Wn. App. at 284 ("One driving a motor vehicle at the request and for the purposes of the owner is usually treated as the servant or agent of the owner so as to impose on the latter liability for negligence in the operation of the vehicle.").

- d. Ms. Morgan is not claiming the Heberts are liable for "negligently" allowing their vehicle to be stolen: the correct question is whether an agency relationship existed at time of collision**

Relying on a series of out-of-state decisions and facially distinguishable Washington decisions pertaining to vehicles stolen by third-parties, the Heberts assert that Ms. Morgan cannot show their actions

proximately caused her injury. [Br. of Resps. at 12-14]. These decisions have no bearing on Ms. Morgan's claim that the Heberts are liable as a principal for their son's negligence. These cases generally involve strangers stealing a car and the primary issue in these decisions is whether "negligently" allowing a vehicle to be stolen can create liability for the vehicle owner. [Brief of Resp. at 12-14].

Ms. Morgan has not alleged the Heberts are liable because they failed to secure their car keys, failed to keep their son out of their home despite a drug habit, or should have taken different steps to prevent their car from being taken from their home by their son. The Heberts are liable because they authorized their son to drive their car for the very trip that resulted in her injury.

Further, while the Heberts' focus on "proximate cause" confuses the issues (the correct inquiry is whether Michael's relationship with his parents establishes principal/agent liability), the undisputed facts show that it was, in fact, the Heberts' instruction that proximately caused their son to use the vehicle at the time of the collision with Ms. Morgan. None of the "stolen car" decisions have any similar post-taking authorization and do not have any significance to this matter.

3. “Recaption” or “replevin” is an inapplicable and unrecognized “privilege” that the Heberts have failed to show applies

The Heberts claim that whether they created an agency relationship with their son or not, they are immune from any liability due to a “replevin” or “recapture” privilege. The Heberts assertion of “privilege” as a means to defeat agency is unrecognized, inapplicable and improperly asserted in this case. The Heberts have not cited a single Washington authority that recognizes a recapture of chattel privilege, nor any persuasive authority that bears any resemblance to the facts of this case. The Heberts failed to raise this claimed privilege as an affirmative defense, or even at all, until they filed a reply brief to the trial court, and should be equitably estopped from challenging their principal liability based on this novel theory now. Ms. Morgan asks the Court to apply the multifactor test regarding agency, not create a new exception to agency liability based on replevin.

a. No Washington decisions have recognized a “recaption” privilege, the Heberts have not cited any non-binding similar decisions, nor provided a compelling reason to create an exception to general agency principles

The Heberts have not cited, nor can Ms. Morgan find, any decision that applies “replevin” or “recaption” to a similar set of facts or uses this doctrine to prevent agency liability, though they claim “recaption...does

not create” an agency relationship. [Brief of Resp. at 23]. The out-of-state cases cited by the Heberts do not address anything close to the scenario at issue. Giant Food v. Mitchell, 640 A.2d 1134, 334 Md. 633 (1994)(involving a dismissal of a Maryland lawsuit against shopkeeper who pursued shoplifter who injured a customer); Hanfield v. Gracen, 567 P.2d 546, 279 Ore. 303 (1977)(upholding jury instruction on recapture in Oregon lawsuit against shopkeeper who injured third-party when firing weapon in attempt to recover his merchandise). These cases hold a person may use reasonable force to reacquire stolen property. There is no legal authority that insulates principals from liability based upon agency, or prevents an agency relationship from being created between parents and a child who borrows their car and is subsequently given permission to use it.

b. The Heberts themselves do not describe the car as stolen because it was taken by their son

The Heberts’ argument regarding “recapture” is based on an assertion that their vehicle was “stolen” and they could use any means reasonably necessary to recover it. However, as noted above, the Heberts themselves testified that they did not view the car as “stolen.” Their vehicle was not taken by a stranger, it was used by their son. According to Mr. Hebert, he did not call the police to report it stolen because “it was my son.” [CP 222:13]. As noted above, though Ms. Hebert testified at her

deposition that Michael did not have “permission” to take the car, she did not characterize it as stolen. [CP 146:19-25].

It is contradictory for the Heberts to testify that they did not view their son’s use of the car as a theft while claiming a privilege to use any action (such as “birdshot” or reasonable force) to recover purportedly “stolen” property without any liability to innocent third-parties. There is qualitative difference between the temporary use of a car by a family member, whether *initially* permissive or not, versus a stranger who takes the car without any intent to ever return it. This distinction highlights the importance of applying the established agency factors, which includes consideration of the relationship between the alleged agent/principal. See, e.g., O’Brien, 122 Wn. App. at 285.

- c. To the extent that “recaption” or “replevin” did apply, the Heberts must prove the privilege; they never pled replevin in their Answer and have failed to prove this affirmative defense**

Though the “recapture” doctrine has no bearing on this case, Ms. Morgan notes that the Heberts failed to accurately describe their knowledge of their son’s suspended license and drug abuse to avoid a question of fact on an admitted limitation to this doctrine. As a claimed “privilege,” the Heberts bear the burden to prove “recapture” is applicable here as a matter of law. See, e.g., Momah v. Bharti, 144 Wn. App. 731,

182 P.3d 455 (2008)(in defamation action, trial court erroneously required plaintiff to establish lack of privilege by clear and convincing evidence). The Heberts admit that the privilege is inapplicable “if the actor realizes or should realize that his act creates an unreasonable risk of harm.” [Br. of Resps. at 15]. As such, the Heberts’ inaccurate descriptions of their knowledge about their son’s license and drug use are telling..

The Heberts’ brief claims “there is no admissible evidence the Heberts knew Michael did or did not have his license, despite their inklings.” [Br. of Resps. at 16]. At their depositions the Heberts testified differently, stating that they both believed that their son had a suspended license. Ms. Hebert testified as follows:

Q My impression is that he had official action taken to suspend his license. Did you ever hear any such thing?

A I figured that. Did I know for proof positive? -- no.

[CP 145:12-14]. Mr. Hebert testified as follows:

Q. Tell us whether you believe that Michael had been specifically informed he was not to ever drive the Infinity?...

A Well, he didn't have a license for one thing...

[CP: 219:10-15]. The Heberts fail to explain why these statements are not admissible to show their knowledge.

The Heberts also ignore their knowledge that Michael was an illicit drug user. Ms. Hebert testified, “**I know that he had a drug problem...**” [CP 146:24-25]. Mr. Hebert testified, “...he cut everything off. **Once he got on drugs...**” [CP 140:15-16]. Given that testimony, even if a “recapture” privilege applied, there would be a question of fact regarding whether by authorizing their son, with a suspended license and drug habit, the Heberts realized that their instructions to their son created an unreasonable risk of harm to others, like Ms. Morgan.

d. The Heberts should be equitably estopped from claiming “privileged” actions given their failure to identify this issue in their Answer and waiting until their Reply brief to trial court to assert it

Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” Lybbert v. Grant Cty., State of Wash., 141 Wn.2d 29, 35, 1 P.3d 1124, 1127–28 (2000) (citing Kramarevcky v. Dep’t of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993)). The elements of equitable estoppel are: “(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to

contradict or repudiate the prior act, statement or admission.” Id. (internal citations omitted). Equitable estoppel must be shown “by clear, cogent, and convincing evidence.” Id. Failure to assert an affirmative defense in an Answer may provide a basis for establishing equitable estoppel. See King v. Snohomish Cty., 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (citations omitted) (applying equitable estoppel and examining whether defense was asserted in Answer as factor of in determining whether party was dilatory).

Here, the Heberts *first* raised the issue of “replevin” in their reply in support of the motion for summary judgment to the trial court. [CP 11 19 (Reply); CP 157-168 (Motion)]. This prevented Ms. Morgan from responding to this novel argument. They did not assert “replevin,” “recaption” or “recapture” as an affirmative defense. [CP 244-45]. Counsel, jointly representing the Heberts and Michael, refused to allow inquiry into the circumstances of Michael’s taking of his parents’ car at his deposition. [CP 32:14-21].

Given this context, it would be inequitable to allow the Heberts to use this new “privilege” as a means to defeat agency liability given that they waited until Ms. Morgan had no opportunity to challenge the basis for the defense, prevented inquiry into certain factual areas relevant to the purported “theft,” and prevented Ms. Morgan from responding to their

previously undisclosed defense. See King, 146 Wn.2d at 424. To the extent the Court reaches the issue of “recaption,” Ms. Morgan asks it to apply equitable estoppel to this defense.

4. Ms. Morgan’s request that trial court find in her favor as matter of law was appropriate: Washington courts have long held that a trial judge may find in non-moving party’s favor based on facts presented

As they did at the trial court, the Heberts dispute the appropriateness of Ms. Morgan’s request for entry of summary judgment against the Respondents based on the undisputed facts. [Br. of Resps. at 25-30]. Although objecting to the timeliness of Ms. Morgan’s request, the Heberts do not cite any case law to challenge the fundamental principle that summary judgment may be granted in favor of the nonmoving party if it becomes clear that she is entitled to summary judgment. E.g., Rubenser v. Felice, 58 Wn.2d 862, 365 P.2d 320 (1961) (summary judgment reversed and granted to nonmoving party to quiet title); Impecoven v. Dep’t of Revenue, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992)(“Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party.”) (citing Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1967)(acknowledging procedure for granting summary judgment for a nonmoving party)); and Washington Ass’n of Child Care Agencies v. Thompson, 34 Wn. App. 225, 660 P.2d

1124 (1983) (appellate court granting nonmoving party summary judgment)). These decisions only illustrate the longstanding concept that summary judgment may be entered in favor of the non-moving party based on the undisputed facts. See also id. (“even though the state and DSHS did not move for summary judgment of dismissal, we believe that they as nonmoving parties are entitled to a summary judgment...”). There is no limitation provided in these decision, nor in any case cited by the Heberts, that this power to grant judgment in favor of the nonmoving party is limited to “binary issues” as alleged by Respondents, [Br. of Resps. at 29-30], the question is whether there are any genuine issues of material fact.

Here, the facts relied upon by the Heberts in their summary judgment motion and their own deposition testimony demonstrated their liability to Ms. Morgan under agency principles. The Heberts instructed their son to drive their car “home” so that they could use it. There is only “one reasonable conclusion drawn from the facts” and “the nature of the relationship between the parties” is a question of law. See O’Brien, 122 Wn. App. at 284. The Heberts’ instruction to their son that authorized his use of their car at the time of the collision established a principal/agent relationship.

5. The arbitration award is not binding on the Heberts as they were not parties to the case at time of decision; Ms. Morgan asks the Court to reverse and remand this matter for trial on her damages

Finally, in their Response, the Heberts argue that, because the “arbitration conclusively established Morgan’s total damages in this matter,” the “only remaining issue on remand” would be “whether the hearsay statement establishes liability, which would be before the arbitrator.” [Br. of Resps. at 32]. Although not asserting it as such, the Heberts appear to be raising the issue of collateral estoppel, or issue preclusion. However, collateral estoppel is an affirmative defense, and the party asserting it has the burden of proof. State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300 (2002) (citing, e.g., Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash L. Rev. 805, 812-13 (1985)). For collateral estoppel to apply, the Heberts must show that: (1) the issue decided in the arbitration is identical with the one presented in the court action, (2) the prior arbitration ended in a final decision on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party in the arbitration, and (4) application of the doctrine does not work an injustice. See, e.g., Robinson v. Hamed, 62 Wn. App. 92, 98–99, 813 P.2d 171 (1991); see also Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833

(2000). Collateral estoppel requires the parties have a full and fair opportunity to present their case. Id.

The Heberts have not met their burden to show collateral estoppel applies to Ms. Morgan's damages. For example, even if true, that Ms. Morgan's damages were "conclusively established" at arbitration does not show the issues are identical (element #1) or that application of collateral estoppel would not work an injustice (element #4). And the Heberts have not shown that Ms. Morgan had a full and fair opportunity to present her case at the previous arbitration. For example, Ms. Morgan stated her claim was arbitrable only because she waived claim in excess of \$50,000 several months before the Heberts were summarily dismissed. [CP at 257-58; CP 9-10]. The arbitration had jurisdictional limit on damages of \$50,000 for only a single remaining claim, and the award to Ms. Morgan was close to that limit. [CP 252-53, 257-58]. The Heberts have not asserted, properly nor proven, that Ms. Morgan is precluded from litigating her damages against the parties who were dismissed prior to the arbitration award entered solely against Michael. At a minimum, Ms. Morgan asks the Court to reserve this issue for determination by the trial court upon remand.

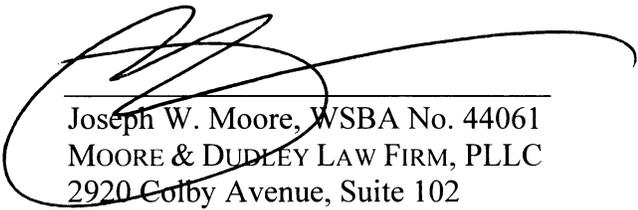
B. Conclusion

Ms. Morgan asks the Court to reverse the trial court's summary judgment dismissal of William and Maria Hebert. In addition, Ms. Morgan

asks the Court to direct the trial court to enter judgment on the Heberts' liability and to remand this case for a trial against the Heberts on her damages. The trial court is best suited to address any offset necessary following a verdict on her damages. The Court should award costs on appeal to Ms. Morgan.

DATED this 18th day of August, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I caused a copy of the forgoing to be served on the following people in the manner indicated below:

Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101-4170	<input type="checkbox"/> U.S. mail, first-class postage prepaid <input checked="" type="checkbox"/> Hand delivery <input type="checkbox"/> By legal messenger <input type="checkbox"/> By email, per prior consent
A. Troy Hunter Justin P. Walsh Issaquah Law Group 410 Newport Way NW, Suite C Issaquah, Washington 98027 <i>Attorney for Defendants</i>	<input type="checkbox"/> U.S. mail, first-class postage prepaid <input type="checkbox"/> Hand delivery <input checked="" type="checkbox"/> By legal messenger <input type="checkbox"/> By email, per prior consent
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Dated: August 18, 2016



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