IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALCATEC, LLC, et al.

Plaintiffs/Appellants

Court of Appeals No. 2018-CA-01590-COA

VS.

Hinds County Circuit Court No. 1:15-cv-00131

THE JONES GROUP OF MISSISSIPPI, LLC, et al.

Defendants/Appellees

REPLY BRIEF OF APPELLANTS ALCATEC, LLC AND ROSEMARY BARBOUR

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

No. 2018-CA-01590-COA
ALCATEC, LLC, et al. v. THE JONES GROUP OF MISSISSIPPI, LLC, et al.

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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I. The trial court abused its discretion in allowing Defendants to amend their Answer to assert a new affirmative defense, as Defendants were on notice of the purported basis of that defense since the inception of this case yet failed to plead it in their Answer before actively litigating this case for more than three years.

Defendants contend that they did not delay in seeking leave to amend their Answer after "the conclusion of necessary written discovery."[1] This argument is disingenuous. Plaintiffs' Complaint clearly and expressly raises the prior case, *Alcatec v. U.S.*, such that Defendants were on notice that they needed to plead collateral estoppel if they wanted to argue collateral estoppel as a defense in this case. The Complaint discusses the FEMA Contract between Alcatec and the Government that was the subject of *Alcatec v. U.S.*[2] The Complaint also discusses the manner in which Alcatec hired Jones Group to help Alcatec perform under the FEMA Contract and how Jones Group failed to do so.[3] Most importantly, the Complaint states:

> 3.9 In the course of Alcatec's performance of the FEMA Contract, [the Government] breached the FEMA Contract in failing to pay certain amounts due. Thereafter, Alcatec filed suit against the Government. In response to Alcatec's claim, the Government asserted a False Claims Act counter-claim against Alcatec, which Alcatec firmly believed it would defeat. Alcatec lost the False Claims Act claim based on Alcatec's improper billing during the period of time that Jones Group and Mainstream Software were involved providing services under the Alcatec/Jones Group Contract. **As a result of the False Claims Act case, Alcatec suffered damages in excess of $5,000,000.00 under the FEMA Contract and was required to pay penalties in excess of $300,000.00. Also as a result, both Alcatec and Barbour have been excluded from doing business with the Government.**
>
> 3.10 **All of these damages were the result of Defendants' failures in connection with their provision of services**.[4]

In other words, the Complaint makes it clear that through the present case, Plaintiffs seek damages from Jones Group and Jones that Plaintiffs incurred in the prior case between Alcatec and the Government. Nothing produced in written discovery could have possibly alerted Defendants of

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[1] Appellees' Brief at p. 10.
[2] *See* R. 16, Plfs' Cmplt. at 2.
[3] *See* R. 17-18, Plfs' Cmplt. At 3-4.
[4] R. 18-19, Plfs' Cmplt. At 4-5.

the need to plead collateral estoppel, if they thought it applied, any more than the Complaint should have. Indeed, Defendants point to no specific discovery response that so alerted them.

Instead, Defendants vaguely claim that "[a]fter review of the responses and document production, it became evidently clear that Alcatec did not have any new information of evidence against Jones that was not previously argued and presented to the federal court."[5] In reality, the affirmative defense of collateral estoppel did not suddenly become available after more than three years of discovery, as Defendants had all the information they needed to plead it at the inception of the case. The bottom line, however, is that it does not apply as discussed in Appellants' briefs in this case.

Defendants concede that they actively litigated this case for years before moving to amend their Answer.[6] Even if the Court is inclined to entertain Defendants' argument that Defendants were not put on notice of the potential need to plead collateral estoppel until after Plaintiffs served the discovery responses in question, Defendants still delayed nearly half a year longer before moving to amend their Answer.[7]

Defendants also argue that "Alcatec's counsel agreed in writing to the amendment."[8] Not so. Alcatec's counsel merely said that he had "no objection to the motion."[9] In other words, Alcatec's counsel did not agree to all of Defendants' proposed amendments to their Answer or the applicability or availability of any affirmative defenses; rather, Alcatec's counsel merely did not object to Defendants' filing the motion with the court. This is different to counsel's agreeing to the contents or substance of the answer and certainly not defenses.

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[5] Appellees' Brief at p. 10.
[6] *See* Appellees' Brief at p. 10 (describing Defendants' activity in filing pleadings, moving to dismiss, filing a petition for interlocutory appeal, and engaging in discovery).
[7] *See* Defs' Mot. to Amend Answer, R. 799, which was filed on September 26, 2017 and which references Plaintiffs' second and third rounds of production, which occurred on April 19, 2017 and April 24, 2017 respectively.
[8] Appellees' Brief at p.11.
[9] R. 1007.

Counsel merely agreed that he would not move to strike the Motion for Leave to Amend itself. Defendants' counsel knows that this was the understanding between the parties at the time. Most tellingly in this regard, when Defendants filed their Motion for Leave to Amend, Defendants did not state within the Motion that it was unopposed. If the Motion had been unopposed, Defendants would have so stated within the motion in accordance with common practice. And there is no doubt that Alcatec opposed the motion. Alcatec filed a response in opposition to the Motion.

In attempting to distinguish *Hutzel*, Defendants' only argument is that Defendants had no reason to know of the purported basis of any potential collateral-estoppel defense until more than three years into this case, whereas the *Hutzel* defendant was aware of the basis of its affirmative defense at the outset of the lawsuit.[10] Again, this argument is disingenuous at best. The purported basis of Defendants' collateral estoppel defense is this prior case between Alcatec and the Government. Plaintiffs' Complaint clearly discusses this case and even more clearly states that the damages Plaintiffs seek in this case is the money Plaintiffs lost due to the prior case against the Government.[11] Defendants' argument is rendered more ridiculous by the fact that they pleaded numerous affirmative defenses in their Answer, including many that were far less likely to become a factor in the case than collateral estoppel.[12] Defendants also filed a Motion to Dismiss, citing the federal claims court opinion.

Finally, Defendants are wrong that the present case is more analogous to *Doe v. Rankin County School District*, 189 So. 3d 616 (Miss. 2015). In *Doe*, ***the defendant pleaded discretionary-function immunity in its Answer***. *Doe*, 189 So. 3d at 622 (this fact is noted in the facts section of Justice Kitchens' opinion concurring in part and dissenting in part). The only issue

[10] Appellees' Brief at p. 11-12.
[11] *See* R. 18-19, Plfs' Cmplt. At 4-5.
[12] *See* R. 65-79.

regarding waiver in *Doe* was that after the defendant pleaded this affirmative defense in its Answer, the defendant then participated in one year and seven months of discovery before filing its motion for summary judgment based on discretionary-function immunity. *Doe*, 189 So. 3d at 617-18.

The present case could not be more distinguishable from *Doe*. Defendants failed to plead collateral estoppel in their Answer even though they were on notice to plead it and even though they took the liberty of pleading numerous other affirmative defenses. They then actively participated in the litigation for over three years before moving to amend their Answer to include collateral estoppel as an affirmative defense, at which time Defendants baldly argued they had no way to know to plead collateral estoppel until after written discovery.

Finally, Defendants' reliance on *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006) is misplaced. Defendants cite the following: "where . . . there is a substantial and unreasonable delay in pursuing the right, coupled with active participation in the litigation process, we will not hesitate to find a waiver of the right to compel arbitration." 926 So. 2d at 180.[13] All of these factors are present in the instant case. Defendants delayed more than three years to assert collateral estoppel. This is substantial. It is also unreasonable in light of the fact that Defendants were on notice to plead it from the outset. Furthermore, this substantial and unreasonable delay was coupled with active participation. Defendants vigorously pursued discovery and filed multiple motions to dismiss. Defendants also filed a petition for interlocutory appeal.

In addition, as pertains to the present case, *Horton* stands for the proposition that "[t]o pursue an affirmative defense or other such rights, a party need only assert it in a pleading, bring it to the court's attention by motion, ***and*** request a hearing." 926 So. 2d at 181 n.9 (emphasis added). "And" means that the party must do all of them. Here, Defendants did not properly pursue collateral estoppel because they failed to assert it in their pleading.

[13] *See* Appellees' Brief at 12-13.

Accordingly, the trial court abused its discretion by allowing Defendants to amend their Answer.

II. The trial court erred in applying collateral estoppel to this case.

Even assuming for argument's sake that this Court found that the trial court did not abuse its discretion in permitting an amendment to the pleadings, the trial court refused to follow black letter Mississippi law in ruling that collateral estoppel barred Plaintiff's claims.

A. Under the Mississippi Supreme Court's strict mutuality requirement, Defendants were not in privity with a party to the case between Alcatec and the Government.

Defendants rely on *Jordan v. McKenna*, 573 So. 2d 1371 (Miss. 1990) and *McCoy v. Colonial Banking Co., Inc.*, 572 So. 2d 850 (Miss. 1990) in an attempt to overcome the Mississippi Supreme Court's long-standing requirement of strict mutuality. As detailed in Appellants' principal brief, these cases are critically distinguishable and do not help Defendants. Jones was not a key prosecutorial witness and did not have an adversarial relationship to Alcatec or Barbour in *Alcatec v. U.S.*, as even the federal judge acknowledged in her opinion. *See Alcatec, LLC v. U.S.*, 100 Fed. Cl. 502, 508 (2011) (noting that Ms. Jones did not "have an ax to grind with Rosemary Barbour."). This contrasts starkly with *Jordan*, where the rape victim was clearly a key prosecutorial witness who had an ax to grind with her rapist. The reality is that Barbour and Alcatec entered that case and trial fully expecting to defeat the False Claims Act counterclaim and did not anticipate Jones being an adversary to this goal. Furthermore, unlike in *McCoy*, Barbour and Jones lack the husband-wife relationship such that their interests would be aligned and thereby satisfy the privity requirement.

Because Defendants were neither a party nor in privity with a party to *Alcatec v. U.S.*, Defendants cannot satisfy the Mississippi Supreme Court's strict mutuality requirement and are foreclosed from asserting collateral estoppel.

B. Even if the Court conclusively accepts that Appellant Barbour perpetuated a scheme, it would not as a matter of law negate any wrongdoing by Defendants.

Defendants appear to argue that applying collateral estoppel even without combining it with the tort doctrine of superseding intervening cause requires summary judgment for Defendants. The only authority Defendants cite in this regard is *Knight's Marine & Indus. Servs. V. Lee*, 110 So. 3d 795, 798 (Miss. Ct. App. 2012) for the general proposition that in order to recover from breach of contract, "the damages sought must stem from the breach."[14] Here, genuine issues of material fact exist as to whether Plaintiffs' damages stem from Defendants' failures to provide the logistical support Defendants were contractually obligated to provide.

As detailed to the trial court and in Appellants' principal brief, Plaintiffs had a multi-million-dollar contract with FEMA under which Plaintiffs oversaw temporary housing for citizens affected by Hurricane Katrina. This FEMA contract encompassed many duties. In turn, Plaintiffs contracted with Defendants to help make sure these duties were performed competently, including the correct entry of data into CrossForms and the prevention of duplicate information to be submitted in CrossForms. Defendants recommended CrossForms as a system that would ensure proper organization and logistics as well as accurate billing. But Defendants' system failed to do so, thus resulting in the exact billing chaos that Defendants knew Plaintiffs sought to avoid when Defendants were hired and undertook to provide a competent system.

III. The trial court erred in concluding as a matter of law that Plaintiffs committed an intervening superseding cause that bars all of Plaintiffs' claims.

"The law dealing with the duty to foresee the imprudent acts of others appears under the general rubric of the jurisprudence of 'intervening cause.'" *Entrican v. Ming*, 962 So. 2d 28, 35 (Miss. 2007) (citing *Southland Mgmt. Co. v. Brown by & Through Brown*, 730 So.2d 43, 46 (Miss. 1998)). "The Second Restatement of Torts defines a superseding cause as 'an act of a third person

[14] Appellees' Brief at p. 20.

or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.'" *Id*. (citing *Southland Mgmt. Co.*, 730 So.2d at 46) (citing Restatement (Second) of Torts § 440 (1965)). "Under this theory, an original actor's negligence may be superseded by a subsequent actor's negligence, if the subsequent negligence was unforeseeable." *Id*. (citing *Southland Mgmt. Co.*, 730 So.2d at 46).

Finding that Plaintiff's wrongdoing as adjudicated by the federal claims court constituted a superseding intervening cause, the trial court erred in dismissing all of Plaintiff's remaining claims for breach of contract, negligence, gross negligence, negligent misrepresentation, contractual indemnity.

Breach of Contract. Defendants cite no authority for applying the tort doctrine of superseding intervening cause to all of Plaintiffs' claims, including Plaintiffs' claim for breach of contract. Indeed, the doctrine is a tort theory that does not apply to claims for breach of contract, and the trial court erred as a matter of law by dismissing Plaintiff's claims for breach of contract. Causation and Damages are not elements of a breach-of-contract claim under Mississippi law:

> We recognize that contracts, as legally binding and enforceable instruments, have intrinsic value to the parties entering into them, and that the failure of one party to carry out his side of the bargain necessarily may result in injury to the other party for the simple fact that a promise was broken, even if the damage resulting from that injury is nominal and/or not monetary. Monetary damages are a remedy for, not an element of, breach of contract. It has long been recognized that equitable remedies for breach of contract, such as specific performance or reformation, do not speak in terms of actual monetary damage to the plaintiff. *See Ivison v. Ivison,* 762 So. 2d 329, 335-36 (Miss. 2000); *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., Inc.,* 683 So. 2d 396, 405 (Miss. 1996). Therefore, we hold that whether a plaintiff "has been thereby damaged monetarily" is *not* an element of a breach-of-contract claim. *Warwick,* 603 So. 2d at 336. To the extent that *Warwick* and its progeny require a plaintiff to prove monetary damages to prevail on a breach-of-contract claim, they are overruled. We hold that a plaintiff is required to prove by a preponderance of the evidence only the first two factors set out by this Court in *Warwick* to prevail on a breach-of-contract claim, without regard to the remedy sought or the actual damage sustained. To be clear, monetary damages are a remedy for breach of contract, not an element of the claim.

Bus. Commc'ns, Inc. v. Banks, 90 So. 3d 1221, 1225 (Miss. 2012). There is therefore no way that Defendants can be entitled to summary judgment on the breach-of-contract claim based on an argument that Plaintiffs caused their own damages. Citing only the federal claims opinion, Defendants provide no summary-judgment evidence that they did not breach the contract. Whether Plaintiffs can prove entitlement to compensatory damages from Defendants is an issue for the jury.

Contractual-Indemnity. Furthermore, the contractual-indemnity claim is controlled by the indemnity provisions in the contract: "Contractor shall hold harmless and fully indemnify Company and its Officers, Directors, Members and employees and its successors against all losses, liabilities, claims, demands, damage, costs or expenses whatsoever based upon [. . .], occasioned by, attributable to the performance" of Defendants.

As set forth in Plaintiffs' principal appeal brief, genuine issues of material fact exist as to whether Plaintiffs suffered damages based upon, occasioned by, or attributable to Defendants' conduct. The mere fact that the Government was overbilled and the federal claims court opinion found that Plaintiffs had committed wrongdoing does not mean that no genuine issues of material fact exist as to whether Defendants also committed some wrongdoing for which they should be held responsible under the sweeping indemnity provision to which Defendants agreed. It does not mean that Plaintiffs' damages resulting from the overbilling were not ***also*** attributable to Defendants' wrongdoing in whole or in part. This specific issue was not adjudicated in the federal claims court, and Defendants have adduced no evidence to show that they played no role in Plaintiff's injuries.

Negligence. Finally, genuine issues of material fact exist as to Plaintiff's negligence claims. The Mississippi Supreme Court has articulated that "[t]he question of superseding intervening cause is so inextricably tied to causation, it is difficult to imagine a circumstance where

such issue would not be one for the trier of fact." *Green v. Dalewood Prop. Owners' Ass'n, Inc.*, 919 So. 2d 1000, 1009 (Miss. Ct. App. 2005) (citing *O'Cain v. Harvey Freeman and Sons, Inc. of Miss.,* 603 So. 2d 824, 829 (Miss. 1991)).

The six factors relevant to a superseding intervening cause analysis weigh in Plaintiff's favor, establishing genuine issues of material fact.

1. The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence.

Plaintiffs' alleged actions did not bring about a different kind of harm than that which otherwise would have resulted from Defendants' failures. Plaintiffs hired Defendants to ensure that the Government was not overbilled. Defendants were in charge of the billing system. Defendants were in charge of preparing the invoices sent to the Government. Defendants failed, and Plaintiffs (as the prime contractor) took the heat for it in *Alcatec v. U.S.* when the court found that the Government had been recklessly overbilled. And reckless overbilling under the False Claims Act meant that Alcatec lost everything it otherwise would have been due under the FEMA Contract, plus having to pay penalties, plus being barred from future contracting with the government. Therefore, Plaintiffs' alleged actions in submitting faulty invoices, some prepared by Defendants, and others through Defendants' system, did not bring about a different kind of harm than that which otherwise would have resulted from Defendants' preparation of faulty invoices to bill the Government.

2. The fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation.

Plaintiffs' conduct was not extraordinary in view of the circumstances existing at the time of its operation. In arguing that Plaintiffs' conduct was extraordinary, Defendants apparently contend that after Defendants failed in their task of managing the process of invoicing and billing the Government, Plaintiffs should have shut down operations rather than endeavouring to continue

servicing the Katrina victims' homes and trying to make things work with the Government. Resolution of this issue is highly fact-intensive. In view of the circumstances existing ***at the time of its operation***, Plaintiffs' attempts to carry on and make things work did not appear extraordinary, especially when Plaintiffs at the time were not aware that Defendants had failed in their contractual duties. Resolution of this issue is fact intensive.

3. The fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation.

Plaintiffs' conduct did not operate independently of the situation created by Defendants' failures. Plaintiffs hired Defendants to ensure that the Government was properly billed. The federal court found that the Government was recklessly overbilled. Plaintiffs have adduced evidence showing that Defendants breached their duties with regard to invoices and billing. Contrary to Defendants' characterizations, there is no way that Plaintiffs' conduct operated independently of these failures by Defendants.

4. The fact that the operation of the intervening force is due to a third person's act or to his failure to act.
5. The fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him.
6. The degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Plaintiffs' conduct was not due to a third person's act or failure to act. Rather, it was due to or at the very least dependent on Defendants' failures to provide the contracted-for logistical support for preparing invoices and billing the Government. In reality, Defendants were the third person which set the intervening force in motion, as Defendants were in charge of setting up and running the invoice and billing system that ultimately failed and resulted in the Government's receipt of faulty invoices.

Even early in the process, Defendants were aware of duplicate inspection submissions, CrossForms' inability to prevent duplicate entries of trailer information and accompanying reports,

and other problems. As early as June 2006, there were duplicates in the backup documentation that Defendants prepared for invoicing FEMA.[15] Defendants were responsible for setting up CrossForms and inputting all of the FEMA trailers into a master database.[16] But Defendants lacked the manpower to enter all the units into CrossForms, so Defendants sent the data to Mainstream to perform a mass data dump.[17] Defendants then looked at the database and noticed a lot of information that seemed to be either missing or inaccurate.[18] Defendants did not delete the inaccurate information.[19] Over the next several months, Defendants continued to input information, including information from completed PMI checklists, into CrossForms.[20]

Defendants acknowledge that they agreed to provide the hardware and software support and to work with CrossForms.[21] Defendant Jones was the point of contact for user access with Mainstream and CrossForms.[22] Defendants acknowledge that they agreed to develop and maintain software and hardware to provide all functions required by the company in the FEMA Contract.[23] At the heart of Defendants' operation were tools, such as CrossForms, to manage and track work orders, warranty information, inventory and warehouse management, and review maintenance trends.[24] Defendants' operation included managing and tracking monthly PMIs, and Defendants were aware that a unit could be inspected and billed for only once per month.[25] Defendants were to use CrossForms to help dispatch technicians and independent contractors to the various customer sites and to support PMIs.[26] Defendants prepared the backup information concerning

[15] R. 1746.
[16] R. 1721.
[17] R 1721-23.
[18] R. 1723.
[19] R. 1723.
[20] R. 1728.
[21] R. 1726.
[22] R. 1746.
[23] R. 1727.
[24] R. 1729.
[25] R. 1729.
[26] R. 1729.

PMIs and periodically sent this information to Plaintiffs for purposes of invoicing FEMA.[27] CrossForms could provide a complete history of PMIs and work orders for any particular unit.[28]

Defendants acknowledge that they agreed to "customerize" and initialize software for Plaintiffs' performance under the FEMA Contract.[29] Yet Defendants never looked into whether any software (e.g., CrossForms) could be customized such that for each unit only a single PMI could be entered on a monthly basis and that the software would reject entry of any other PMIs for that unit in the pertinent time period.[30] As Defendants acknowledge, such customization is possible.[31] As Defendants also acknowledge, Defendants represented to Plaintiffs that Defendants would allocate $75,000 for "customerization and initialization," but Defendants now cannot say whether they did so, instead admitting that CrossForms is an "off-the-shelf product."[32] This admission contradicts Defendants' earlier promises that CrossForms could be tailored to meet customer needs, including invoicing needs.[33] Furthermore, Defendants did not take care of all the duplicate entries using Microsoft Excel's sorting method after exporting the monthly PMI data there from CrossForms.[34] In the same vein, Defendants cannot say whether they provided even basic Excel training to their employees.[35]

Ultimately, Defendants failed in their job of reviewing the backup documentation that was used to invoice the government, failing to verify that there was no duplicate billing even though Defendants had the ability to sort through the information to check for duplicates.[36] When asked whether there was any reason why Defendants were sending Plaintiffs backup documentation

[27] R. 1730.
[28] R. 1731.
[29] R. 1732.
[30] R. 1732.
[31] R. 1732-33.
[32] R. 1733.
[33] *See* R. 1334.
[34] R. 1734.
[35] R. 1737.
[36] R. 1745.

containing duplicates, Defendants now admit that "Nobody's . . . perfect," that "Nothing is 100 percent," and that someone could have missed it when they reviewed it.[37] Defendants admit that there is a high probability of duplicates when relying on humans to input a large number of units into a system without proper quality-assurance measures in place.[38]

The bottom line is that Defendants knew that they could not handle the project. Defendants took it anyway and accepted multiple large payments from Plaintiffs. Defendants knew they were failing. Yet Defendants continued sending Alcatec faulty backup documentation for invoicing the Government. Ultimately Defendants left Plaintiffs with a broken system, failed to tell them so, and the damage was done. Defendants cannot now eschew responsibility through the doctrine of superseding intervening cause by relying on a federal claims opinion that fails to address Defendants' wrongdoing. This Court should reverse the trial court's award of summary judgment to Defendants and remand this case for trial on the merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the Hinds County Circuit Court's order granting Defendant's motion to amend their Answer to include collateral estoppel as an affirmative defense, and this Court should remand this case for further proceedings. Alternatively, this Court should reverse the court's order granting Defendants' motion for summary judgment and remand the case for further proceedings.

THIS the 4th day of September, 2019.

Respectfully submitted,

/s/ Michael A. Heilman
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[37] R. 1745.
[38] R. 1746.

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CERTIFICATE OF SERVICE

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This the 4th day of September, 2019.

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