IN THE SUPREME COURT OF OHIO

MARLENE LEININGER,	*	Case No. 06-1304
	*	
	*	
Plaintiff-Appellee,	*	On Appeal from the
	*	Fifth Appellate District
	*	
v.	*	
		5th District No. 05-COA-048
	*	
PIONEER NATIONAL LATEX, et al.,	*	
	*	
Defendant-Appellant.	*	

MERIT BRIEF OF AMICUS CURIAE OHIO MANAGEMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS PIONEER NATIONAL LATEX, MELISSA McCORMIC, AND JERRY MEYER

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE AND FACTS 1

III. ARGUMENT 1

A. Public Policy Claims for Wrongful Discharge are Inappropriate Where the General Assembly has Both Identified a Right and Specified the Remedy for Violations of that Right. 2

1. The Power to Legislate Rests Solely with the General Assembly. 3

2. The United States Supreme Court and Other Jurisdictions Have Recognized the Limited Role of the Judiciary 4

3. If the General Assembly Provided a Remedy, the Courts Should not Create Additional Remedies. 6

4. The General Assembly has Provided a Remedy for Employment Discrimination; Any Additional Remedies Undermine the General Assembly's Legislative Authority 8

5. Stare Decisis is Not Applicable Here 10

B. The *Wiles* Decision also Mandates Reversal 11

IV. CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

Barlowe v. AAAA International Driving, Inc., 2d Dist. No. 19794, 2003-Ohio-5748 9
Berge v. Columbus Community Cable Access (1999), 136 Ohio App.3d 281 9
Brunswick v. Brunswick Hills Twp. Bd. of Trustees, 81 Ohio App. 3d 252 4
Calderon v. Dinan & Dinan PC (D. Conn.), 2006 U.S. Dist. LEXIS 39024 5
Carver v. Elec. Data Sys. Corp. (S.D. Ind.), 2005 U.S. Dist. LEXIS 3692 5
Collins v. Rizkana, 73 Ohio St.3d 65, 1995-Ohio-135 ..... 1, 2
Endahl v. Vinnell Corp. (D. Colo.), 2006 U.S. Dist. LEXIS 1617 5
Greeley v. Miami Valley Maint. Contractors, Inc. (1990), 49 Ohio St.3d 228 ..... passim
Grzyb v. Evans (Ky. 1985), 700 S.W.2d 399 5
Kaltenmark v. K-Mart, Inc. (N.D. Ohio), 2005 U.S. Dist. LEXIS 21699 13
Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134 ..... passim
Lawrence v. Texas (2003), 539 U.S. 558 10
Lewis v. Fairview Hosp., 156 Ohio App.3d 387, 2004-Ohio-1108 9
Livingston v. Hillside Rehabilitation, 79 Ohio St.3d 249, 1997-Ohio-155 1
Mischer v. Erie Metropolitan Housing Authority (N.D. Ohio 2004), 345 F. Supp. 2d 827 9
Painter v. Graley, 70 Ohio St.3d 377, 1994-Ohio-334 ..... 1, 11
Palesh v. Rockwell Int'l Corp., 8th Dist. No. 79725, 2002-Ohio-32 9
Provens v. Stark County Bd. of Mental Retardation, 64 Ohio St.3d 252, 1992-Ohio-35 7
Reynolds v. Georgia-Pacific Corp. (S.D. Ohio), 2006 U.S. Dist. LEXIS 5356 13
Satterwhite v. Faurecia Exhaust Sys. (S.D. Ohio 2005), 2005 U.S. Dist. LEXIS 10282 9
Smith v. F.W. Morse & Co. (1st Cir. 1996), 76 F.3d 413 5
State ex rel. Advanced Metal Precision Products v. Indus. Comm., 111 Ohio St.3d 109, 2006-Ohio-5336 10
Switchmen's Union of North America v. National Mediation Board (1943), 320 U.S. 297 5
Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849 10
Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994 ..... passim

(continued on next page)

TABLE OF AUTHORITIES
(continued)

Constitutional Provisions and Statutes

29 U.S.C. 2617(a)(1) 13
Ohio Const., Art. II, Sec. 1 3
Ohio Const., Art. IV, Sec. 1 4
R.C. 4112.02(N) 8
R.C. 4112.05 8
R.C. 4112.14(B) 8
R.C. 4112.99 8
U.S. Const., Art. I, Sec. 1 4
U.S. Const., Art. III, Sec. 1 4

Other Authorities

Will the Real Legislature Please Stand Up? A Response to *Kulch v. Structural Fibers, Inc.*: Clarifying the Public Policy Exception, 46 Clev. St. L.Rev. 19 ..... 4, 11

I. INTRODUCTION

The plurality decision in *Wiles* is right as far as it goes and dictates reversal in this case. (See Section III.B., below.) However, the Ohio Management Lawyers Association respectfully urges this Court to go further and to curb the judicial legislating that has occurred in the area of public-policy employment law.

II. STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts by reference the Statement of the Case and Facts set forth in the Appellants' Merit Brief.

III. ARGUMENT

PROPOSITION OF LAW: A plaintiff cannot state a separate cause of action for wrongful discharge in violation of public policy based upon the policy against discrimination in employment embodied in Ohio Revised Code Chapter 4112.[1]

This case gives this Court the opportunity to correct the judicial missteps of *Greeley v. Miami Valley Maint. Contractors, Inc.* (1990), 49 Ohio St.3d 228, and *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, as well as the line of cases that have inappropriately expanded the remedies available to plaintiffs in employment cases under the guise of public policy. See, e.g., *Painter v. Graley*, 70 Ohio St.3d 377, 384, 1994-Ohio-334; *Collins v. Rizkana*, 73 Ohio St.3d 65, 1995-Ohio-135; *Livingston v. Hillside Rehabilitation*, 79 Ohio St.3d 249, 1997-Ohio-155 (a summary reversal that has been

[1] Appellants also include a Proposition of Law relating to the procedural requirements of the relevant statutes. Amicus curiae generally agrees with this Proposition, but has no additional comment.

interpreted by lower courts to permit plaintiffs to seek a public-policy claim for wrongful discharge on the basis of age).

A. Public Policy Claims for Wrongful Discharge are Inappropriate Where the General Assembly has Both Identified a Right and Specified the Remedy for Violations of that Right.

To maintain a public-policy wrongful-termination claim in Ohio, a plaintiff must prove four elements: (1) the existence of a clear public policy (the clarity element); (2) dismissing employees under circumstances like those involved in plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135. The first two elements are questions of law, and the last two are questions of fact. Id. Only the jeopardy element comes into play in this appeal.

The General Assembly enacted R.C. Chapter 4112, which gives rise to the public policy that employers should not discriminate against employees based on age, race, disability, and other characteristics. That public policy is embodied in the language of the statute itself, which also includes remedies for violations. Any additional remedies or enforcement procedures created by the courts amount to inappropriate judicial legislation. The same is true for any other statute that creates both a right and a remedy for violations of that right.

1. The Power to Legislate Rests Solely with the General Assembly.

"The legislative power of the state shall be vested in a general assembly...." Ohio Const., Art. II, Sec. 1. The Constitution gives no other body that right. When the General Assembly creates a right and then sets forth a remedy or enforcement procedure, that is the entire expression of public policy as to that statutory right. The Court should not expand the statutory right or remedy under the guise of public policy. To do so usurps the function of the Assembly.

If, for example, the Assembly creates a right and provides that it will be enforced by the Attorney General, that act is the Assembly's expression of public policy. If this Court were to create a private "public policy" claim based on the same right, that would in fact contravene the public policy expressed by the General Assembly. Similarly, if the General Assembly creates a right and then provides a private cause of action with specified recoverable damages, that is the expression of public policy. If this Court were to add a "public policy" claim with additional recoverable damages, that act would usurp the legislative function.

At least one scholarly article has recognized that judicial creation of additional remedies is the result of the judiciary stepping into the role of the legislature: "For a court to add remedies to those available under the statute on the basis that they are merely 'complementary' is to rewrite the statute, which is beyond the scope of its authority." "Will the Real Legislature Please Stand Up? A Response to *Kulch v.*

Structural Fibers, Inc.: Clarifying the Public Policy Exception," 46 Clev. St. L.Rev. 19, 41, citing *Brunswick v. Brunswick Hills Twp. Bd. of Trustees*, 81 Ohio App. 3d 252, 256 ("Courts may not judicially rewrite legislation under the guise of 'statutory construction.'") (citations omitted).

2. The United States Supreme Court and Other Jurisdictions Have Recognized the Limited Role of the Judiciary

The Ohio Constitution language granting the legislative authority solely to the General Assembly is modeled after the United States Constitution, which states, "All legislative Powers granted shall be vested in a Congress of the United States...." U.S. Const., Art. I, Sec. 1. And, like the United States Constitution, the Ohio Constitution vests "judicial power" in the courts. See Ohio Const., Art. IV, Sec. 1; U.S. Const., Art. III, Sec. 1.

The United States Supreme Court has repeatedly noted the role that the judiciary must play when Congress has issued a specific remedy for a right. For example: "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the [prescribed remedy] would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally

excludes another." *Switchmen's Union of North America v. Nat'l Mediation Bd.* (1943), 320 U.S. 297, 301, 64 S.Ct. 95 (citations omitted).

Other jurisdictions have also acknowledged this limitation on the judiciary in the area of public-policy claims. For example, in *Grzyb v. Evans* (Ky. 1985), 700 S.W.2d 399, the Kentucky Supreme Court held that wrongful-discharge public-policy claims must be based on a right created by statute and, where one exists, that statute defines the cause of action, remedy, and procedure. "Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Grzyb*, supra at 401.

See also, *Carver v. Elec. Data Sys. Corp.* (S.D. Ind.), 2005 U.S. Dist. LEXIS 3692 at *23 ("Indiana courts would not recognize a common law claim for wrongful discharge contrary to public policy where the underlying statute establishes its own remedies and procedures for discrimination and retaliatory discharge."); *Endahl v. Vinnell Corp.* (D. Colo.), 2006 U.S. Dist. LEXIS 1617 at *28 (existence of a statutory remedy precludes public policy wrongful discharge claim); *Calderon v. Dinan & Dinan PC* (D. Conn.), 2006 U.S. Dist. LEXIS 39024 at *24 (same); *Smith v. F.W. Morse & Co.* (1st Cir. 1996), 76 F.3d 413, 429 (same).

3. If the General Assembly Provided a Remedy, the Courts Should not Create Additional Remedies.

Thus, in our constitutional system, when looking at a right created by the General Assembly, the "jeopardy" analysis must be limited to one question: Did the Assembly provide any enforcement or remedy?

Any judicial consideration of the sufficiency of that remedy is inappropriate, unless the General Assembly created a right with no enforcement mechanism. In that situation, judicial creation of a remedy may fall within the proper judicial gap-filling function. However, *Greeley* is not an appropriate judicial exercise of this function. In that case, the Assembly had provided statutory enforcement—a fine. In addition, the previous version of the statute had included a private right of action. The dissent in that case got it right:

> When the General Assembly amended R.C. 3113.21(J) to remove the requirement that an employer reinstate an employee with back pay where the employer had improperly discharged such employee contrary to R.C. 3113.21(J), it made a clear policy statement with respect to the law on this issue. The question is not whether we agree that a $ 500 fine is appropriate or inappropriate. The question is who has the authority to define the sanction. *Greeley*, supra at 235 (Moyer, C.J., dissenting).

Likewise, the dissent in *Kulch* recognized the problem of judicial legislation:

> This decision by the majority is a troubling instance of the Court's elevating itself above the General Assembly as an architect of Ohio's public policy.... The majority, because it disagrees with the legislative decisions to limit remedies provided in the state and federal statutes, acts beyond the

> court's constitutional authority.... *Kulch,* supra at 164 (Cook, J., dissenting).

It is time for this Court to recognize what the dissents in *Greeley* and *Kulch* recognized—namely, that if the Assembly provides any enforcement or remedy for a right that it has created under its Article II role, the Court should not add to this. (A similar analysis would be appropriate as to acts of Congress under the principle of comity. A different jeopardy analysis might be appropriate when the source of the right is other than the General Assembly or Congress.)

This request is not out of step with the Court's own recognized limitations: "[I]t is not incumbent upon this court to engage in the type of comparative analysis of the relative merits of various remedies. . . . Rather, the more appropriate course for this court is to defer to the legislative process of weighing conflicting policy considerations and creating certain administrative bodies and processes for providing remedies. . . ." *Provens v. Stark County Bd. of Mental Retardation,* 64 Ohio St.3d 252, 261, 1992-Ohio-35. Although that case related to non-judicial enforcement, the same logic applies to remedies.

Applying this analysis to the present case, since the General Assembly has provided remedies for age discrimination, this court should not judicially legislate an additional public-policy claim.

4. The General Assembly has Provided a Remedy for Employment Discrimination; Any Additional Remedies Undermine the General Assembly's Legislative Authority.

The present case involves an alleged violation of the public policy contained in R.C. Chapter 4112. This Chapter is illustrative of all statutory schemes that both create a right and provide for a remedy.

The General Assembly, after weighing the conflicting policy considerations, selected the precise remedies that it deemed appropriate for protections of the rights in R.C. Chapter 4112. Aggrieved individuals may recover civil damages and injunctive relief (among other appropriate relief). R.C. 4112.99. They may file a civil action in any court with jurisdiction for legal or equitable relief, or they may file a claim with the Ohio Civil Rights Commission ("OCRC") for further investigation. See, e.g., R.C. 4112.02(N); R.C. 4112.14(B); and R.C. 4112.05.

These remedies are the public policy recognized by the General Assembly. Thus, the General Assembly created both the right (no discrimination based on age) and the exclusive remedy (damages, right to sue, right to file a claim with OCRC).[2] To engage

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[2] As the U.S. Supreme Court stated: "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another." *Switchmen's Union,* supra at 301 (citations omitted). The *Kulch* decision was based in part on the mistaken presumption that the General Assembly's inclusion of specified remedies did not exclude other remedies. This error in construing legislative intent should now be corrected by overruling *Kulch.*

in the policy considerations reserved for the legislature usurps the power of the General Assembly.[3]

Many Ohio courts (both state and federal, applying Ohio law) have refused to read a public-policy claim into R.C. Chapter 4112. See, e.g., *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 305-7, discretionary appeal not allowed, 88 Ohio St.3d 1503 ("[T]he cases creating and applying the *Greeley* claim sought to provide a remedy where none otherwise existed for an employee discharged for a reason contrary to statute or public policy. . . . [The plaintiff's] remedies under R.C. 4112.99 are sufficient to provide the complete relief mandated by *Kulch*."); *Palesh v. Rockwell Int'l Corp.*, 8th Dist. No. 79725, 2002-Ohio-32 at *12-13 ("A claim for the tortious violation of a public policy does not lie if a statute addresses the public policy and provides a specific legal remedy. R.C. 4112 both addresses the public policy of not permitting discrimination based upon gender and age, and provides a specific legal remedy."). See also *Barlowe v. AAAA Int'l Driving, Inc.*, 2d Dist. No. 19794, 2003-Ohio-5748; *Lewis v. Fairview Hosp.*, 156 Ohio App.3d 387, 2004-Ohio-1108, appeal denied, 102 Ohio St.3d 1533 ; *Satterwhite v. Faurecia Exhaust Sys.* (S.D. Ohio), 2005 U.S. Dist. LEXIS 10282; *Mischer v. Erie Metropolitan Housing Authority* (N.D. Ohio 2004), 345 F. Supp. 2d 827, 832, aff'd, at 168 Fed. Appx. 709.

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[3] Any argument that the General Assembly could enact a new statute to override the effects of *Greeley* and *Kulch* would be shortsighted. The Assembly should not be responsible for fixing every judicial misstep, and the judiciary should not wait for legislative action to correct its own mistakes.

5. Stare Decisis is Not Applicable Here.

This Court should overrule *Greeley* and *Kulch,* which inappropriately created additional remedies beyond what the General Assembly considered necessary to protect the rights of the individuals its enactments are intended to protect.

The Ohio Supreme Court will depart from stare decisis and overrule a prior decision when (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to that decision; (2) it has been subject to "substantial and continuing" criticism[4]; and (3) abandoning the precedent would not create an undue hardship for those who relied upon it. *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216 at Syllabus ¶1, 2003-Ohio-5849, citing *Lawrence v. Texas* (2003), 539 U.S. 558, 587 (Scalia, J., dissenting) (citations omitted); see also *State ex rel. Advanced Metal Precision Products v. Indus. Comm.,* 111 Ohio St.3d 109, 2006-Ohio-5336 (overruling two previous Supreme Court cases and deferring to the lawmaker's expertise.)

All three elements of *Galatis* are satisfied. First, *Greeley* and *Kulch* contradict the purpose and plain meaning of Article II of the Ohio Constitution because they allow

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[4] The Court identified the second prong as "the decision defies practical workability," but then cited Justice Scalia's Dissent in *Lawrence* as a synthesis of the stare decisis test. The Court's discussion of Justice Scalia's analysis suggests that it agrees with this definition of the second prong. Justice Scalia defined the second prong as subject to "substantial and continuing" criticism; in other words, "practical workability" means a legal analysis that can logically be applied by courts on a consistent basis. When rights have been created by statutes that also prescribe remedies and enforcement procedures, there are no logical principles that can be applied to determine on a consistent basis if additional remedies and enforcement procedures should be permitted.

courts to legislate in areas specifically reserved for the General Assembly.[5] Second, *Greeley* and *Kulch* have been subject to substantial and continuing criticism and have not been consistently applied. See, e.g., "Will the Real Legislature Please Stand Up? A Response to *Kulch v. Structural Fibers, Inc.*: Clarifying the Public Policy Exception," 46 Clev. St. L.Rev. 19, 41, and cases cited within and supra. Finally, abandoning the precedent would not create an undue hardship because no one would reasonably have changed their position based on those cases. Employees remain protected by the same statutory rights, and employers remain restricted by the same statutory prohibitions under R.C. Chapter 4112. No employee or employer would have reasonably acted or refrained from acting based on the possibility of different procedures or remedies for these same statutory rights.

Accordingly, amicus curiae urges this Court to overrule *Greeley* and *Kulch* and reverse the Fifth District's judgment.

B. The *Wiles* Decision also Mandates Reversal.

Moreover, the Fifth District's judgment should be reversed under *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994. In the more limited *Wiles* approach, the plurality rejected a public-policy claim based on adequate remedies in the federal FMLA (which do not include punitive damages or damages for emotional distress).

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[5] Contrary to the rationale in *Painter v. Graley*, supra at 384, that a court's public-policy examination is intended to determine whether the "public policy alleged to have been violated is of **equally** serious import as the violation of the statute," the actual result of this determination is the application of **more** procedures and remedies than those which the General Assembly provided in the statute.

There can be no doubt that this same conclusion applies in this case where the General Assembly has provided a full panoply of remedies for age discrimination. Therefore, under *Wiles*, there can be no public-policy age claim.

In *Wiles* , the Ohio Supreme Court stated that "there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests" and held that the lack of complete remedies in the Family and Medical Leave Act ("FMLA") did not give rise to a public-policy cause of action for wrongful discharge. *Wiles*, supra ¶ 15.

The Court concluded that the FMLA was a sufficiently clear source of public policy to satisfy the first element of a wrongful-discharge claim. However, the claim failed because the jeopardy element was not satisfied. The Court noted that the "issue of adequacy of remedies" was a particularly important component of the jeopardy analysis. *Wiles*, supra ¶ 15.

Thus, the focus for the jeopardy element under *Wiles* is whether the remedies adequately protect the public interest. The Court held that the remedies under the FMLA did so. The absence of punitive or emotional-distress damages for FMLA claims did "not render the statutory remedies inadequate." *Wiles*, supra ¶ 15.

The remedial scheme of R.C. Chapter 4112 is substantially similar to that of the FMLA, but is even broader. *Wiles* thus applies to bar public policy claims based on age discrimination where the plaintiff has also brought a claim under R.C. Chapter 4112.

As discussed above, R.C. Chapter 4112 provides a wide range of remedies available to individuals who have been discriminated against based on their age. In fact, these remedies are at least comparable to those available under the FMLA, which only allows recovery for economic and an equal amount of liquidated damages (plus interest) and equitable relief. 29 U.S.C. 2617(a)(1). And unlike R.C. Chapter 4112, the FMLA has no additional enforcement mechanism such as the OCRC. Looking at a comparable set of remedies to those available here, the Court determined that the FMLA provided adequate relief.

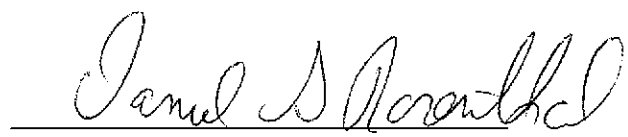
The Southern District of Ohio recently interpreted *Wiles* in *Reynolds v. Georgia-Pacific Corp.* (S.D. Ohio), 2006 U.S. Dist. LEXIS 5356. Examining Ohio age-discrimination law, the court held: "[T]he remedial scheme of O.R.C. § 4112 is substantially similar to that of the FMLA, and that *Wiles* thus applies to bar public policy claims based on age discrimination where the plaintiff has also brought a claim under O.R.C. § 4112." *Reynolds*, supra at *25-26. See also *Kaltenmark v. K-Mart, Inc.* (N.D. Ohio), 2005 U.S. Dist. LEXIS 21699 at *19 (discussing *Wiles* and age discrimination public-policy claims; "Section 4112 is a remedial statute that adequately protects society's interests in preventing employment discrimination").

Thus, this Court should reverse the Fifth District's judgment on the basis of *Wiles*.

IV. CONCLUSION

This Court should take this opportunity to overturn *Greeley* and *Kulch* and restore to the legislature its Constitutional function to determine the remedies and enforcement procedures for the employment rights it has created. Alternatively, the Court should apply its reasoning in *Wiles* to this case. The Fifth District's judgment should therefore be reversed and the trial court's judgment reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on Corey V. Crognale and Kelly K. Curtis, Schottenstein, Zox & Dunn Co., L.P.A. 250 West Street, Columbus, OH 43215-2538 and Michael T. Conway, 180 Aster Place, Brunswick, OH 44212 via regular U.S. mail, postage prepaid, on this 6th day of December, 2006.

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