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NO. A09-1506

State of Minnesota  
In Supreme Court

Bruce Thompson, et al.,

*Appellants,*

v.

Western National Insurance Company,

*Respondent.*

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES .....2**

**STATEMENT OF LEGAL ISSUES .....3**

**STATEMENT OF THE CASE .....4**

**STATEMENT OF THE FACTS .....5**

**STANDARD OF REVIEW .....8**

**LEGAL ARGUMENT .....8**

**I. A DISPUTE OVER THE REASONABLENESS OF A DISCOVERY  
REQUEST AND THE RESULTING NON-PAYMENT OF THE CLAIM  
RAISE FACT ISSUES FOR AN ARBITRATOR TO DECIDE AND NOT  
A LEGAL ISSUE INVOLVING BREACH OF CONTRACT.**

**a. THE APPELLANTS HAD A RIGHT TO OBJECT TO THE  
RESPONDENT’S UNREASONABLE REQUESTS FOR FORMAL  
DISCOVERY**

**b. THE APPELLATE COURT’S DECISION IS CONTRARY TO THE  
REQUIREMENTS OF REASONABLENESS AND MANDATORY  
ARBITRATION IN THE NO-FAULT ACT.**

**CONCLUSION .....18**

**CERTIFICATE OF BRIEF LENGTH .....19**

**APPENDIX .....A1**

## TABLE OF AUTHORITIES

### **Minnesota Cases:**

<i>Betlach v. Wayzata Condominium</i> , 281 N.W. 2d 328 (Minn. 1978) .....	8
<i>Dairyland Ins. Co. v. Starkey</i> , 535 N.W. 2d 363, 364 (Minn. 1995) .....	8
<i>Wolf v. State Farm</i> , 450 N.W. 2d 359 (Minn. App. 1990) .....	9
<i>Neal v. State Farm</i> , 529 N.W. 2d 333 (Minn. 1995) .....	11, 17
<i>Weaver v. State Farm</i> , 609 N.W. 2d 878 (Minn. 2000) .....	11, 12, 17
<i>In re the Claims for No-Fault Benefits Against Progressive Insurance Company</i> , 720 N.W. 2d 865 (Minn. 2006) .....	17
<i>Nicollet Restoration, Inc., V. City of St. Paul</i> , 533 N.W. 2d 845, 848 (Minn. 1995) .....	12
<i>Loven v. City of Minneapolis</i> , 626 N.W. 2d 128, 201 (Minn. App. 2001) Aff'd, 639 N.W. 2d 869 (Minn. 2002) .....	16

### **Statutes and Rules:**

Minn. Stat. 65B.525 .....	13, 16
Minn. Stat. 65B.54 .....	10
Minn. Stat. 65B.56 .....	11 -14, 16

### **Other Authorities:**

Minnesota No-Fault Arbitration Rules .....	10,13,17
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## STATEMENT OF LEGAL ISSUES

The issue presented to this Court for review is the following:

- I. If a Claimant objects to the reasonableness of an insurer's request for discovery under the terms of an insurance contract, does the refusal raise a fact question for an arbitrator to decide?

*Trial Court held in the affirmative*

**Apposite cases:**

Weaver v. State Farm, 609 N.W.2d 878 (Minn. 2000)

In re the Claims for No-Fault Benefits Against Progressive Insurance Company,  
720 N.W.2d 865 (Minn. 2006)

## STATEMENT OF THE CASE

Appellants were injured in an auto accident while insured for no-fault coverage with Respondent who admitted their claims and paid benefits. Respondent demanded Appellant's submit to deposition statements under the terms of their contract. Both Appellants objected on the grounds the requests for formal discovery were unreasonable at the time they were requested. Respondent denied payment of ongoing benefits, so each Appellant filed a petition for mandatory no-fault arbitration. Prior to the arbitration hearings the Respondent petitioned the respective arbitrators to order the Appellants to give the requested depositions, or in the alternative to stay each proceeding until it could have the matters heard in the District Court. Both arbitrators refused Respondent's requests, and the hearings went forward resulting in arbitration awards favorable to each Appellant. The Respondent brought a motion in the District Court for summary judgment alleging breach of contract, and challenging the jurisdiction of each arbitrator to issue an award. Appellants brought a motion to confirm their arbitration awards. The District Court held the Appellant's objection to the reasonableness of the Respondent's discovery requests constituted a "refusal" that raised a fact issue for each arbitrator to decide. The District Court additionally held the arbitrators had jurisdiction to hear each case (even though the refusals occurred before benefits were denied and the petitions for arbitration were filed) based upon the requirement of mandatory arbitration of no-fault claims and the amount of each claim at the time of filing.

## STATEMENT OF FACTS

On September 27, 2007 the Appellants and one other passenger were involved in a high impact auto accident caused by another driver that severely injured everyone in their vehicle. The accident was immediately reported to the Respondent who sent forms to the Appellants that it required for opening and investigating their claims. The Appellants promptly completed and returned the forms including an application for benefits, medical, employment and police authorizations. (A8-12). The Appellants also gave a phone statement to an adjuster, had their vehicle photographed and had their treating doctor send all of their medical records and bills for services to Respondent. (A15-16). The Respondent investigated their claims, admitted liability, and began paying no-fault benefits. Respondent paid \$7,111.40 for Bruce Thompson and \$7,196.50 for Cindy Thompson respectively for their medical care before arbitrarily stopping payment due to the discovery dispute between the parties. (A6-7).

The Appellants received a letter from the Respondent's attorney dated January 22, 2008 requesting they appear for scheduled depositions. (A17-18). The letter made it clear Respondent intended to take formal examinations that would subject Appellants to cross-examination, and that the attorney hired to take the statements represented only the Respondent whose interests were adverse to the Appellants. The letter advised them they could consult with and have an attorney present, but made it clear they would bear their own cost of representation. Appellants did hire counsel who responded to the deposition requests on January 28, 2008. (A13-14). In it the Appellants objected to the reasonableness of the Respondent's requests for formal discovery based upon the level of cooperation they had provided up to that point, and upon their willingness to continue to

cooperate with Respondent by providing any information it deemed necessary on an informal basis. The response clearly indicated the Appellants desire to continue to provide their cooperation with regard to any and all reasonable requests for information stating:

However, if your client feels that it still needs additional information, I would urge you to put any requests in writing and send them to my office. I will then discuss any requests with them and give you a prompt reply. If I don't receive any requests for information, we will assume your client has determined it has all the information it needs to continue to pay their claims.

In response, the Respondent sent various letters to the Appellants and the American Arbitration Association with regard to these claims. The Appellant responded to each continually asking the Respondent to put in writing any requests for information it needed, but never once in any of these communications did the Respondent ever request specific discovery information from the Appellants that couldn't be provided informally. (A27-63).

The Respondent arbitrarily denied payment of ongoing no-fault benefits. Each Appellant filed a petition for mandatory arbitration to collect for their medical care that had been denied. (A19-20). Although the Respondent did send letters alleging the Appellants had failed to cooperate with its investigation, the record is clear that they had provided their full cooperation with regard to all requests for information. (A8-16 & 21-47). Even after the Respondent stopped paying benefits the Appellants continued to cooperate with all reasonable requests for information providing additional medical authorizations, a list of all past medical providers for the previous 7 years and all of the medical and other information required by Rule 12 of the Minnesota Rules for No-Fault

Arbitration. (A27-44 & A47). They also voluntarily attended independent medical examinations requested by the Respondent. (A45-46).

During the arbitration process the Respondent filed motions with each appointed arbitrator in an attempt to stay the arbitration process and/or obtain an order requiring each Appellant to submit to a formal discovery deposition. (A48-51). The Appellants position stated in the numerous letters sent to the American Arbitration Association indicated they were not refusing to cooperate with the Respondent, but merely objecting to the reasonableness of its request for formal discovery on these admitted and previously investigated claims. (A52-63). Each arbitrator denied the Respondent's request for a stay and for depositions considering these requests unreasonable under the facts of this case. (A64). The cases went forward through mandatory arbitration. Each Appellant received an award for the full amount of their claims together with applicable interest. (A65-66).

The Respondent brought a motion in the District Court to vacate the arbitration awards. The Appellants brought a motion to confirm the awards. The motions were heard by Judge William Howard who determined the Appellants objections to the reasonableness of the deposition requests raised an issue of refusal, which in turn was a fact issue for each arbitrator to decide, not a legal issue regarding breach of contract. Judge Howard issued an order confirming each arbitration award. (A1-5).

The Respondent appealed Judge Howard's decision to the Appellate Court, which reversed it.

## STANDARD OF REVIEW

On appeal from summary judgment, the function of the Appellate Court is to determine whether there are any genuine issues of material fact, and whether the District Court erred in its application of the law. Betlach v. Wayzata Condominium, 281 N.W.2d 328 (Minn. 1978). On appeal from summary judgment where no material facts are in dispute as in this case, and the only question is one of law, the appellate courts review *de novo*. Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995).

## ARGUMENT

### **I. A DISPUTE OVER THE REASONABLENESS OF A DISCOVERY REQUEST AND THE RESULTING NON-PAYMENT OF THE CLAIM RAISE FACT ISSUES FOR AN ARBITRATOR TO DECIDE AND NOT A LEGAL ISSUE INVOLVING BREACH OF CONTRACT.**

The dispute in this case stems from language in the insurance policy concerning a discovery issue. The Respondent demanded the Appellants submit to expensive and time consuming formal discovery despite the fact the Appellants had up to that point fully cooperated with Respondent's investigation of their claims. Their prior cooperation had long since resulted in the Respondent admitting liability and the payment of benefits.

Both arbitrators who reviewed the Respondent's discovery requests denied them as being unreasonable. Judge Howard determined "there was no need for an examination under oath for the expedient investigation of the claim, and whether Cindy Thompson's employment is relevant presents a genuine fact question". Even the Appellate Court made a finding that "Western National does not dispute that the Thompson's have cooperated with all of the other insurer's requests respecting the investigation of these claims". *App. Ct. at P. 8*.

Despite this level of cooperation by the Appellants, the Respondent still demanded formal discovery of the type that would necessitate the Appellants hiring legal counsel and incurring substantial expense to defend. The Respondent demanded they appear and incur these substantial costs even though it could not make a showing of good faith to the arbitrators or the court that formal discovery was warranted, or that informal means were not available to obtain the same information. The Appellants objected to the reasonableness of these requests, while continuing their cooperation with Respondent's further requests for information.

The question this Court must answer is who decides this discovery dispute when a claimant/insured objects to the unreasonableness of these financially onerous requests by the Respondent.

**A. The Appellants had the right to object to the Respondent's unreasonable requests for formal discovery.**

This dispute between the parties arose upon the Respondent's request for formal discovery based upon language in its policy that stated:

B. A person seeking coverage must:

3. Submit, as often as we reasonably require:

b. To examination under oath and subscribe the same.

The operative words in the policy are seeking coverage and reasonably require.

At the time the requests were made the Appellants were not seeking coverage. They had met their burden under the No-Fault Act to provide reasonable proof of their loss and entitlement to no-fault benefits. *Wolf v. State Farm*, 450 N.W. 2d 359 (Minn. App. 1990). After doing so, the burden was then upon the Respondent to investigate the claims and make a decision upon payment. *Wolf*, supra. The Respondent met its burden

after investigating the claims with the full cooperation of each Appellant, and it admitted liability paying each claim. Minn. Stat. 65B.54. By the time the Respondent made its requests for formal deposition statements coverage was not an issue.

The language of the policy also required the Appellants to provide statements under oath when “reasonably” requested by the Respondent. A statement under oath is a discovery tool to obtain information about a claim. It is generally used by adjusters to make an initial determination concerning payment. If after reviewing all of the required paperwork and other information submitted by a claimant, the adjuster decides more information maybe needed to make a determination, an informal statement can be taken either over the phone, or in person. The statement can be, but is not always recorded. Its purpose is to allow the insurer to make an “initial determination” regarding acceptance or denial of the claim. Since insurers are statutorily required to make that determination within 30 days after receipt of proof of the claim, it is by necessity quick and informal. Minn. Stat. 65B.54, subd. 2.

Formal deposition statements on the other hand are taken before a court reporter by an attorney hired by the insurer whose position is adverse to the claimant’s. It is taken for the purpose of discovery in anticipation of, or during litigation. These formal statements can also be used as a tool to investigate fraud. However, no fraud has ever been alleged in these claims and none has ever been proven. It is formal discovery of the type that necessitates an insured retaining counsel to protect their right to no-fault benefits. This type of formal discovery is specifically discouraged by the no-fault arbitration rules. Minn. R. No-Fault Arb. 12.

The Appellants objections to Respondent's requests were consistent with the No-Fault Act. The level of cooperation a claimant must provide to an insurer investigating a claim is described in Minn. Stat. 65B.56, subd. 1 that states, in addition to submitting to an examination by an insurer's doctor:

An injured person shall also do all things reasonably necessary to enable the obligor to obtain medical reports and other needed information to assist in determining the nature and extent of the injured person's injuries and loss and the medical treatment received.

This statute describes the reasonable level of cooperation a claimant must provide not only when submitting to physical exams, but when providing all things reasonably necessary the insurer may need to determine the nature and extent of the loss and medical treatment received. The operative word in both the insurance policy and this statute was the requirement for any request to be reasonable.

This Court has long recognized that the parties to an insurance contract have mutual obligations to the other. There is a quid pro quo, or balancing of entitlements inherent in the no-fault system. The claimant is entitled to the prompt payment of benefits while the insurer is entitled to cooperation in its investigation of the claim. *Neal v. State Farm*, 529 N.W. 2d 330 (Minn. 1995). However, the question here, just as in *Neal*, is not whether the request for discovery or the refusal was reasonable, but who decides reasonableness, and what are the consequences of that determination. This Court's decision in *Weaver v. State Farm*, 609 N.W. 2d 878 (Minn. 2000) provided the answer that both arbitrators and the District Court relied upon in reaching their decisions

in favor of the Appellants. They each determined that reasonableness raises an issue of refusal, which is an issue of fact to be determined by an arbitrator.

This appeal presents the similar fact circumstance of requests for formal discovery by the Respondent. The Appellants refusals in these cases, like those in *Weaver* is based upon an objection to the reasonableness of the discovery requests arising from the particulars fact circumstances presented in each case and not the language in the policy per se. This Court said in *Weaver*:

We conclude that under the no-fault statute refusal presents an issue of reasonableness, which is a fact issue to be determined by the arbitrator. *Id.* at 880.

Not surprisingly, the arbitrator and District Court concluded the very same thing referencing this Court's decision in *Weaver*. Further, the fact the requests here were for depositions and not an IME doesn't change the result. The issue still involves discoverable information required by the same statute. This Court took note in *Weaver* that Minn. Stat. 65B.56, subd. 1 specifically provided for an IME, but went on to recognize the language in that statute also "requires an insured to do all things reasonably necessary..." in cooperating with an insurer. Referring to the balancing of entitlements recognized in *Neal*, this Court concluded, "Reasonableness has traditionally been considered an issue of fact". Citing, *Nicollet Restoration, Inc, v. City of St. Paul*, 533 N.W. 2d 845, 848 (Minn. 1995). And based upon that reasoning this Court held:

It is for the arbitrator to decide the reasonableness of the (IME) request and the reasonableness of the claimant's response to the request. *Id.* at 880.

Arbitrators are to make the determination of reasonableness and its consequences within the arbitration process itself to preserve the goal of a quick, efficient and cost effective system to resolve disputes involving mandatory no-fault claims. This is the process contemplated by Minn. Stat. 65B.56, subd. 1 that states:

If a claimant refuses to cooperate in responding to requests for ... information as authorized in this section, evidence of such noncooperation shall be admissible in any ... arbitration filed ... for the benefits provided by sections 65B.41 to 65B.71.

Additionally, there is a mechanism in place to protect the insurer's right to conduct discovery beyond what is normally allowed by statute. If the insurer is aggrieved by a claimant's objection to discovery, it can petition the arbitrator for an order requiring the claimant to cooperate. Upon a showing of good cause the arbitrator has the authority to order any request for discovery that can be granted by the District Courts. Minn. R. No-fault Arb. 12. And if the claimant refuses to cooperate with an arbitrator's order for discovery, the arbitrator can take the refusal into account when rendering an award. Minn. Stat. 65B.56, subd. 1.

The contract provision in this dispute is subject to the requirements of reasonableness inherent in the No-Fault Act. Both parties to the insurance contract have a legal duty of reasonableness that is enforceable by the arbitrator during the mandatory arbitration process. The statutorily prescribed method of dealing with all no-fault disputes is through the mandatory arbitration process, which previously took place in these cases. Minn. Stat. 65B.525.

**B. The Appellate Court's decision is contrary to the requirements of reasonableness and mandatory arbitration in the No-Fault Act.**

The Appellate Court's decision would move these parties discovery dispute out of the realm of mandatory arbitration and place the burden to resolve it solely upon the Appellants. They must comply with any provision in their policy, however unreasonably made, or suffer the loss of their benefits without the right to have the dispute resolved by arbitration. This decision is the contrary to the No-Fault Act for a number of reasons.

First, it ignores the reciprocal obligation of both parties to act in a reasonable manner toward each other. The Appellate Court tried to make a statutory distinction between the parties' mutual obligations to act reasonably when requesting an IME as opposed to any other permissible discovery, claiming in the later "there is no precondition of reasonableness that the insurer must satisfy..." when requesting a statement. But Minn. Stat. 65B.56, subd 1 clearly says there is no distinction. The obligation of the claimant is to do all things that are reasonably necessary, not all things that are ultimately required by the language in the insurance contract. The statutory requirement is not written as an absolute. The requirement that discovery requests be reasonable naturally assumes by implication that there maybe situations where the request by an insurer is unreasonable. In those circumstances, the insured must have recourse to raise an objection to any unreasonable request by the insurer. The recourse contemplated is dispute resolution through the mandatory arbitration process.

Judge Howard and the arbitrators of these cases came to the conclusion the Respondent's requests were unreasonable. Yet the Appellate Court would void these decisions and shelter the Respondent from any obligation to act fairly or reasonably under these circumstances. Judge Howard's decision quoted this Courts decision in *Weaver* on which he relied stating "the legal duty built in to the No-Fault Act is one of

reasonableness". There can be no fairness in a system where only one party is required to act reasonably as the Appellate Court has found. Rather, this Court's decisions in *Neal* and *Weaver* have already determined the proper method for handling these discovery disputes was to submit them to the arbitrators for a decision during the mandatory arbitration process. Arbitration preserves the rights and obligations of both parties to the insurance contract while satisfying the goals of providing a quick and fair means of resolving a claimant's right to benefits.

Second, the Appellate Court found having an arbitrator decide these factual discovery issues would essentially allow them and thereby the Appellants to rewrite the language of the insurance contract. However, the opposite is true. When deciding factual disputes the arbitrators are preventing insurers from rewriting the No-Fault Act by inserting provisions contrary to its intended operation. The arbitrator's determinations didn't affect the language of the policy, but merely applied the no-fault law to the circumstances of its operation with regard to the factual dispute of these particular claims. The Respondent was and still is free to request statements from other claimants under the terms of its policies where the circumstances warrant. The arbitrator's decisions concerning these claims is not precedent restricting the Respondents future requests for statements under oath, provided the requests are reasonable when made. The Respondents policy was not rewritten by the arbitrators decisions, its operation was explained in the context of the Appellant's objections to its unreasonable application to the facts of this case.

The arbitrator's decision regarding reasonableness didn't change the language of this policy it simply applied the law to the facts of each case, which is the essence of an

arbitrator's duty when considering whether to grant any relief. Every dispute that may arise from this provision in an insurance contract by its very nature will be limited to the facts of that case. Arbitrators are in the unique position to decide any factual disputes on a case by case basis while applying the standards of reasonableness required by this Court. It is preferable to have an arbitrator decide first the reasonableness of any factual disputes during the course of the arbitration process, and then decide upon a remedy as a consequence for any refusal. *Weaver*.

Third, the Appellate Court incorrectly held the Appellants had breached their contract by objecting to the reasonableness of the discovery requests. It failed to find that this contract provision must comply with the requirements of the No-Fault Act. *Loven v. City of Minneapolis*, 626 N.W. 2d 128, 201 (Minn. App. 2001), aff'd, 639 N.W. 2d 869 (Minn. 2002). All disputes concerning the right to no-fault benefits are subject to the right of mandatory arbitration. Minn. Stat. 65B.525. The parties' dispute over the reasonableness of the requests for discovery directly affected the Appellants rights to ongoing benefits. The dispute and the contract provision from which it arose were subject to mandatory arbitration on the issue of Appellants rights to benefits. The provision in the insurance contract cannot limit that right to arbitration. *Loven Id.* The Appellate Court's decision voided the arbitration awards thus eliminating Appellants right to mandatory arbitration guaranteed by the No-Fault Act. Minn. Stat. 65B.525.

The policy provision in question relates solely to discovery that is clearly defined by statute. Minn. Stat. 65B.56, subd. 1. The dispute over discovery related to the facts and circumstances of these particular requests. It was not a legal challenge to the Respondents right to conduct such discovery as there may be fact circumstances in other

cases that warrant its use. The language in the policy concerning statements may be clear, but its operation is subject to the provisions of the No-Fault Act that require discovery requests to be reasonable and this Court's prior decisions in *Neal* and *Weaver* that require the parties to act reasonably in that regard. And has this Court has already held in *Weaver* this issue of reasonableness in the operation of the policy provision raises a fact issue for an arbitration, not a legal issue for the courts.

Finally, the Appellate Court came to the conclusion the arbitration rules, and in particular Rule 12 that discourages formal discovery, do not apply when a dispute over no-fault benefits arises before a claim is formally denied and a petition for arbitration is filed. But the reverse is actually true because a petition for arbitration is not necessary until there is a dispute that must be resolved through the arbitration process. As long as benefits were being paid there was no dispute to arbitrate. It was the factual dispute between these parties, and the resulting non-payment of benefits that necessitated arbitration.

The Respondent made this same argument in the District Court challenging the arbitrator's jurisdiction to hear these disputes before a formal denial relying on Rule 5 (a) of the Minnesota Rules of No-Fault Arbitration. The District Court correctly pointed out that the Court of Appeals had already held the arbitration rules to be merely procedural; and the mandatory jurisdiction of the arbitrator stems from the amount of the claim. *In re the Claims for No-Fault Benefits Against Progressive Insurance Company*, 720 N.W. 2d 865 (Minn. App. 2006). A formal denial of benefits is not necessary before the commencement of arbitration. Benefits are deemed denied when, as in this case, benefits remain unpaid for more than 30 days for any reason. Minn. R. No-Fault Arb. 5(d). Then

the benefits sought, and factual dispute that caused the non-payment are subject to an arbitrator's jurisdiction and the arbitration rules, including Rule 12.

### CONCLUSION

This Court in the past has recognized the underlying requirement of reasonableness in the no-fault system. When disputes like this arise it is unfair to put the burden to act reasonably solely upon the claimant. Instead resolution of no-fault claims will undoubtedly depend upon the specific facts that give rise to each dispute. Arbitrators are in the best position to determine the respective rights of the parties to a discovery dispute. In allowing arbitrators to act, the goals of achieving a quick and fair resolution of claims, while limiting the burden of litigation on the courts and the parties, are realized. At the same time, this procedure is eminently fair to the insurer involved because it maintains the right and opportunity to present its side of any dispute (including any proof it has of fraud or misrepresentation) to the arbitrator for consideration. The arbitrator has been vested with the same authority as the District Courts to grant any relief deemed reasonably necessary to either party to insure fairness in the operation of the arbitration and resolution of no-fault claims.

For these reasons, the Appellants respectfully ask this Court to reverse the Appellate Court and Order confirmation of their arbitration awards.

Dated: August 19, 2010



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### CERTIFICATION OF BRIEF LENGTH

The undersigned counsel for the Appellants, Bruce and Cindy Thompson hereby certifies that this brief conforms to the requirements of Minn. R. Civ. App P. 132.01, Subd. 1 and 3, in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2002 software and contains 4235, words excluding the Table of Contents and Table of Authorities.

Dated: August 19, 2010

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