Case No. 2008-CA-01083

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SIDHARTH SOLANKI, INDIVIDUALLY, AND AS WRONGFUL DEATH BENEFICIARY; DEVESHA S. SOLANKI AND AVANI S. SOLANKI, MINORS BY AND THROUGH THEIR FATHER AND NATURAL GUARDIAN, SIDHARTH SOLANKI, AND NEHA SOLANKI, WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED, AND ALL OTHER WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED,
APPELLANTS

vs.

MELVIN TYRONE ERVIN, THE MERCHANT COMPANY D/B/A MERCHANT FOODSERVICES, JOHN DOE PERSONS 1-10, AND JOHN DOE ENTITIES 1-10,
APPELLEES

Appeal from the Circuit Court
of the First Judicial District of Hinds County, Mississippi

REPLY BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

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

I. Sidharth Solanki, Appellant;

II. Devesha S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant;

III. Avani S. Solanki, Minor by and through her Father and Natural Guardian, Sidharth Solanki, Appellant;

IV. Neha S. Solanki, Appellant;

V. Melvin Tyrone Ervin, Appellee;

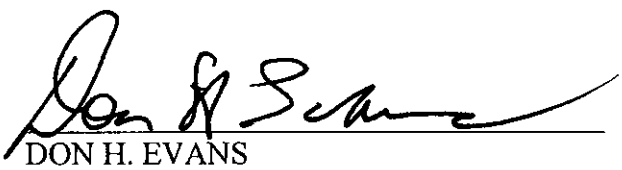
VI. The Merchant Company, d/b/a Merchant Foodservices, Appellee;

VII. William Coleman, Circuit Court Judge of Hinds County, Mississippi;

VIII. Honorable Don H. Evans, Attorney for Appellants; and

IX. Honorable Roy Liddell, Attorney for Appellees.

RESPECTFULLY SUBMITTED, this the 8th day of April, 2009.

BY: 
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In reply to the appellee's brief, the appellants would like to address several issues and they are as follows:

I. ISSUE OF WHETHER OR NOT THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND WAS THE PRODUCT OF BIAS OR PREJUDICE

The Appellees argue that the verdict was not against the overwhelming weight of the evidence and was not the product of bias or prejudice and, therefore, the Appellants' Motion post-trial motions were properly denied. The Appellees carefully construct a story, through their accident reconstructionist, William Messerschmidt, whereby Ervin perceives Nilma Solanki's vehicle, realizes the vehicle is actually stopped, applies his brakes, attempts to move over into the right lane to avoid hitting her vehicle but is unable to do so because of the traffic to his right, and, in a last attempt to avoid hitting the vehicle, turns left and into the median but still strikes the rear of Nilma Solanki's vehicle. ***However, the Appellees fail to address the fact that Ervin has given three different versions of the occurrence of the subject accident, none of which are consistent with Messerschmidt's version of the accident.*** The facts in the present case clearly make it a case, whereby the Court should have granted a directed verdict for the Appellants or should have granted a peremptory instruction for the Appellants at the close of the evidence.

The Appellants have argued the Appellees' four different versions of the subject accident in their Appellants' Brief and a condensed summary of said versions:

A. Appellee Ervin's First Version, Version #1

In his deposition, Appellee Ervin testified under oath that when he moved over he was less

than a football field away from the stopped car. He said that there was a dump truck in front of him in the right-hand lane of I-220, and that the dump-truck had a high bed that blocked his view, partially keeping him from being able to see the stalled Solanki car before he moved over.

He said that he did not see the stalled car prior to his changing lanes. Appellee Ervin testified that he did not immediately hit his brakes because he did not realize that the car was stopped. From Appellee Ervin's own testimony and without the aid of others, he had clearly testified that he moved over, from the right-hand lane of I-220 into the left-hand lane of I-220, without seeing the Solanki car until he was already in the left-hand lane of I-220, and that by the time that he realized that Nilima Solanki's vehicle was stopped, it was too late for him to avoid the accident. Appellee Ervin testified that he only slowed his vehicle down to approximately 55 or 60 miles-per-hour before impact with the Solanki vehicle. If Ervin was going 65 miles-per-hour and only slowed down to 60 miles-per-hour, that means that he could not have even touched his brakes before the impact. Appellee Ervin's testimony was that he only reduced his speed by five miles-per-hour before impact. If Appellee Ervin had merely lifted his foot off of his accelerator, his speed would have been reduced by at least five miles-per-hour. Therefore, the evidence indicates that he may not have even let off of the accelerator, much less applied his brakes. Appellee Ervin made no effort to avoid the accident until it was too late. This means that he did not even see Nilima Solanki until he maneuvered into the left-hand lane of I-220. Clearly, Appellee Ervin failed to ascertain he could safely make a lane change before doing so, failed to keep and maintain a proper lookout and failed to keep and maintain his vehicle under free and easy control.

Also, there were no skid marks as demonstrated by all the photographs that were introduced into evidence. None of these photographs showed any skid marks. They were taken at the scene by

the police officers that were called to the scene immediately following the accident. There was absolutely no indication whatsoever in the evidence that physically showed that Appellee Ervin ever attempted to do anything to avoid the accident, other than jerk to the left at the last split-second. This is a full indication that Appellee Ervin never saw Nilima Solanki until a split-second before the subject accident.

The Appellees' expert testified that, just 98 feet prior to impact, Appellee Ervin was traveling approximately 67 miles-per-hour. Appellee Ervin, at trial and in his deposition, actually testified that he was going 65 miles-per-hour. The police officer testified that Appellee Ervin told him, at the scene, that he was going 70 miles-per-hour.

Both experts agree that if Appelle, Ervin, was going 65 miles-per-hour to 70 miles-per-hour, that he was traveling approximately 100 feet per second. He said that he moved over less than football field away from the stalled car. Both the Appellants' and the Appellees' experts testified that it would probably take 1½ to 2 seconds to perceive and react. The Appellees' expert basically figured from the point of impact, because he said he was so close to the car that he did not have time to perceive and react. The expert said that Appellee Ervin was only 98 feet from the stalled car when he realized that it was stopped and that he was going 67 miles-per-hour. This would clearly make it Appellee Ervin's fault when his own expert testified that at the place where he changed lanes he was so close to a stalled car that he did not have time to perceive and react to it and that he could only get slowed down 5 miles-per-hour.

If Appellee Ervin had merely 1 ½ to 2 seconds to do anything, that was totally his fault. No one made him change lanes when he was so close to this car. He clearly did not ascertain that the road was clear and that he could safely make his lane change.

B. Appellee Ervin's Second Version, Version #2

Appellee Ervin testified in the trial and in his deposition that he came up behind a dump truck and that he moved over from behind the dump truck long before he got to the bridge and long before reaching the loop that comes up onto I-220 from Highway 49. This would have made Appellee Ervin having moved over approximately 700 to 800 feet before the stalled Solanki car. This would have been approximately 2 ½ football fields away. Appellee Ervin said that when he first moved over, he had not seen the stalled car, but as soon as he moved over, he saw the Solanki vehicle, but he thought it was moving. ***He then says he hit the brakes before he got to the bridge. He marked a spot on a chart during trial, which was approximately 115 feet before the bridge, as being the place where he first applied his brakes.*** The bridge is 265 feet long, and the car was stalled 223 feet south of the bridge. If the distances are added up, it comes to 603 feet of space of which Appellee Both experts testified that he should have been able to come to a complete stop between 250 to 309 feet. Therefore, Appellee Ervin could have stopped 2½ times within that distance. However, according to Appellee Ervin, he only slowed down from 65 miles-per-hour to 55 or 60 miles-per-hour before impact. Appellee Ervin never testified that he ever let his foot off of his brakes. ***He would have the Court believe that in 603 feet with his brakes on, he could only slow down 5to 10 miles-per-hour. This story is absurd.*** The Appellants' expert, James Hannah, testified that it takes 1 ½ to 2 seconds to perceive something and to react. Keeping this in mind, if Appellee Ervin was already hitting his brakes at 603 feet before impact, he obviously had seen her at least 700 to 800 feet prior to impact. This proves, beyond a shadow of a doubt, that Appellee Ervin failed to keep and maintain a proper lookout. This story does not match up with anything, and the Appellees' expert

did not even use his story to reconstruct the accident and/or form his opinion(s).

C. Appellee Ervin's Third Version, Version #3

The investigating Officer testified that, when he interviewed Appellee Ervin at the scene, he never mentioned a dump truck. The Officer testified that he was told by Appellee Ervin that he was traveling 70 miles-per-hour in the right lane of I-220 and that he moved over into the left-hand lane to allow oncoming cars, coming up the loop from Highway 49 onto I-220, onto the interstate.

This version clearly makes Appellee Ervin at fault, if he had started moving over as the cars were coming on to I-220 because Appellee Ervin would have had plenty of time to see the Solanki vehicle 488 feet away and would have had plenty of time to stop. This obviously means Appellee Ervin was not paying attention and was not keeping a proper lookout. There was nothing in Appellee Ervin's view, and he had a distance almost 2 football fields to stop before impact. The other version of when he moved over would have been just before he hit the Solanki vehicle, and that clearly would have been an improper lane change. It would have also been a failure to keep and maintain a proper lookout and a failure to keep his vehicle under reasonable control.

Appellee Ervin had no logical reasoning for not seeing Nilima Solanki and for hitting her, other than that he failed to keep and maintain a proper lookout and failed to keep his vehicle under reasonable control.

D. Appellees' Expert, William Messerschmidt's, Version

The Appellees' accident reconstruction expert, William Messerschmidt, testified that he did not use ***any*** of Appellee Ervin's testimony as to when Appellee Ervin changed lanes, and Messerschmidt testified as to his reasoning for not using his testimony. That reason was that ***Appellee Ervin gave a different version each time he testified.*** It is absurd when the Appellee

driver's testimony is ***so unreliable that his own expert refuses to use any of it.*** This should have indicated to the jury that Appellee Ervin was clearly at fault for the subject accident.

The Appellees' expert used, in his calculation(s) and testimony, a diagram which he and another expert person created, whereby he used a specific point, 158 feet from impact, as Appellee Ervin's lane-changing point or the point where the Appellee Ervin first realized that the car was stopped. It is not clear what his testimony was in this respect. Messerschmidt said this was 1.6 seconds from impact. In his diagram, Messerschmidt stated that only 15 % of drivers could respond this quickly. He also stated that the average driver would have responded 59 feet from impact. He stated that Appellee Ervin responded 98.5 feet from impact. This means that the Appellees' expert was attempting to say that Appellee Ervin moved over 158 feet from impact, and that this was too close for Appellee Ervin to avoid hitting the stalled Solanki vehicle. This clearly makes Appellee Ervin 100% at fault for the subject accident. The point of impact was 223 feet south of the bridge. ***This means that Appellee Ervin had crossed the bridge and was 71 feet past the bridge when he moved over into the left-hand lane with nothing in front of him but the stalled Solanki vehicle.*** It is clear that, at that close range, Appellee Ervin could not do anything, other than to jerk to the left to avoid hitting the Solanki car. Under the Appellees' expert's opinion as to where Appellee Ervin changed lanes or where he said he first realized that the Solanki vehicle was stopped, Appellee Ervin clearly made an improper lane change under the laws of the State of Mississippi. There is no way that Appellee Ervin could have moved over that close to the Solanki vehicle and avoided hitting the Solanki vehicle, under the Appellees' expert, William Messerschmidt's, version.

The Appellees' expert's version is the most ridiculous version of all because it was not based upon anything. He wrote in red on Exhibit 22, which was a drawing to scale of the highway. He put

an "X" on the road which he said was 98 feet from the point of impact, and he testified that Appellee Ervin was traveling 67 miles-per-hour at that point. He used the download off of the truck to determine that speed. The expert simply said that when you are only 98 feet away and you are traveling at 67 miles-per-hour, you do not have time, basically, to do anything. This is exactly what the Appellants are arguing. The expert had no bases for saying he was 98 feet away anyway. No one testified to this. This was just a made up point. He could have made his point up anywhere.

II. ISSUE OF WHETHER OR NOT NILMA SOLANKI'S ACTIONS WERE NEGLIGENT OR CONSTITUTED CONTRIBUTORY NEGLIGENCE

The trial court gave a comparative negligence instruction even though ***there was no evidence to show that the Deceased was negligent***. However, with the court giving the comparative negligence instruction, the Jury had to completely ignore this instruction in order to find for the Appellees. In any event, the facts would never support a verdict for the Appellees that puts 100% fault on the Deceased, Nilima Solanki. A verdict for the Appellees implies that Appellee Ervin was not guilty of ***any*** negligence. Appellee Ervin clearly made a lane change at a time when he did not first ascertain that the lane change could be safely made. One only has to look at Appellee Ervin's ***numerous*** versions as to how the accident occurred, specifically Appellee Ervin's ***three different versions*** as to when, where and why he made the lane change from the right-hand lane of I-220 into the left-hand lane of I-220. ***All versions*** regarding Appellee Ervin's lane change(s) clearly and unequivocally make him negligent and totally at fault for the subject accident. He would even be totally at fault by his expert's version of when Appellee Ervin changed lanes. The Appellants cite numerous cases on point where the Court said that the Defendant was totally at fault.

Instead, the jury found in favor of the Appellees, which would place 100% of fault on the

Nilma Solanki. It is clear that Nilima Solanki's car became disabled and stalled on I-220 on the day of the subject accident. Although no one knows for sure why her vehicle became disabled and stalled on the roadway, a reasonable person can infer that no one, especially a person with a young child in the vehicle, would purposefully stop a vehicle on the roadway. Furthermore, the Appellants would show that the Appellees did not show that it was reasonably practical for Decedent Nilima Solanki to pull her motor vehicle off of the highway. The Appellees argued that there was a paved shoulder onto which Nilima Solanki could have steered. The Appellees have not shown, however, that it was reasonably practical for Nilima Solanki to steer her vehicle onto this shoulder. It is unknown what lane of I-220 Nilima Solanki was in at the time her vehicle began to become disabled, as ***no*** witnesses have come forth which actually saw the Solanki vehicle as it began slowing, or as it continued to slow and/or stop. I-220 is a high-traffic interstate. Furthermore, the accident occurred around a bustling exit and entrance ramps to I-220, at which there are multiple lanes at any given point. Based upon the location of the Solanki vehicle at the time it was hit, it can reasonably be inferred that Nilima Solanki was traveling in the right-hand lane of I-220 when her vehicle began to become disabled and stall and that she could not move over to the right, as there was traffic entering I-220 via the Medgar Evers on-ramp, which was attempting to move over into the right-hand lane in which Nilima Solanki was traveling. It can further be inferred that, as Nilima Solanki could not exit the roadway to her right, she attempted to go left and simply ***could not*** make it all the way across the left-hand lane and onto the left shoulder of the roadway before her vehicle stopped moving. There could have been cars passing her on the left also.

Moreover, based upon the testimony of Sidharth Solanki, Appellant and husband of the decedent, the two of them were on the phone prior to impact for approximately 20 seconds. Based

upon this short length of time, there was no way that Nilima Solanki had time to exit her vehicle and to get the small child out or even attempt to move her vehicle from the roadway before she was hit by Appellee Ervin. It was obvious from Appellant, Sidharth Solanki's, testimony that the vehicle was stalled and that Nilima Solanki could not get out of the roadway. The Appellants have established that Nilima Solanki could not reasonably get off the roadway.

There is no way under this set of facts that the jury could have rationally reached the decision that Appellee Ervin was not even 1% at fault and that the wreck was 100% Nilima Solanki's fault. The bottom line it that the evidence suggest that it was impossible, or in the very least ***not reasonable practical***, for Nilma Solanki to avoid stopping in the roadway. One can clearly see that the Court did not see any negligence on the part of Nilima Solanki, and for the jury to have assessed her with 100% of the negligence evinces bias or prejudice on the part of the jury, or, shows that they were just confused as to what the law was and as to how they were supposed to rule.

III. ISSUE OF WHETHER OR NOT THE APPELLANTS ARE IMPROPERLY ARGUING THE WEIGHT OF THE EVIDENCE RATHER THAN THE LEGAL SUFFICIENCY OF THE EVIDENCE

The Appellees state that the Appellants are "improperly arguing the weight of evidence rather than the legal sufficiency of the evidence." The Appellants view this statement as a play on words as, in essence, the overwhelming weight of the evidence and the legal sufficiency of evidence in this case are on in the same. The Appellants have presented the Court and Jury with overwhelming evidence that not only was Nilma Solanki not guilty of negligence, but the Appellees have shown that Ervin has given numerous conflicting stories that totally discredit him. It is with the combination of all of the overwhelming weight of evidence, all of which weighs on the legal

sufficiency of said evidence, that the Appellants have shown that the Jury was so confused by the "parking in a roadway" instruction and by the comparative negligence instruction that the Appellees gave or that they were just simply bias and prejudice and simply ruled against the Appellants due to the fact they were foreigners.

IV ISSUE OF WHAT IS THE EFFECT OF MRS. SOLANKI NOT GETTING OUT OF HER CAR BEFORE THE WRECK

The Appellees have argued that maybe Mrs. Solanki was at fault because she may have remained in the car for two or three minutes. Although the Appellants contend that it was only seconds, no one knows for sure. The downloading equipment and the phone records have different ways of calculation which, according to the experts, can be misleading as to the exact times recorded. In any event, it seems to be absurd to think that a woman stranded in the highway with a baby strapped in a car seat on the back seat is at fault because she did not think fast enough to get out of the vehicle before an 18-wheeler who was in strict in violation of the lane change law traveling at approximately 70 miles per hour ran into her. Said 18-Wheeler was clearly failing to keep and maintain his vehicle under reasonable control and he was also clearly failing to keep and maintain a proper lookout and illegally ran into the back of her vehicle. The Appellee driver was required under the law to not change lanes unless it was safe to do so. It is unequivocally undisputed that it was not safe for him to change lanes. This is the cause of the wreck. All Ervin had to do was just move back into his lane. If he says that he could not get back over because there were vehicles to his right, then he clearly moved over and was passing the other vehicles in violation of the lane change law. This indicates that he was going much faster than the vehicle in front of him or he would be able to pull back behind the vehicle in front of him. He was required to keep and maintain

a proper lookout. If he was keeping the proper lookout, he would have seen the stalled car. If he had his vehicle under control he could have either stopped his vehicle or pulled back in his lane that he was traveling. If he says he was too close to the car when he changes lanes to do anything, then he would absolutely be in violation of the lane change law because that is exactly what the law was trying to prevent. It orders a motorist to not change lanes unless he or she can first ascertain that it is safe to do so. Appellee totally failed to make that determination before he changed lanes.

In regard to placing the negligence on Mrs. Solanki for not getting out of the vehicle fast enough before she got hit, this at best would only be contributory negligence. It would not be 100% her fault simply because she did not react fast enough in a life or death situation. However the case in Mississippi appear to state that how long she stayed in the car would not relieve the Appellees from being totally at fault. In the case of *City of Jackson v. Sullivan* 349 So.2d 527 (Miss. 1977), the Defendant in this case changes lanes in the city of Jackson without first determining that it was safe to do so and there was a barricade in the road in the lane she changes over into and she hit it. That barricade had been there longer than two or three minutes. In fact, the barricade was there for work to be done on the street. Therefore, how long she stayed in the vehicle should not be a factor. If she had managed to get out of the vehicle, the most logical side would have been towards to the median. The Appellee, Ervin, would still have had his wreck no matter whether she and the baby would have gotten out of the car or not. Since he snatched to the left and went off the shoulder on the left, he would have probably killed both her and the baby on the side of the roadway if she had gotten out. She may have been safer in the car. At least the baby lived and if she had managed to just barely get him out of the car, he would have most likely been killed.

In *City of Jackson v. Sullivan* 349 So.2d 527 (Miss. 1977), the Court said that Plaintiff was

not entitled to recover from the city for her injuries or property damage. The Court did not even apportion damages although the barricade had been there for a long time. Certainly Mrs. Solanki's one or two minutes at the most could not put her 100% at fault as the jury ruled.

Also, in the case of *Cipriani v. Miller,* 160 So. 2d 87 (Miss. 1964) and *Nobles v. Unruh,* 198 So. 2d 245 (Miss. 1967), the Courts put all of the fault on the Defendant for changing lane without making sure it was safe to do so.

It would be an extreme injustice for the Appellee to have gone down the road passing in such a reckless manner and wind up free of fault by him saying Mrs. Solanki should not have been in his way. If he did not make an improper lane change and contends that he was in the fast lane for a long time then he simply rear-ended Mrs. Solanki without keeping and maintaining a proper lookout and without keeping and maintaining his vehicle under reasonable control. When a vehicle is stopped in the road in front of another car, the law requires the following vehicle to stop his vehicle behind that vehicle. The Appellee, Ervin, cannot say that he did not have adequate time to stop his vehicle. The measurements offered into evidence, along with the photographs, clearly show that he could have stopped numerous times from where he first saw her. Not only did he not stop, but according to his own story, he only slowed down approximately five miles per hour before hitting her.

Since three comparative negligence instructions were given and the jury put absolutely no negligence on the Defendant, the verdict of the jury was so overwhelming against the weight of the evidence as to evidence bias and prejudice on the part of the jury and would require that justice be done by ordering a new trial on damages only or ordering an entirely new trial.

CONCLUSION

The Appellants contend that they lost Nilima Solanki as a result of the negligence of the

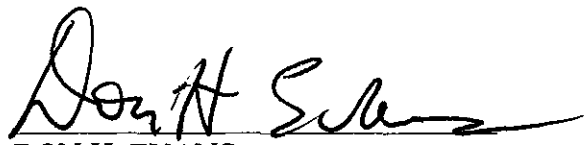
Appellees. The Appellants also feel that they clearly put on evidence proving that Nilima Solanki was not totally at fault for the accident in question and that Appellee Ervin was totally or, at least, partially at fault. The Jury had the comparative negligence instructions, and they should have assessed some degree of negligence on Appellee Ervin and awarded a verdict in favor of the Appellants, reflecting the deduction for whatever proportion they felt she may have caused, if any. However, they did not do that. They put 100% fault on Nilima Solanki. The Appellants feel that the Jury was so confused by the "parking in a roadway" instruction and by the comparative negligence instruction that the Appellees gave or that they were just simply bias and prejudice and simply ruled against the Appellants due to the fact they were foreigners. In any event, the Appellants request that the Court reverse the verdict of the jury and grant a new trial on damages only or to grant an entirely new trial on all issues.

If Appellants have prayed for improper relief, then Appellants ask that the court grant them whatsoever relief it deems proper.

RESPECTFULLY SUBMITTED, the 8th day of April, 2009.

RESPECTFULLY SUBMITTED,

SIDHARTH SOLANKI, INDIVIDUALLY, AND AS WRONGFUL DEATH BENEFICIARY; DEVESHA S. SOLANKI AND AVANI S. SOLANKI, MINORS BY AND THROUGH THEIR FATHER AND NATURAL GUARDIAN, SIDHARTH SOLANKI, AND NEHA SOLANKI, WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED, AND ALL OTHER WRONGFUL DEATH BENEFICIARIES OF NILIMA SOLANKI, DECEASED, APPELLANTS

BY: 
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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellants, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellants' Brief to the following:

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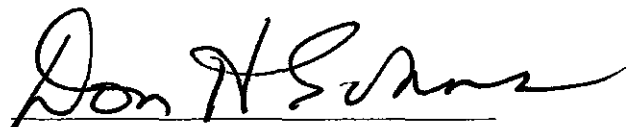
On this the 8th day of April, 2009.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