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Kysor Industrial Corp. v. Frazier: Strict Liability for Failure to Warn

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KYSOR INDUSTRIAL CORP. V. FRAZIER: STRICT LIABILITY FOR FAILURE TO WARN

INTRODUCTION

In March 1982, the Colorado Supreme Court reversed a jury verdict for the plaintiff in a products liability action for personal injuries.[1] This decision halted a trend, favoring plaintiffs in failure to warn cases,[2] which had begun in 1975 when the Colorado Supreme Court adopted section 402A of the *Restatement (Second) of Torts*.[3]

The opinion in *Kysor Industrial Corp. v. Frazier*[4] is worthy of critical comment for two reasons. First, the supreme court majority's interpretation of the facts appears to have been made in disregard of competent evidence; and second, the opinion is likely to be cited inappropriately as precedent for failure to warn products liability actions in Colorado.

This comment will provide a brief discussion of the rationale and history of strict liability for products, a review of Colorado case law on failure to warn in products liability actions, and an analysis of the relevance of the foreseeability of harm and of the plaintiff's conduct in such actions in light of the *Kysor* decision.

I. FACTS OF THE CASE

On February 16, 1976, Jack Frazier was severely injured while moving a four-ton traverse plate saw,[5] which was sixteen feet long and seven feet high.[6] Frazier's employer, Duffy Moving & Storage Company (Duffy), had been contacted by the distributor, Duboc-Lane and Moncton, Inc. (D.L.M.). Duffy was to move the saw from the D.L.M. to the warehouse of Esco Corporation (Esco), the purchaser.[7] Usually this large piece of equipment, manufactured by Kysor Industrial Corporation (Kysor), was shipped directly to the purchaser. In this case, however, D.L.M. agreed to store the saw until Esco completed the warehouse where it was to be housed.[8]

When the saw first arrived in Denver, a Duffy employee safely moved it

1. Kysor Indus. Corp. v. Frazier, 642 P.2d 908 (Colo. 1982).

2. The reported cases in strict liability for failure to warn, decided in Colorado between 1975 and the *Kysor* decision are: Anderson v. Heron Eng'g Co., 198 Colo. 391, 604 P.2d 674 (1979); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Martinez v. Atlas Bolt & Screw Co., 636 P.2d 1287 (Colo. App. 1981); Good v. A. B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977); Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976).

3. Section 402A of the RESTATEMENT (SECOND) OF TORTS (1965) (see *infra* note 37 for full text) was expressly adopted in Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975). In *Hiigel* the court held that failure to provide an adequate warning may render a product, otherwise free of defect, defective for purposes of § 402A.

4. 642 P.2d 908 (Colo. 1982).

5. *Id.* at 909.

6. *Id.* at 913 (Dubofsky, J., dissenting).

7. 642 P.2d at 909.

8. *Id.*

into the D.L.M. warehouse using a hydrocrane.[9] Three weeks later, Frazier, a foreman for Duffy, was sent to move the saw from D.L.M. to Esco's warehouse.[10] At the D.L.M. warehouse, Frazier was shown how to rig the saw in order to lift it with the hydrocrane, which had been ordered for the operation. He then loaded the saw onto a truck.[11] Knowing that a forklift was available at Esco for unloading, Frazier sent the hydrocrane back to Duffy's yard; neither Kysor nor D.L.M. knew what equipment was to be used to unload the saw at the Esco warehouse.[12]

As an experienced mover of heavy equipment, Frazier looked for lift marks on the saw and attempted to determine the center of gravity in preparation for unloading the saw at Esco.[13] Most of the surface area above the saw's center of gravity was covered with sheet metal, which made the calculation difficult.[14] There were no lift marks and no warnings or instructions for moving the saw.[15] Frazier slipped the forklift under the lowest horizontal member of the saw, unloaded it from the trailer, and moved it into Esco's warehouse.[16] This maneuver was executed without incident; the saw was put in position in the warehouse and Frazier prepared to remove its 600-700 pound skid plate.[17]

Believing the saw had been lowered all the way to the ground, Frazier directed his co-workers to remove the lag screws from the skid.[18] He then bent over to cut the steel bands which held the unassembled parts of the saw to the skid. The saw in fact was slightly above the ground, and removal of the skid caused the center of gravity to shift.[19] The saw became unstable; it rocked back and forth on the forklift and then turned over onto Frazier, causing a severe hemorrhage in his back and a sprain in the cervical region of his neck.[20]

Justice Dubofsky noted evidence in her dissent which was not mentioned in the majority opinion.[21] According to one expert witness, the center of gravity was probably below the lift point while the skid was attached.[22] The skid could not have been removed, according to this expert, unless the saw was slightly above ground, and the saw by itself could not have been lifted in a stable manner with a forklift positioned under the lower beam.[23]

A long-time superintendent of Duffy's testified that it was customary for

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 909-10.
13. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3, Kysor Indus. Corp. v. Frazier, 642 P.2d 908 (Colo. 1982).
14. *Id.*
15. *Id.*
16. 642 P.2d at 910.
17. *Id.* The skid plate was a wooden apparatus with rollers, temporarily attached to the base of the saw during shipment. *Id.* at 913 (Duboskfy, J., dissenting).
18. 642 P.2d at 910, 912.
19. *Id.* at 910.
20. *Id.*
21. *Id.* at 913-15 (Dubofsky, J., dissenting).
22. *Id.* at 914.
23. *Id.*

large uncrated machines to be accompanied with instructions or warnings for hoisting, moving, slinging, or lifting.[24] In the absence of instructions to the contrary, the superintendent testified, he would have used a forklift to move the saw, as the plaintiff had, since the saw appeared to be stable.[25]

In addition, the general foreman at Kysor's own plant testified that during the manufacturing process the saw was moved around the plant by using an overhead crane with chains attached to particular points on the saw, one chain being used especially for steadying.[26] Based on his familiarity with the saw, this witness further stated that the crane was the only proper way to lift the saw.[27]

Frazier sought relief against Kysor and D.L.M., alleging strict liability in tort for failure to provide warnings or instructions for the proper lifting and moving of the saw and removal of the skid.[28] The jury returned a verdict for Frazier which was affirmed by the Colorado Court of Appeals.[29] The Supreme Court of Colorado granted certiorari but reversed the decision, declaring there was no factual basis for submitting the strict liability claim to the jury.[30]

II. STRICT LIABILITY FOR PRODUCTS

A. *Rationale and Limits*

Strict liability originally emerged in response to societal concerns over the changing relationship between the individual consumer and the manufacturer and sellers of a product.[31] Prior to 1960, recovery by a plaintiff-

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. 642 P.2d at 910. Frazier originally sought recovery on three theories: 1) negligence, 2) breach of implied warranty, and 3) strict liability for failure to provide warnings for the proper method of lifting and moving the saw and removing the skid plate. Frazier later withdrew the negligence and breach of warranty claims. *Id.*
29. Frazier v. Kysor Indus. Corp., 43 Colo. App. 287, 607 P.2d 1296 (1979), *rev'd*, 642 P.2d 908 (Colo. 1982). The Court of Appeals held, *inter alia*, that: 1) there was sufficient evidence for the jury to find a failure of adequate instruction thereby creating a defective condition unreasonably dangerous to the user or consumer; 2) plaintiff's expertise in moving heavy equipment did not preclude the finding of a defectively dangerous product due to the lack of instructions for safely and properly moving the saw; and 3) by placing a product which is unreasonably dangerous without a warning into the stream of commerce, the manufacturer bears the risk of liability to those who foreseeably may be injured along the path of delivery. Therefore, a professional mover is a protected "consumer" within the meaning of section 402A. 43 Colo. App. at 290-92, 607 P.2d at 1300-01.
30. 642 P.2d at 913. The majority held that since the product's dangerous condition was created *solely* by Frazier's mishandling there was no duty to warn or instruct. *Id.* at 911-12. For a discussion of the factual issues reported in the majority and minority opinions, see *infra* notes 137-49 and accompanying text.
31. *See generally* Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966). Increased public awareness of the hazards associated with the manufacture and design of products has spurred the growth of strict products liability. W. PROSSER, LAW OF TORTS 651 (4th ed. 1971). Imposition of liability on the manufacturer for harm caused by use of a defective product has been justified by several arguments: a manufacturer is encouraged to produce safer products if it believes it may be subject to liability for defective products; the loss can be borne without hardship since the manufacturer can spread costs equally among consumers by adjusting prices; the manufacturer is the entity that can easily obtain liability insurance, and this

consumer who had suffered injury to his person or property from a product was sometimes obtainable from a manufacturer or seller on theories of warranty or negligence.[32] Serious obstacles to recovery existed with both approaches. An injured individual seeking relief under a contract-warranty theory was often denied recovery because of disclaimer clauses or a lack of privity of contract.[33] Recovery under a tort-negligence theory was limited by the difficulty of proving the defendant failed to use reasonable care or was somehow at fault in the manufacture or sale of the product.[34] The plaintiff in a strict liability action is in a better position to overcome the burdens imposed by the increasing complexity of the manufacturing and distributional process;[35] recovery is possible without proving the defendant's negligence or the existence of a privity relationship between the plaintiff and defendant.[36]

Section 402A of the *Restatement (Second) of Torts*[37] provides that a manufacturer or supplier who allows a product to be distributed in a "defective condition unreasonably dangerous to the consumer or user" may be liable, even to remote users, although "all possible care" has been used in the preparation and sale of the product.[38] A product may be defective as marketed if any of the following exists: a flaw in the product such as a manufacturing abnormality which makes the product more dangerous than intended,[39] a failure to warn or provide adequate instructions as where the product is in its intended condition but is defective because of the failure to present it properly to users,[40] or a defective design where the product is in its intended condition but is not sufficiently safe.[41]

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expense can be built into production costs. *See generally* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 561 (1969); Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 293-98 (1979) [hereinafter cited as *Products Liability*]; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

32. Keeton, *Products Liability, supra* note 31, at 295-96.

33. *Id.* at 296.

34. *Id. See also* Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980) [hereinafter cited as *Design Defects*]; Wade, *supra* note 31.

35. Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 93, 337 A.2d 893, 898 (1975).

36. Wade, *supra* note 31, at 825.

37. Section 402A states:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

38. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 256 (1969).

39. *Products Liability, supra* note 31, at 297.

40. *Id.* at 297-98; *Design Defects, supra* note 34, at 551.

41. *Products Liability, supra* note 31, at 298; *Design Defects, supra* note 34, at 551.

Strict liability is not the equivalent of insurance;[42] otherwise, the manufacturer would be absolutely liable for any injury sustained by any person however remotely connected with the product. Although the *Restatement* dispenses with requirements of privity and proof of negligence, a plaintiff in most jurisdictions must still prove that the product was "unreasonably dangerous" as well as defective.[43] A finding that the product was "unreasonably dangerous" will likely be affected by consideration of negligence rules.[44]

Appropriate limits both as to the original existence of liability and as to its scope and extent are currently being defined.[45] Limits set by the courts in terms of scope and extent have usually been controlled by the concepts of proximate cause or risk, including abnormal use, and plaintiff's fault, including contributory negligence, assumption of risk, and misuse.[46] On the other hand, analysis of the nature of the product itself governs original existence of liability;[47] actionability exists when there is something wrong with the product that makes it dangerous.[48] It is then usually referred to as a defective product. This adjective presents little problem when something has gone wrong in the manufacturing process, and the product is not in its intended condition.[49] A cause of action, however, may also exist when a product has been manufactured exactly as intended and the design is not sufficiently safe, or warnings or adequate instructions are not provided.[50] The adjective "defective" is then an expression for a legal conclusion rather than a test for reaching that conclusion.[51] The authors of the *Restatement (Second) of Torts* anticipated potential problems in determining actionability. They decided that by using terms which might appear redundant, "defective condition" and "unreasonably dangerous," it would be clear that the product must have something wrong with it, and that it must be harmful as a result.[52]

B. *Development of Current Law*

The first test for strict liability in tort was articulated in 1962 by Justice Traynor in *Greenman v. Yuba Products Co.*[53] After the publication of the final draft of the *Restatement* in 1965, jurisdiction after jurisdiction cited both sec-

42. Wade, *supra* note 31, at 828.

43. Noel, *supra* note 38, at 257. For discussion of the elimination of the "unreasonably dangerous" requirement, see *infra* notes 56-63 and accompanying text.

44. Noel, *supra* note 38, at 257.

45. Wade, *supra* note 31, at 828.

46. *Id.*

47. *Id.*

48. *Design Defects, supra* note 34, at 551.

49. *Id.*

50. *Id.*

51. *Id.* at 552.

52. Wade, *supra* note 31, at 830-33. Wade briefly discusses the "legislative history" of the language of § 402A and alternatives to the term "unreasonably dangerous," and then presents a seven-factor test as a standard for application. *Id.* at 830-38.

53. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Justice Traynor, writing for a unanimous court, held that a plaintiff need only prove that while using a product as it was intended to be used, he was injured because of a defect in design or manufacture of which he was not aware and which made the product unsafe for its intended use. *Id.* at 64, 377 P.2d at 910, 27 Cal. Rptr. at 701. Two elements emerged as tests for recovery: *defective* in design or manufacture and *unsafe* for intended use. *Design Defects, supra* note 34, at 554.

tion 402A and *Greenman* as authoritative legal bases for strict liability.[54] A consensus was reached in the common law that the product must be unreasonably dangerous to be actionable.[55]

What appeared to be smooth development for strict liability in tort became complicated by the intermingling of negligence concepts. In *Cronin v. J.B.E. Olson Corp.*,[56] the California Supreme Court re-examined its *Greenman* opinion. The court concluded that a different test had been articulated in *Greenman* than was expressed by the authors of the *Restatement*.[57] The "unreasonably dangerous" qualification, added to section 402A as a limiting mechanism on liability for harm from a product with an inherently dangerous nature, was considered a step backward into the realms of negligence. The court concluded that requiring proof that a defect in a product made it "unreasonably dangerous" significantly burdened the plaintiff. Furthermore, the court feared this would lead to results in strict liability actions no different from those reached under the laws of negligence.[58] The *Cronin* court held that in order to recover in strict liability a plaintiff need only show that the product was defective.[59]

The *Cronin* decision is important because it demonstrates a concern that strict liability has not been applied as a cause of action separate from negligence concepts of unreasonableness or culpability. *Cronin*, however, has been followed by only a few courts outside California[60] and has been criticized by several commentators.[61] It is argued that the term "defective", by itself, can provide no real guidance in deciding a case involving an insufficiently safe design or a failure to provide an adequate warning.[62] Courts which have

54. *Id.* at 555. An informative history of the development of the final draft of § 402A is presented in Wade, *supra* note 31, at 830-31, and *Design Defects, supra* note 34, at 554-55.

55. *Design Defects, supra* note 34, at 556.

56. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

57. *Id.* at 131-35, 501 P.2d at 1161-63, 104 Cal. Rptr. at 441-43.

58. *Id.* at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

59. *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443.

60. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 213 (Alaska 1975); Glass v. Ford Motor Co., 123 N.J. Super. 599, 601-03, 304 A.2d 562, 564 (1973); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 93-97, 337 A.2d 893, 899-900 (1975).

61. *See* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 30-31 (1973); Wade, *supra* note 31, 829-34.

62. *Design Defects, supra* note 34, at 557.

It is evident that the developing law in strict products liability remains in turmoil even in California. In Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the court recognized the inadequacy of the *Cronin* rule, which simply requires the product to be shown defective in a design defect case. A new test was proposed which reflects a substantial modification of the *Cronin* court's position; although in *Barker*, the court was careful to retain the focus on the condition of the product as opposed to the conduct of the manufacturer. Under *Barker* a product is defective in design if: 1) the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or 2) the benefits of the design do not outweigh the risk of danger inherent in the design. *Id.* at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40. A striking departure from the "unreasonably dangerous" requirement of the *Restatement* is not apparent except that, with regard to the risk-benefit standard, the court held the burden of proof would shift to the defendant once the plaintiff makes a prima facie showing that the design proximately caused the injury. *See id.* at 431-32, 573 P.2d at 446-47, 455, 143 Cal. Rptr. at 228-29, 237; *Design Defects, supra* note 34, at 558.

A California Court of Appeals case construing *Barker* held that in a warning case, the jury must be instructed that the standard is whether the "absence of an adequate warning renders

considered the problem have adhered to the *Restatement's* "unreasonably dangerous" requirement, being unwilling to risk the consequences of unburdening the plaintiff to the extent allowed by the *Cronin* rule.[63] Juries have been instructed to consider "defect" in terms such as "reasonable expectations" or "reasonableness of putting the product on the market,"[64] phrases reminiscent of negligence principles.

C. *The Law in Colorado*

Colorado court decisions during the last ten years in strict products liability cases have reflected a turmoil in the law. The basic premises for strict liability were introduced in *Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*,[65] where the Colorado Court of Appeals recognized section 402A as a basis for recovery for a plaintiff injured by a product in a "defective condition unreasonably dangerous."[66] Privity was held not to be a prerequisite to recovery, and an attempt to inject an element of foreseeability into the definition of "unreasonably dangerous" was rejected by the court as a negligence concept, inapplicable in a strict liability claim.[67]

In 1975, the Colorado Supreme Court expressly adopted section 402A in *Hiigel v. General Motors Corp.*[68] A failure to provide an adequate warning was held to render a product defective under section 402A, although the product was otherwise free of defect.[69] While emphasizing that the focus must be the condition of the product, the court held that the duty to warn rested on considerations of the likelihood of accident and the seriousness of consequences for failure to warn.[70] The court attempted to apply strict products liability theory, but the requirement of determining the existence of a duty by foreseeability and risk considerations actually kept the possibility of recovery within traditional negligence bounds.

A comprehensive opinion by the Colorado Court of Appeals was issued in 1976 in a strict liability action for failure to warn. In *Hamilton v. Hardy*,[71] the court clarified the difference between negligence and strict liability theories. In a negligence action, a manufacturer would be subject to liability for

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the article *substantially* dangerous to the user." Cavers v. Cushman Motor Sales, Inc., 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142, 149 (1979) (emphasis in original). Although the "unreasonably dangerous" requirement has been removed, the modifier indicates a weighing of degrees of danger. *Id. See Design Defects, supra* note 34, at 565.

63. *E.g.*, Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Aller v. Rodgers Mach. Mfg., 268 N.W.2d 830 (Iowa 1978); Cepeda v. Cumberland Eng'g, 76 N.J. 152, 386 A.2d 816 (1978); Phillips v. Kimwood Mach. Co., 269 Or. 581, 525 P.2d 1033 (1974); Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975). *See Design Defects, supra* note 34, at 557.

64. *Design Defects, supra* note 34, at 557.

65. 33 Colo. App. 99, 517 P.2d 406 (1973).

66. *Id.* at 107, 517 P.2d at 411.

67. *Id.* at 107-10, 517 P.2d at 411-13.

68. 190 Colo. 57, 544 P.2d 983 (1975).

69. *Id.* at 63, 544 P.2d at 987. The court adopted comment j to § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which states in part: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."

70. 190 Colo. at 64, 544 P.2d at 988.

71. 37 Colo. App. 375, 549 P.2d 1099 (1976).

injuries caused by its failure to use reasonable care to warn of possible dangers.[72] In strict liability, "a manufacturer who sells a product in a defective condition unreasonably dangerous to the consumer is subject to liability for physical harm thereby caused, even though the seller has exercised all possible care in the preparation and sale of the product."[73] Citing an Oregon Supreme Court opinion,[74] the Colorado court emphasized that in strict liability, the issue is the condition of the product sold without warning, while in negligence, the issue is the reasonableness of the manufacturer's conduct in selling the product without a warning.[75]

The court of appeals concluded that the dangerousness of the product, as distinguished from the seller's culpability, should be determined by assuming the seller knew of the product's propensity to injure and then asking whether the seller acted unreasonably in selling it without a warning.[76] Such an assumption would not be made in a negligence action where the plaintiff is required to prove the fault of the defendant. This opinion reflects an effort to resist application of negligence principles in strict liability failure to warn actions.

Two years later in *Union Supply Co. v. Pust*,[77] the Colorado Supreme Court expressly adopted section 402A as a theory of recovery for injuries caused by a product unreasonably dangerous because of a defect in its design. The plaintiff was involved in an industrial accident when his arm was caught in the "nip point" of a conveyor belt. Plaintiff sued the manufacturer of the conveyor, alleging design defects in the conveyor and failure to warn adequately of the dangers of working at the "nip point."[78] The court confirmed its holding in *Hiigel* that a failure to provide adequate warning can render a product otherwise free of defect, defective under section 402A, and quoted *Hamilton* in recognizing the distinction between the focus of strict liability and negligence actions.[79]

In a footnote to the opinion, the court indicated its awareness of the split of authority on the definition of strict liability—the followers of the *Restatement* versus the jurisdictions eliminating the "unreasonably dangerous" requirement.[80] Although the supreme court recognized that other

72. *Id.* at 383, 549 P.2d at 1106.
73. *Id.*, 549 P.2d at 1106-07.
74. Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974).
75. 37 Colo. App. at 384, 549 P.2d at 1107.
76. *Id.* at 385, 549 P.2d at 1108.
77. 196 Colo. 162, 583 P.2d 276 (1978).
78. *Id.* at 166-68, 583 P.2d at 278-80.

The absence of appropriate warnings or instructions is sometimes classified as a "design defect." Wade, *supra* note 31, at 842. The court in *Union Supply* did not refer to absence of warning or instruction as a design defect *per se* but did find that the elements in a failure to warn case were the same as those in a design defect case, except for the need to find creation of the defective condition due to lack of adequate warning. *Union Supply*, 196 Colo. at 173, 583 P.2d at 283-84. Those elements are: 1) the product is in a defective condition unreasonably dangerous to the user or consumer; 2) the product is expected to and does reach the user or consumer without substantial change; 3) the defect must be the cause of the plaintiff's injury; 4) the defendant sold the product and is engaged in the business of selling such products; and 5) the plaintiff has been injured as a result. *Id.* at 171-73, 583 P.2d at 282-83.

79. *Id.* at 173, 583 P.2d at 283 (quoting *Hamilton*, 37 Colo. App. at 383, 549 P.2d at 1107).
80. *Id.* at 171 n.5, 583 P.2d at 282 n.5.

courts had removed the "unreasonably dangerous" portion because of its negligence implications, the court expressed its intention to retain that requirement as a mechanism for limiting the liability of a manufacturer or seller.[81]

The court remanded the case, concluding that a jury question had been presented on whether the failure to attach warnings had created a defective condition unreasonably dangerous to the plaintiff.[82] A clear test for determining liability, however, was not defined. No mention was made of the *Hamilton* provision that in strict liability for failure to warn it is assumed the defendant knew of a product's propensity to injure.

In the 1979 case of *Anderson v. Heron Engineering Co.*,[83] the Colorado Supreme Court reversed a court of appeals decision which had affirmed a verdict for the defendant. The plaintiff's claims were based on breach of express warranty and strict liability under section 402A for failure to provide more complete maintenance instructions or for failure to warn of the consequences of improper maintenance.[84] On the issue of failure to warn, the court held that a product otherwise free of defect may be defective and unreasonably dangerous if not accompanied by adequate instructions and warnings.[85] Such a defect, the court emphasized, may impose the same liability on a manufacturer as if the defect were a manufacturing or design defect.[86]

The court also held that a manufacturer is obligated to warn of dangers that may arise from improper use and handling, and that a defense of no knowledge of prior problems is inapplicable in a strict liability action.[87] The argument that liability should be imposed only if the defendant knew or should have known of a latent defect "mixes 'reasonableness' and 'foreseeability' concepts of negligence law with precepts of strict liability."[88] Attention to the manufacturer's knowledge or what he could reasonably be assumed to have known, the court continued, directs the focus away from the condition of the product back to the reasonableness of the manufacturer's conduct, a result inappropriate in strict liability.[89]

The court further noted that a defendant's knowledge of a defect that renders a product unreasonably dangerous is, in effect, assumed in strict liability cases.[90] Thus, the *Anderson* court concluded, the jury issue was whether the manufacturer's failure to provide adequate instructions or warning rendered the product unreasonably dangerous, without regard to the reasona-

81. *Id.*

82. *Id.* at 173, 583 P.2d at 283.

83. 198 Colo. 391, 604 P.2d 674 (1979).

84. *Id.* at 394, 604 P.2d at 675-76.

85. *Id.* at 395, 604 P.2d at 676 (citing *Union Supply*, 196 Colo. at 168 n.1, 583 P.2d at 280 n.1; *Hiigel*, 190 Colo. at 63, 544 P.2d at 988).

86. 198 Colo. at 395, 604 P.2d at 676.

87. *Id.* at 397-98, 604 P.2d at 678.

88. *Id.* at 398, 604 P.2d at 678.

89. *Id.*, 604 P.2d at 679.

90. *Id. Accord Hamilton*, 37 Colo. App. at 385, 549 P.2d at 1108. The *Anderson* court cited Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974), the same case relied upon in *Hamilton*.

bleness of the manufacturer's conduct in failing to warn.[91]

III. *KYSOR INDUSTRIAL CORPORATION V. FRAZIER*

In a split decision, the Colorado Supreme Court reversed a jury verdict awarding damages to the plaintiff in *Kysor Industrial Corp. v. Frazier*.[92] The plaintiff, Jack Frazier, had filed an action against the manufacturer, Kysor, and distributor, D.L.M., of an industrial saw seeking recovery based on strict liability under section 402A for failure to warn or provide instructions for the proper method of lifting and moving the saw and removing the skid.[93] The jury awarded Frazier $75,000 for injuries he suffered while moving the saw.[94] The court of appeals affirmed the decision against Kysor and D.L.M., concluding that: 1) section 402A was an appropriate theory of recovery; 2) sufficient evidence existed for the jury to find a failure of adequate instruction which created an unreasonably dangerous defective condition; 3) the plaintiff was a user or consumer within the protection of section 402A; and 4) reversible error did not exist in the trial court's rulings on admissibility of certain evidence.[95]

The supreme court majority addressed the first two issues, deciding there was no evidence that the saw or skid was defective in the absence of a warning. Therefore, Frazier's claim for recovery under section 402A was erroneously submitted to the jury.[96] The remaining issues were not addressed; the judgment was reversed and the case remanded for entry of judgment in favor of Kysor and D.L.M.[97]

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91. 198 Colo. at 398, 604 P.2d at 679 (citing *Hamilton*, 37 Colo. App. at 385, 549 P.2d at 1108).

Only two other cases were reported in Colorado based on strict liability for failure to warn or provide adequate instruction after *Hiigel* and prior to *Kysor*. In Good v. A. B. Chance, 39 Colo. App. 70, 565 P.2d 217 (1977), the court of appeals ruled that, although negligence principles are not applicable in a strict liability case, evidence demonstrating pre-existing knowledge of inherent danger and feasibility of providing a warning should have been admitted as establishing a duty to warn users or consumers. *Id.* at 78-79, 565 P.2d at 223-24. This opinion reflects some intermingling of the two causes of action.

In another court of appeals case, Martinez v. Atlas Bolt & Screw Co., 636 P.2d 1287 (Colo. App. 1981), the court found reversible error in the trial court's refusal to instruct the jury on the issue of failure to warn. The fact that persons using the equipment were aware of the defect did not relieve the manufacturer of its duty to warn, if the duty existed at the time the equipment was sold. Since no warnings had been given, there was a factual basis for submitting the failure to warn question to the jury. *Id.* at 1290.

92. 642 P.2d 908 (Colo. 1982). Justice Erickson wrote for the majority, Justice Rovira concurred specially, and Justices Lohr and Quinn joined Justice Dubofsky in the dissent.

93. *Id.* at 910.

94. *Id.*

95. *Id.*

96. *Id.* at 911.

97. *Id.* at 913. The third issue presented to the supreme court on appeal, whether the plaintiff, an expert mover, was a user or consumer within the contemplation of § 402A, remains unanswered. The majority stated that it agreed with the court of appeals that plaintiff's experience in moving heavy equipment did not preclude a finding of a defective and unreasonably dangerous product. *Id.* at 911. The statement, however, appears to be dictum. In holding that the cause was erroneously submitted to the jury under § 402A, the court concluded that it need not address the remaining issues. *Id.* at 913.

The court of appeals had found Frazier to be a protected consumer under the rule that a manufacturer who places a product into the stream of commerce must bear the risk of liability to anyone who foreseeably may be injured along the path of delivery. Frazier v. Kysor Indus.

In reaching its decision, the court noted that section 402A had been adopted in the 1975 Colorado case of *Hiigel v. General Motors Corp*.[98] The court further stated that under section 402A a product may be found defective and unreasonably dangerous to the user even though faultlessly made, if placed on the market without adequate warnings or instructions concerning safe and proper use.[99] A manufacturer's strict liability rests upon the concept of enterprise liability for casting a defective product into the stream of commerce rather than on traditional negligence principles.[100] Nevertheless, the court indicated that determination of the existence of a duty to warn turns upon consideration of the likelihood of accident and the seriousness of the consequences of failing to warn.[101] The focus for determining liability, however, is to be the condition of the product rather than the conduct of the manufacturer.[102] In Colorado, the court noted, a plaintiff must prove that a product is both "defective" and "unreasonably dangerous" to sustain an action under section 402A.[103]

The court emphasized that strict liability is not the equivalent of absolute liability, and therefore, the fact that an accident occurs through use of a product does not necessarily render the product defective and unreasonably dangerous without a warning.[104] According to the majority, the plaintiff in this case was the sole cause of the accident.[105] There was no evidence in the record to show the saw or skid was defective and unreasonably dangerous in the absence of warnings or instructions; rather, Frazier created the danger by his own mishandling.[106] The court read the record as supporting a finding that Frazier's misjudgment in failing to lower the saw to the ground and subsequent attempt to remove the skid plate amounted to mishandling, which was the sole cause of the danger. The plaintiff, therefore, had not sustained his burden of proof.[107]

The majority recognized that the question of whether a product is in a

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Corp., 43 Colo. App. 287, 292, 607 P.2d 1296, 1301 (1979), *rev'd on other grounds*, 642 P.2d 908 (Colo. 1982).

98. 190 Colo. 57, 544 P.2d 983 (1975). *See supra* notes 68-70 and accompanying text.

99. 642 P.2d at 910-11 (citing Anderson v. Heron Eng'g Co., 198 Colo. 391, 604 P.2d 674 (1979); Union Supply v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Hiigel v. General Motors, 190 Colo. 57, 544 P.2d 983 (1975); RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965)).

100. 642 P.2d at 911.

101. *Id.*

102. *Id.*

103. *Id.* (citing Union Supply v. Pust, 196 Colo. 162, 583 P.2d 276 (1978)). The majority noted that some courts had eliminated the "unreasonably dangerous" requirement because of its negligence implications, but made no further comment on the issue. 642 P.2d at 911 n.1.

104. *Id.*

105. *Id.* at 912.

106. *Id.* at 911-12.

107. *Id.* The majority relied on comment g of § 402A of the *Restatement* in concluding that a duty to warn does not exist "where a product's dangerous condition is created *solely* by the plaintiff's own mishandling or misuse." *Id.* at 912 (emphasis added). Comment g provides in part:

> The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling . . . [makes] it harmful. . . . The burden of proof that the product was in a defective condition at the time it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965), *quoted in Kysor*, 642 P.2d at 911.

"defective condition unreasonably dangerous" because of a failure to warn is normally for the jury to decide.[108] Nevertheless, "after a view to all the evidence" the supreme court concluded that the question was erroneously submitted to the jury.[109] The court found no evidence to show the saw or skid was defective without a warning; on the contrary, the court found that Frazier himself created the dangerous condition resulting in his injury.[110]

IV. ANALYSIS OF THE MAJORITY OPINION

A. *Foreseeability*

It is well settled that a product may be defective and unreasonably dangerous because of the absence of warnings or adequate instructions for proper use, and that such a condition may give rise to a cause of action in strict liability under section 402A.[111] The test for determining when an unlabeled product is defective and unreasonably dangerous, however, is not clear. The decision is normally one for the jury.[112] In Colorado, two different tests have been articulated by the supreme court.

The first, applied in *Hiigel*, provides that a duty to warn must exist, and that the duty is determined by considering the likelihood of accident and the seriousness of consequences from a failure to warn.[113] In *Anderson* a second test was applied. The Colorado Supreme Court did not talk of a manufacturer's duty, but rather focused entirely on the condition of the product without a warning.[114]

The difference in these tests is significant. Although the *Hiigel* court expressed an intent to stay outside the realm of negligence and to focus on the nature of the product, its test requires a finding of breach of a duty. Determination of the existence of the duty requires an evaluation of what the manufacturer could or should have foreseen. The court's focus was not on the condition of the product, but on the conduct of the manufacturer. The analysis was based not on the concepts associated with strict liability but on negligence principles.

In *Anderson*, the court asserted that the manufacturer's knowledge of a product's propensity for harm must be assumed in a strict liability action.[115] The reasonableness of the manufacturer's failure to warn is not to be considered.[116] The existence of liability is determined by considering whether the failure to warn rendered the product unreasonably dangerous. In *Kysor*, the

108. 642 P.2d at 912-13 (citing Anderson v. Heron Eng'g Co., 198 Colo. 391, 604 P.2d 674 (1979); Union Supply v. Pust, 196 Colo. 162, 583 P.2d 276 (1978)).

109. *Id.* at 913.

110. *Id.*

111. *See* Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 398-99 (1970); Noel, *supra* note 38 at 256; *Design Defects, supra* note 34 at 551; Wade, *supra* note 31 at 830; Note, *Products Liability in Texas: Foreseeability and Warnings*, 58 TEX. L. REV. 1323, 1323 (1980).

112. *See Anderson* 198 Colo. at 398, 604 P.2d at 679 (1979); *Union Supply*, 196 Colo. at 173, 583 P.2d at 283.

113. 190 Colo. 57, 63, 544 P.2d 983, 987-88 (1975).

114. 198 Colo. at 398, 604 P.2d at 679.

115. *Id.*

116. *Id.*

Colorado Supreme Court had an opportunity to resolve this disparity by unambiguously deciding whether a manufacturer's foreseeability is an issue in a strict liability action for failure to warn. The majority, however, based its decision on the conduct of the plaintiff, and the court's comments regarding a test for determining liability do little but perpetuate the confusion.

Writing for the majority, Justice Erickson demonstrated the court's support for the *Hiigel* test by stating that a consideration of the likelihood of accident and the seriousness of the consequences determines whether warnings or instructions are required.[117] Justice Erickson did not, however, actually consider these factors in the opinion. He merely concluded there was no evidence in the record showing the saw or skid to have been in a defective condition because of lack of warning.[118]

The court stated that normal negligence rules were not applicable, but that the manufacturer's liability was based on the theory of enterprise liability for placing a defective product on the market.[119] The critical issue, according to the court, was the condition of the product without a warning.[120] Justice Erickson was careful, however, to mention that the occurrence of an accident would not necessarily render a product defective and unreasonably dangerous because a manufacturer is not required to be an insurer of its products.[121]

The court then asserted that Frazier's claim could not be sustained under section 402A because it was Frazier's own contact with the saw which caused the injury.[122] Justice Erickson rendered a holding which is confusing on its face and likely to be interpreted inconsistently: "[W]e hold that a duty to warn or instruct does not occur where a product's dangerous condition is created solely by the plaintiff's own mishandling or misuse."[123]

The mention of duty brings into play the foreseeability issue. Justice Erickson, however, did not immediately discuss the likelihood or seriousness of potential injury, factors which he had indicated must be considered to determine whether a duty exists. Instead he again shifted the focus to the plaintiff's conduct.[124] The language of the holding quoted above may be interpreted as meaning that a duty to warn of potential risks or to provide instructions for safe and proper use may be determined after the harm has occurred. This interpretation illustrates the failure in logic of the court's holding. A duty to warn is based on foreseeability and cannot be determined by the intervening conduct of the user or on an *ad hoc* basis. The duty either exists or does not exist at the time the manufacturer releases the product into the stream of commerce. It is not related to later use of the prod-

117. 642 P.2d at 911.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 911-12.
124. Immediately following the statement quoted in the text, the majority declared: "The record establishes that Frazier created the dangerous condition which resulted in his injury by his own inadvertence and mishandling." *Id.* at 912.

uct.[125] The court's only application of foreseeability factors was somewhat later in the opinion where it stated that since the saw could be moved by a variety of methods no specific warnings or instructions could have been issued.[126]

B. *Plaintiffs' Conduct and the Condition of the Product*

In *Hiigel* and *Anderson* the Colorado Supreme Court held that a manufacturer is obligated to warn of dangers that may arise from improper use and handling.[127] Justice Erickson did not mention that rule nor did he distinguish the facts in *Kysor*. Instead he cited section 402A comment g, as pertinent to the issue of plaintiff's misuse.[128] That comment absolves the manufacturer of liability when the user mishandles an otherwise safe product in such a way that it becomes harmful.[129] This analysis leaves unanswered the question of whether a manufacturer has a duty to warn of dangers that may arise from improper use and handling and the reciprocal issue of whether a plaintiff is barred from recovery where he has misused a product lacking instructions.

Justice Erickson was careful to note that contributory negligence, which consists merely of failure to discover a defect in the product or to guard against the possibility of its existence, is not applicable in a strict liability action.[130] By applying comment g, the court in *Kysor* attempted to show that the decision to deny recovery was reached on causation theories rather than contributory negligence principles.[131] According to the court, the record supported a finding that Frazier's injury resulted from the unstable condition created by his mishandling of the forklift and saw, and not from Kysor's failure to warn. Therefore, the issue was not contributory negligence.[132] The majority declared that the sole cause of Frazier's accident was his own conduct.[133]

The justifiability of the result reached by the court's application of comment g must be questioned. Kysor manufactured the four-ton saw for industrial use. In order for the saw to be used, it had to be moved to the buyer's location, unloaded and placed in position—a process for which Jack Frazier

125. Trine, *Duty to Warn in Product Liability Cases*, 31 TRIAL TALK 7 (June 1982).

126. 642 P.2d at 912.

127. To comply with this duty [to warn] the manufacturer . . . must appropriately label the product, giving due consideration to the likelihood of accident and the seriousness of consequences . . . so . . . as to warn of any dangers that are inherent in it and its use or that may arise from the improper handling or use of the product.

Hiigel, 190 Colo. at 63, 544 P.2d at 988 (quoting Crane v. Sears Roebuck & Co., 218 Cal. App. 855, 32 Cal. Rptr. 754, 757 (1963)). "[A] manufacturer is obligated to warn of dangers that may arise from improper use and handling." *Anderson*, 198 Colo. at 395, 604 P.2d at 678 (citing *Hiigel*, 190 Colo. at 63, 544 P.2d at 988).

128. *See supra* note 107 and accompanying text.

129. *Id.*

130. "[O]rdinary contributory negligence consisting of a failure to exercise due care to discover a defect or to guard against its possible existence, is not a defense to strict liability." 642 P.2d at 912 n.3 (citing *Union Supply*, 196 Colo. at 174, 583 P.2d at 284). *See* RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

131. 642 P.2d at 912 n.3. *See* Trine, *supra* note 125, at 7.

132. 642 P.2d at 912 n.3.

133. *Id.* at 913.

was responsible. When the saw left the manufacturer, there were no warnings or instructions for moving.[134] Comment g of the *Restatement* provides that the seller is not liable when he delivers the product in a safe condition and subsequent mishandling makes it harmful.[135] The suggestion that someone must do something to the product, change it in some way so that it becomes dangerous, is clear. Jack Frazier attempted to unload the saw, a task which Kysor obviously intended. He did not transform or change it, yet the majority denied him compensation on the basis that he created the dangerous condition that caused his injuries.[136] Even if the court intended to overrule its prior holdings requiring warnings for foreseeable misuse, application of comment g to the facts of *Kysor* seems inappropriate.

C. *The Factual Dispute*

The majority emphasized that the question of whether a product was in a defective condition unreasonably dangerous because of a failure to warn is normally an issue for the jury. Yet the majority concluded there was not, after a "view to all the evidence," sufficient factual basis for submitting the case to the jury.[137] The dissenting opinion written by Justice Dubofsky and joined by Justices Lohr and Quinn suggests that there was sufficient conflicting evidence to take the matter to the jury, and that the jury's determinations should not have been disturbed unless so clearly erroneous as to find no support in the record.[138]

Evidence which could have aided the jury in reaching its finding that without a warning the saw was in an unreasonably dangerous defective condition included: 1) sheet metal covered the saw's surface above its center of gravity, making the appearance of stability deceiving;[139] 2) the only method used by Kysor to move the saw around its plant was by overhead crane with chains attached at certain lift points;[140] 3) Kysor also used the crane to load the saw onto a truck for shipment;[141] and 4) even if the plaintiff had lowered the saw and skid to the floor before attempting to remove the skid, the skid could not have been removed without lifting the saw alone, and the saw alone could not have been lifted in a stable manner with the forklift.[142]

Information presented to the supreme court indicated the feasibility of attaching a label to the saw with instructions and warnings for moving and unloading. Kysor had consistently used a hydrocrane to move the saw around the plant and to load the saw for shipment; the lifting points were always the same and could have been marked.[143] A clear warning label concerning operation was already being attached to each saw in a minimal

134. *Id.*
135. RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965). *See supra* note 107.
136. 642 P.2d at 912.
137. *Id.* at 912-13.
138. *Id.* at 914 (Dubofsky, J., dissenting) (quoting Peterson v. Ground Water Comm'n, 195 Colo. 508, 579 P.2d 629 (1978)).
139. 642 P.2d at 914 (Dubofsky, J., dissenting).
140. *Id.*
141. *Id.*
142. *Id. See also supra* text accompanying notes 21-27.
143. *Respondent's Brief,* at 4, *Kysor*.

amount of time.[144] Yet the majority in *Kysor* concluded that "no specific warnings or instructions regarding the lifting or moving could logically have been given."[145]

The dissent focused on facts surrounding the condition of the saw.[146] The majority based its finding on the conduct of the plaintiff.[147] Regardless of the basis for the decision, Colorado law requires that appellate courts be bound by the jury's findings: where there is evidence in the record to support the result, where the decision is based on conflicting evidence, and where the jury has been correctly instructed by the trial court.[148] A reading of the majority and minority opinions reveals factual issues which a jury should have been allowed to decide. The evidence reported in the minority opinion refutes the majority's repeated assertions that the plaintiff was *solely* responsible for the accident.[149]

CONCLUSION

The decision to deny the plaintiff recovery in *Kysor v. Frazier* is noteworthy for several reasons but probably not for the reasons that initially come to mind. This decision has broken a Colorado trend of plaintiff recoveries in strict liability for failure to warn cases. The majority reached its conclusion in apparent disregard of key evidence, and in so doing, overturned a jury finding which according to precedent should not have been disturbed.

The court seemed to hold that a plaintiff's misuse affects a manufacturer's duty to provide adequate warnings or instructions, thus barring recovery in a strict liability action. The court interpreted the record as supporting a finding that Frazier was the sole cause of the accident, yet the opinion was filled with a confusing discussion of negligence and strict liability principles. If, as the majority held, Frazier alone was responsible and it was not the absence of adequate warning or instruction which resulted in his injuries, then nothing was to be gained by commenting on the manufacturer's duty to warn or the condition of the product without a warning. By discussing the negligence concepts of foreseeability and degree of injury (tests for determining a duty to warn), but also asserting that strict liability for failure to warn is an action based on the condition of the product, the majority has perpetuated confusion of the two actions. This result is particularly ironic since the discussion was unnecessary under the majority's own interpretation of the evidence.

It is unfortunate that the Colorado Supreme Court, in its discussion of

144. *Id.*

145. 642 P.2d at 912.

146. *Id.* at 913-14 (Dubofsky, J., dissenting).

147. 642 P.2d at 911-12.

148. *Id.* at 914 (Dubofsky, J., dissenting) (quoting Vigil v. Pine, 176 Colo. 384, 490 P.2d 934 (1971)). *See also* Gebhardt v. Gebhardt, 198 Colo. 28, 595 P.2d 1048 (1979); Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979).

149. "[W]e can find no evidence in the record showing that . . . the saw and attached skid were in a defective condition because of a lack of warning. . . ." 642 P.2d at 911. "The record establishes that Frazier created the dangerous condition which resulted in his injury by his own inadvertence and mishandling. . . . [T]he accident happened solely because Frazier created an unstable condition. . . ." *Id.* at 912.

strict liability, failed to clarify a test for determining liability for failure to warn cases. Negligence analysis focusing on a seller's duty will continue to be confused with purer strict liability analysis focusing on the condition of the product, and the possibility exists that a plaintiff's misuse will be successfully asserted as a bar to recovery.

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