IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00095

ZEONIA WILLIAMS, INDIVIDUALLY AND
ON BEHALF OF THE WRONGFUL DEATH
HEIRS OF ANTHONY WILLIAMS, DECEASED — APPELLANTS

VS.

DEBORAH SKELTON, M.D. AND
STEVEN J. PATTERSON, M.D. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
HONORABLE W. SWAN YERGER, CIRCUIT JUDGE

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal:

A. Zeonia Williams, Plaintiff/Appellant

B. Wrongful Death Heirs of Anthony Williams, Deceased

C. D.L. Jones, Jr., Esq., Attorney for Plaintiff/Appellant

D. Deborah Skelton, M.D., Defendant/Appellee

E. Whitman B. Johnson III, Esq. & Lorraine W. Boykin, Esq.
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Attorneys for Defendant/Appellee Dr. Skelton

F. Steven J. Patterson, M.D., Defendant/Appellee

G. Rebecca Lee Wiggs, Esq.
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Attorneys for Defendant/Appellee Dr. Patterson

H. The Honorable W. Swan Yerger, Hinds County Circuit Court Judge

THIS the 17th day of October, 2007.

WHITMAN B. JOHNSON III, MSB [redacted]
LORRAINE W. BOYKIN, MSB [redacted]
REBECCA LEE WIGGS, MSB [redacted]

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STATEMENT OF THE ISSUE

QUESTION: Was the trial court's dismissal of the plaintiff's complaint proper given the undisputed fact that the plaintiff filed suit prior to the expiration of the sixty (60) days notice period required by MISS. CODE ANN. § 15-1-36(15)?

ANSWER: Yes. The judgment of the trial court must be affirmed because the plaintiff failed to give the defendants sixty (60) days notice before filing a complaint against them as required by statute. The complaint was filed only thirty-seven (37) days after the notice of intent to sue letter was sent, despite Section 15-1-36(15)'s language that "[n]o action ... may be begun" prior to the giving of sixty (60) days notice. During this period of time, a plaintiff is actually prohibited from filing suit. *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005). Plaintiff's failure to satisfy the statutory pre-suit notice requirement automatically results in dismissal according to current Supreme Court rulings such as *Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006). Finally, since plaintiff's complaint was a nullity under *Dalton v. Rhodes Motor Co.*, 153 Miss. 51, 120 So. 821 (1929), the statute of limitations was not tolled by the premature filing.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On June 15, 2005, D.L. Jones, Jr., Esq. sent a letter to Dr. Deborah Skelton and Dr. Steven J. Patterson notifying them that Mr. Jones' law firm had been retained by the wrongful death heirs of Anthony Williams to pursue a wrongful death claim against persons involved in the medical care provided to Mr. Williams on August 14, 2003 prior to his death on September 24, 2003. (R. 29-30).

Less than sixty (60) days later, on July 22, 2005, Zeonia Williams, individually and on behalf of the wrongful death heirs of Anthony Williams, filed a complaint in the Hinds County Circuit Court against Dr. Deborah Skelton, Dr. Steven J. Patterson, and John Does, alleging that medical negligence was the proximate cause of Mr. Williams' death. (R. 3-6). All defendants responded to the plaintiff's allegations, denying any liability for the decedent's death. (R. 8-14, 21-25, 31-36). These answers also raised as a defense plaintiff's failure to satisfy the tort reform requirements, including the sixty (60) day notice provision.

Dr. Skelton subsequently filed a Motion to Dismiss or for Summary Judgment setting out in more detail the prematurity defense raised in her answer. (R. 62-66). The basis of this motion was the fact that the plaintiff failed to adhere to the sixty (60) day notice requirement found in MISS. CODE ANN. § 15-1-36(15), with the plaintiff having provided only thirty-seven (37) days notice prior to filing suit on July 22, 2005. Dr. Patterson filed a motion on the same grounds and joined in Dr. Skelton's motion to have the claims dismissed for the violation of MISS. CODE ANN. § 15-1-36(15). (R.70-75).

A hearing took place before Judge W. Swan Yerger, and a Judgment of Dismissal was entered on December 14, 2006, dismissing the claims against Dr. Skelton and Dr. Patterson based

on the plaintiff's failure to satisfy the pre-suit notice requirement found in MISS. CODE ANN. § 15-1-36(15). (R. 81-82). The plaintiff filed her Notice of Appeal on December 21, 2006. (R. 83-84).

B. FACTS

In August 2003, Anthony Williams was admitted to St. Dominic Hospital by Dr. Deborah Skelton. Dr. Skelton consulted with another physician, Dr. Steven Patterson, regarding Mr. Williams during this hospitalization, and the physicians ordered various tests and performed various procedures to try to determine the cause of and treat Mr. Williams' abdominal pain. Surgery was performed on Anthony Williams on August 14, 2003. Mr. Williams unfortunately died on September 24, 2003, after which the plaintiff filed suit against Dr. Skelton and Dr. Patterson alleging that their medical negligence was the proximate cause of Mr. Williams' death. However, the facts regarding the care have no real bearing on the appeal. The only relevant fact is that suit was prematurely filed in violation of the sixty (60) day notice requirement found in Section 15-1-36(15).

SUMMARY OF THE ARGUMENT

Under Mississippi law, a plaintiff is required to provide notice of intent to sue a health care professional at least sixty (60) days prior to filing her complaint. MISS. CODE ANN. § 15-1-36(15). The Mississippi Supreme Court has determined that a plaintiff's failure to satisfy the pre-suit notice requirement mandates dismissal of the plaintiff's complaint. *See Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006); *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006); *see also University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006) (failure to satisfy 90 day notice requirement of MISSISSIPPI TORT CLAIMS ACT requires dismissal).

This claim arises out of surgery performed on Anthony Williams on August 14, 2003. Unfortunately, Mr. Williams died on September 24, 2003. Zeonia Williams sent notice of her intent to sue to Dr. Skelton and Dr. Patterson on June 15, 2005. However, plaintiff then prematurely filed her complaint on July 22, 2005, waiting only thirty-seven (37) days after sending the notice of intent to sue. This non-compliance with the sixty (60) day notice requirement resulted in the trial court's dismissal of her complaint, which was appropriate under Mississippi statutory and common law. The legislature did not provide any exception to the sixty (60) day notice provision which would excuse the plaintiff's failure to satisfy the statute, and this Court should affirm the trial court's dismissal of Ms. Williams' complaint.

The plaintiff obviously recognizes that the lower court's dismissal was proper because she has lobbied in her brief for this Court to decide that she has time remaining under the statute of limitations in which she can re-file her complaint against the defendants. The defendants are not certain if this is an issue properly before the Court at this time since there has been no lower court ruling in this case on that issue. However, should the Court decide to reach this issue, then the only decision which the law can support is one which finds that the dismissed suit had no tolling effect.

The suit which plaintiff filed was one which she was prohibited from filing. *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005) (plaintiff prohibited from filing suit during 60 day notice period). Since the plaintiff was prohibited from filing suit, she should gain no benefit from it. Otherwise, the plaintiff is being allowed to gain an advantage from the performance of an act specifically prohibited by statute. Mississippi law does not sanction such a result. *Price v. Purdue Pharma Co.*, 920 So. 2d 479 (Miss. 2006) (plaintiff may not take advantage of his own immoral or illegal act). Because the plaintiff's complaint filed on July 22, 2005 was not a properly filed complaint given the plaintiff's failure to comply with the statutory requirement of pre-suit notification, it should be treated as a nullity and given no legal effect. *Dalton v. Rhodes Motor Co.*, 153 Miss. 51, 120 So. 821 (1929). *See also Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241, 243 (Miss. 1987) (notice period must be completed before running of statute of limitations to avoid bar). Therefore, the statute of limitations was not tolled by the filing of the complaint on July 22, 2005, such that any complaint which the plaintiff may file after this Court enters its ruling would be time-barred.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE CLAIMS AGAINST DR. SKELTON AND DR. PATTERSON BASED ON THE PLAINTIFF'S FAILURE TO PROVIDE THE FULL SIXTY (60) DAYS NOTICE OF INTENT TO SUE PRIOR TO FILING HER COMPLAINT.

Under Mississippi law, a plaintiff must provide sixty (60) days notice of her intent to file suit against a health care provider before she may actually file a complaint against the provider. The statute is very clear, saying that no medical negligence action "may be begun" without sixty (60) days notice. MISS. CODE ANN. § 15-1-36(15). Zeonia Williams filed suit against Dr. Skelton and Dr. Patterson prior to the completion of the sixty (60) days notice period. The circuit court therefore properly granted the defendants' motions to dismiss or for summary judgment on the basis that the premature filing by the plaintiff required dismissal of the complaint. The common law and statutory law of this State supports the circuit court's decision and mandates this Court's affirmance of the dismissal by the trial court.

A. Standard of review

A review of the trial court's ruling on a motion for summary judgment is a *de novo* review. *See Walker v. Whitfield Nursing Center, Inc.*, 931 So. 2d 583 (Miss. 2006); *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228 (Miss. 2001); *Stuckey v. The Provident Bank*, 912 So. 2d 859 (Miss. 2000). Mississippi law also provides that if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor." *Williamson ex rel. Williamson v. Keith*, 786 So. 2d 390 (Miss. 2001). In this case, there is no issue of fact as to plaintiff's failure to satisfy the notice requirement, such that the defendants are entitled to summary judgment as a matter of law.

B. The 60-day notice requirement is mandatory and any prematurely filed suit is subject to dismissal as a matter of law.

Mississippi statutory law requires that a plaintiff must provide sixty (60) days notice to a medical care provider before filing suit against that provider for alleged medical negligence.

> No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action.

MISS. CODE ANN. § 15-1-36(15) (emphasis added).

The Mississippi Supreme Court has analyzed pre-suit notice requirements created by the legislature and codified in Mississippi statutory law, and has consistently required dismissals of complaints for failure to provide the appropriate notice of intent to sue. *See Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006); *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006); *University of Mississippi Medical Center v. Easterling*, 928 So. 2d 815 (Miss. 2006).

The case of *University of Mississippi Medical Center v. Easterling* marked the Supreme Court's initial recognition of the mandatory nature of statutory pre-suit notice requirement for medical negligence claims. In *Easterling*, the plaintiff filed a malpractice action against University of Mississippi Medical Center without providing the ninety (90) days notice required by the MISSISSIPPI TORT CLAIMS ACT. UMMC's motion for summary judgment based on the plaintiff's failure to provide the required notice of intent to sue was unsuccessful, but the Supreme Court reversed this decision on appeal, finding that violation of the notice requirement mandated dismissal of the complaint. *Easterling*, 928 So. 2d at 816.

The *Easterling* opinion confirmed that a plaintiff has the duty to ensure that appropriate notice is given to the defendant-medical care provider to avoid having her complaint dismissed. *Easterling*, 928 So. 2d at 820. "We hold the responsibility to comply with the ninety-day notice

requirement under [the MTCA] lies with the plaintiff. After the plaintiff gives notice, he must wait the requisite ninety days before filing suit. Because Easterling failed to comply with the ninety-day waiting period, her case must be dismissed." *Id.* (emphasis added). Further, the Court emphasized that "strict compliance" is necessary for the pre-suit notice of intent to sue, and that substantial compliance was not sufficient to satisfy the statute and avoid dismissal of the plaintiff's claims. *Id.* at 819-20. Although the *Easterling* opinion concerned the ninety (90) day notice requirement found in Section 11-46-11 rather than the sixty (60) day notice requirement found in Section 15-1-36(15), the *Easterling* rationale has since been applied to the notice requirement found in Section 15-1-36(15). *See Arceo v. Tolliver*, 949 So. 2d 691 (Miss. 2006); *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006).

In *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927 (Miss. 2006), the Mississippi Supreme Court addressed this issue of pre-suit notification under Section 15-1-36(15) and upheld the requirement created by the state legislature. The Supreme Court affirmed the circuit court's decision to dismiss Ms. Pitalo's complaint against a physician and hospital based on her failure to adhere to the notice requirement found in Section 15-1-36(15). "Pitalo's failure to send to defendants a notice of intent to sue is an inexcusable deviation from the Legislature's requirements for process and notice under MISS. CODE ANN. § 15-1-36(15), and such failure warrants dismissal of her claim." *Pitalo*, 933 So. 2d at 929.

Only months after the *Pitalo* decision was handed down, the Mississippi Supreme Court again addressed the sixty (60) day notice requirement and reiterated that compliance with the statutory notice requirement was mandatory. In *Arceo v. Tolliver*, 949 So. 2d 691, 695 (Miss. 2006), the Supreme Court noted its holding in *Pitalo* and ordered a plaintiff's complaint be dismissed for failure to satisfy the notice requirement. The plaintiff had filed suit against Dr. Arceo and St.

Dominic Hospital without first sending them any notice of the intent to pursue a claim against them. The circuit court had denied the defendants' motion to dismiss, or in the alternative, for summary judgment, but the Supreme Court reversed the trial court's decision and rendered judgment in favor of Dr. Arceo and the hospital. *Arceo*, 949 So. 2d at 692.

The plaintiff does not dispute that she sent her intent to sue letter to Dr. Skelton and Dr. Patterson, yet failed to wait the mandatory sixty (60) days before filing her complaint. "Williams gave notice of the filing of her medical malpractice claim prior to the filing of her complaint. However, she filed the complaint prior to the expiration of sixty days from the notice." *See* Appellant's brief, p. 5. The plaintiff nonetheless argues that the doctors received sixty (60) days notice because they were not served until more than sixty (60) days had passed. This argument misconstrues the applicable statute and is clearly flawed based on the plain language of the statute. It also makes the sixty (60) day notice requirement meaningless since suits could "be begun" prior to the expiration of the required notice as long as the plaintiff did not serve process.

Section 15-1-36(15) states that "[n]o action . . . may be begun" without first providing the medical professional sixty (60) days notice. The timeframe for the notice to be given is tied directly to the commencement of the action - i.e., the filing of the complaint, not service of the action. The statute makes absolutely no mention of notice being given prior to the service of the complaint, as the plaintiff proposes.

The notice letter sent to these doctors was dated June 15, 2005. Section 15-1-36(15) specifically states that sixty (60) days notice must be given before the action can be begun, but Ms. Williams waited only thirty-seven (37) days after sending notice of her intent to sue. Miss. R. Civ. P. 3(a) states, "A civil action is commenced by filing a complaint with the court." The comment to Rule 3 says, "The purpose of Rule 3(a) is to establish a precise date for fixing the commencement

of a civil action .... Service of process upon the defendant is not essential to commencement of the action." Therefore, when the plaintiff proceeded with filing her complaint and thus began the action against Dr. Skelton and Dr. Patterson on July 22, 2005, only thirty-seven (37) days after providing the notice of intent to sue, she prematurely filed suit. Plaintiff was without power to file suit when she did. In fact, she actually "was prohibited by law from filing suit during the sixty-day notice period." *Pope v. Brock*, 912 So. 2d 935, 938 (Miss. 2005). The dismissal by the circuit court judge was therefore not only proper, it was required.

It should also be noted that the rule regarding mandatory notice requirements is not limited to medical negligence actions. In fact, this Court long ago recognized that a notice requirement enacted by the legislature is "clearly a necessary preliminary step to the proper filing" of an action covered by the statute. *See Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241, 243 (Miss. 1987)[1]. Although *Brocato* dealt with the ten-day notice requirement for a libel action under MISS. CODE ANN. § 95-1-5, the analysis from the *Brocato* opinion has been recognized as relevant in the application of the pre-suit notice requirement found in Section 15-1-36(15). "While the [malpractice notice] statute under consideration here is different than in *Brocato*, this Court's holding is applicable to the notice requirement of MISS. CODE ANN. § 15-1-36 . . . because the applicable statute has a requirement to provide notice prior to filing suit." *Proli v. Hathorn*, 928 So. 2d 169, 172-73 (Miss. 2006).

The Mississippi Supreme Court has determined that "the Legislature did not incorporate any given exceptions to this rule [in § 15-1-36(15)] which would alleviate the prerequisite condition of

[1]It should be noted that it makes no difference that there was thirty-seven (37) days notice before filing of the suit. Partial notice is not the strict compliance required for notice provisions according to *Easterling*. Further, in *Brocato*, the Court recognized that even filing two days early would subject a suit to dismissal.

prior written notice." *Arceo*, 949 So. 2d at 695. Simply stated, the sixty (60) days notice requirement is one of the "mandatory instructions" a plaintiff must follow to avoid having her complaint dismissed as a premature nullity. *Pitalo*, 933 So. 2d at 929. There is no excuse for the plaintiff's failure to wait the requisite amount of time before she filed her complaint against Dr. Skelton and Dr. Patterson. *Easterling*, *Pitalo*, and *Arceo* control this case and require that the dismissal of Zeonia Williams' complaint be affirmed.

C. Although plaintiff's argument on whether the statute of limitations was tolled when she improperly filed suit is itself premature, current case law establishes her case is now time barred.

In her brief, the plaintiff made the argument that even if this Court affirms the trial court's dismissal, she should be allowed to re-file her complaint because the statute of limitations has been tolled during this period of time. It is somewhat ironic that the plaintiff is attempting in this case to argue the validity of a position she may take in the future, because her argument, like the complaint presently at issue, is premature. No trial court has yet been asked to pass on the issue of whether a suit that may be filed in the future is already barred by the statute of limitations. Consequently, this issue should probably be deferred by this Court until such time as there is a properly appealed case which comes before the Court after a lower court ruling. However, should the Court decide to address this issue,[2] defendants would show that plaintiff's claim is now clearly barred by the statute of limitations.

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[2]In *Watters v. Stripling*, 675 So. 2d 1242 (Miss. 1996), the Court was faced with a situation involving the one hundred twenty (120) day service requirement. In that case, the plaintiff had filed suit shortly before the statute of limitations ran, but failed to serve process within the time required by the rules. After affirming the trial court's dismissal of the case for failure to serve process timely, this Court also addressed the fact that the statute of limitations would bar any future suit because the statute started to run again when the service period expired. Consequently, the defendants will address this issue, although they believe the matter is premature at this time and not properly before the Court.

It should initially be noted that the plaintiff's position was the result of the plaintiff's own failure to follow the clear wording of the statute. There was nothing that required her to file suit prematurely and she obviously had a window of time after the notice period expired in which she could have filed suit. It's simply not that difficult to comply with the clear statutory language.

However, assuming that the plaintiff decides to file another suit after this Court affirms the trial court dismissal of the action, defendants would certainly take the position that the statute of limitations had run. The plaintiff's argument that the statute has been tolled during the pendency of this action is flawed for a couple of reasons. First, the Mississippi Supreme Court in *Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241-243 (Miss. 1987), recognized that when there is a statutory notice requirement, that notice must be provided and suit properly filed prior to the running of the statute of limitations. In the case at bar, that was not done because there has been no properly filed suit. Additionally, the statute of limitations was not tolled by the complaint filed on July 22, 2005, since that complaint was a prohibited nullity. *Pope v. Brock*, 912 So. 2d 935 (Miss. 2005); *Dalton v. Rhodes Motor Co.*, 153 Miss. 51, 120 So. 821 (1929). Therefore, this Court should not accept this alternative argument or find that any tolling was accomplished by the improperly filed complaint. *See generally Erby v. Cox*, 654 So. 2d 503 (Miss. 1995) (although filing complaint will toll statute of limitations, this tolling is only effective if complaint is timely filed).

Mr. Williams died on September 24, 2003, following his surgery on August 14, 2003. Pursuant to the two-year statute of limitations for actions alleging medical negligence found in Section 15-1-36, the statute of limitations for any claim made by his wrongful death beneficiaries would originally expire on September 24, 2005. By giving notice of intent to sue to Dr. Skelton and Dr. Patterson on June 15, 2005, the plaintiff effectively extended the statute of limitations to November 23, 2005. However, her failure to properly file her complaint (that being an original

complaint filed at least sixty (60) days after June 15, 2005) prevents any tolling of the statute of limitations, because under Mississippi law tolling can only occur during that time that a complaint is properly on file. *See Triple C Transport, Inc. v. Dickens*, 870 So. 2d 1195 (Miss. 2004).

The clearest example of this is seen in connection with the Court's rulings with regard to the one hundred twenty (120) day service requirement found in MISS. R. CIV. P. 4. Although a properly filed complaint tolls the statute of limitations upon filing, that tolling period ends and the statute of limitations starts to run again if a plaintiff fails to serve process within one hundred twenty (120) days and is unable to show good cause for why process was not served. *See Watters v. Stipling*, 675 So. 2d 1242, 1244 (Miss. 1996). In *Watters*, the plaintiff took a position much like the one the plaintiff in the case at bar takes – even though the rules were not followed, the non-compliant suit still tolls the statute of limitations. This Court rejected that rationale, holding that since failure to serve process within one hundred twenty (120) days subjects the case to automatic dismissal, the statute of limitations begins to run again once the one hundred twenty (120) day service period has run. Essentially, Mississippi law recognizes that when a suit is subject to automatic dismissal due to non-compliance with the rules or statute, the statute of limitations is running. Since plaintiff's suit in the case at bar was prohibited and subject to immediate dismissal for being filed during the sixty (60) day notice period, the plaintiff's claim for tolling should stand in no better stead in the case at bar than in *Watters v. Stripling*.

The plaintiff may claim that in the absence of tolling, the statute of limitations has run on her claim. However, this Court addressed that very issue in *Watters*, rejecting it. The Court specifically stated that although the statute of limitations was tolled during the one hundred twenty (120) day service period, tolling ended at the end of that period "and the fact that the action is now barred is of no consequence." *Watters*, 675 So. 2d at 1244.

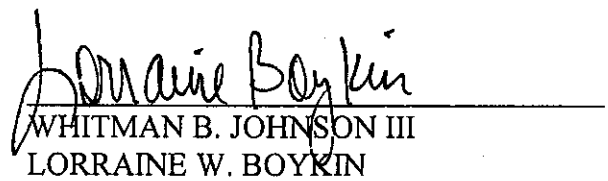
CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be forwarded a true and correct copy of the above and foregoing instrument to the following:

D.L. Jones, Jr., Esq.
860 East River Place, Suite 102
Jackson, MS 39202
Attorney for Plaintiff/Appellant

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

THIS the 17th day of October, 2007.



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