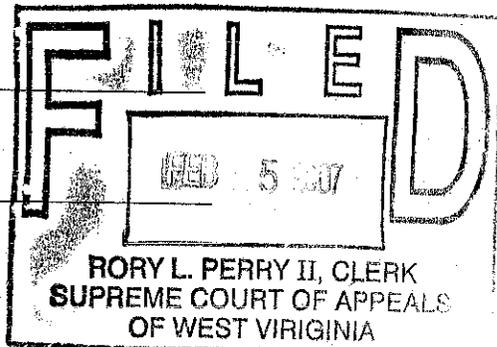


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33218



SALLY BLACK, as Executrix of the Estate of Charles A. Black, Deceased,

Appellant,

vs.

CSX TRANSPORTATION, INC.,

Appellee.

Appeal from the Circuit Court of Kanawha County
The Honorable Arthur J. Recht Judge
Civil Action No.: 02-C-9500

Circuit Court of Marshall County, West Virginia
Civil Action No.: 01-C-162M

BRIEF OF APPELLANT

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I. LOWER COURT PROCEEDING AND NATURE OF RULING

Appellant, Mrs. Sally Black, commenced this action under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, in the Circuit Court of Kanawha County. Mrs. Black brought suit against CSX Transportation, Inc. ("CSX"), alleging injuries and death sustained by her husband, Charles A. Black, as a result of his exposure to asbestos throughout the term of his employment with CSX, and his subsequent development of fatal colon cancer. R. 18. The case proceeded through discovery, and was tried before a jury during the week of November 7, 2005. The jury concluded that Mr. Black's colon cancer was not related to his exposure to asbestos, and judgment was entered in favor of CSX. R. 3-7.

Mrs. Black filed post-trial motions alleging, in part, that the trial court failed to strike prospective juror Edward Polack, M.D. for cause. These motions were denied by the Circuit Court, and an Order to that effect was entered by the Circuit Clerk on April 10, 2006. R. 1-2. This Appeal followed.

II. STATEMENT OF FACTS

As indicated above, Mrs. Black brought suit against CSX alleging injuries and death sustained by her husband, Charles A. Black, as a result of his exposure to asbestos throughout the term of his employment with CSX, and his subsequent development of fatal colon cancer. The case proceeded through discovery, and was tried before a jury during the week of November 7, 2005.

During the *voir dire* portion of trial, Mrs. Black, through counsel, made a Motion to Strike prospective juror Edward Polack, M.D. for cause, because Dr. Polack made an

unequivocal statement of bias in his juror questionnaire, and then continued to display this bias against the Plaintiff during subsequent questioning.

The *voir dire* process began with the prospective jurors completing a court-approved questionnaire entitled: "Supplemental Juror Questionnaire for F.E.L.A. Cases." The last question on this form asked: "After completing this questionnaire, is there any reason at all that would make it difficult for you to be a juror, or that would make it difficult for you to award money damages if they were justified?" Dr. Polack responded by checking "Yes." He then explained this answer by typing the reason that it would be difficult for him to serve: "A personal bias against personal injury lawyers and awarding of damages predicated on anything other than pure objective science – I would be willing to listen to the data presented but any decision on my part would be based on medical fact not emotion." R. 29.

On follow up questioning during the *voir dire* process, the following dialogue transpired between Dr. Polack and Robert F. Daley, counsel for Mrs. Black:

Mr. Daley: What do you mean by "personal bias against personal injury lawyers"?

Dr. Polack: Physicians tend not to like trial lawyers.

Mr. Daley: I understand that, but is there anything aside from the general physicians tend not to like plaintiffs' trial lawyers that underlies your personal bias?

Dr. Polack: My personal bias is about asbestos, because a lot of the issues about asbestos are not science, and I'm perfectly willing to listen to the data, but I will have to be convinced predicated on scientific information, not emotional information.

Mr. Daley: Okay. You think a lot of information on asbestos is not based on pure, objective science?

Dr. Polack: Partially.

Mr. Daley: You couldn't award damages on anything other than pure, objective science based on your answer to number 46 [in the questionnaire]?

Dr. Polack: That's correct.

R. 20, Transcript of November 7, 2005 Trial, at p. 19.¹

The Court also inquired of Dr. Polack:

The Court: The ultimate question, of course, Doctor, is simply this – you know as much about the case right now as I know. Based upon what I told you, do you believe that you'll be able to sit as a juror in this case, listen to the evidence from the witness stand, the law that will be given to you at the close of the case, and you're going to be asked to marry the facts as you determine them to the law as I give them.

Dr. Polack: Yes.

R. 20 at pp. 21-22.

Mrs. Black then moved to strike Dr. Polack for cause. The Circuit Court recognized that Dr. Polack's answers on the juror questionnaire could disqualify him for cause, and it took note of the fact that "if you just take a look at the questionnaire itself, it came perilously close." R. 20 at p. 23. Nonetheless, the Circuit Court ultimately determined that none of Dr. Polack's answers would disqualify him for cause, and therefore denied the Motion to Strike. R. 20 at p. 23.

Later in the *voir dire* process, Mrs. Black, through counsel, renewed her Motion to Strike Dr. Polack for cause. The trial court noted that Dr. Polack's bias against personal injury lawyers is "a strong statement, extremely strong statement." R. 20 at p. 119. Therefore, the trial court recalled Dr. Polack in order to inquire further:

The Court: Doctor, we asked most of the questions. I just have one question. And that is the response that you gave, and we appreciate your candor, is that you do have a bias against personal injury lawyers.

¹ Record citations to trial testimony are cited using the Reproduced Record Index Number ("R. ___") followed by the page of testimony specifically referred to (p. ___).

Dr. Polack: That's correct.

The Court: Question I have, What would it take to overcome that bias, if at all?

Dr. Polack: Credibility—

The Court: Is it possible to do that, No. 1; if so, what would be [*sic*] take?

Dr. Polack: Credibility on the part of the source, in other words, the trial lawyer.

The Court: And the evidence?

Dr. Polack: That's correct.

The Court: So we get back really to, any verdict that you would reach would be based upon the evidence from the witness stand and the law given you by the Court?

Dr. Polack: That's correct.

R. 20 at pp. 122-123.

Reasoning that Dr. Polack's verbal responses transcended his comments on the juror questionnaire, Mrs. Black's Motion to Strike Dr. Polack for cause was again denied. R. 20 at pp. 123-124. As such, counsel was forced to exercise a peremptory strike to remove Dr. Polack from the jury. R. 21.

At trial, the jury ultimately determined that CSX was negligent in one or more of the particulars alleged. R. 4. However, the jury concluded that the negligence of CSX did not cause or contribute to Charles Black's colon cancer. R. 4. On November 30, 2005, the jury verdict was reduced to judgment. R. 3-7. Timely post-trial motions were filed by Mrs. Black. These motions were denied by the trial court, and an order denying those motions was filed on April 10, 2006.

R. 1-2.

III. ASSIGNMENTS OF ERROR.

1. Whether the Trial Court improperly failed to strike Juror Edward P. Polack, M.D. for cause based on responses made by him in both a written jury questionnaire and in *voir dire*.

The trial court answered this question in the negative.

IV. POINTS AND AUTHORITIES.

According to W.Va. Code § 56-6-12, parties to a lawsuit are entitled to impartial jurors, meaning that they must be free from “bias or prejudice,” and must “stand indifferent in the cause.” The task of finding such qualified jurors is accomplished through the jury selection process, of which this Court has stated:

The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias. *Voir dire* ferrets out biases and prejudices to create a jury panel, before the exercise of preemptory strikes, free of the taint or reasonably suspected prejudice or bias. Trial courts have an obligation to strike biased or prejudiced jurors for cause.

O’Dell v. Miller, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002). The need for an impartial jury is so critical that a trial court is obligated to “resolve any doubt of possible bias or prejudice in favor of the party seeking to strike for cause.” Id. at 288, 565 S.E.2d at 410.

O’Dell v. Miller is West Virginia’s principal case on the subject of striking jurors for cause in civil trials. The holding in this case is grounded on the notion that “the trial court should actually go so far as to exclude not only those jurors who have clearly displayed bias, but it should also strike for cause jurors who are subject to well-grounded suspicion of bias.” Id. at 289, 565 S.E.2d at 411.

In O’Dell, a medical malpractice case, the trial court failed to strike a juror for cause who was a patient of the defendant doctor, and was also a client of the defendant’s attorneys.

Throughout *voir dire*, there was no outward bias or prejudice manifested by the juror in question; rather, the bias was only suspected due to the juror's background. Nevertheless, this Court ordered a new trial for the plaintiff, reasoning that the plaintiff "was denied his constitutional right not only to a fair and unbiased jury, but to a jury free from the suspicion of prejudice." Id. at 291, 565 S.E.2d at 413.

In the present case, however, there was no mere "suspicion" of bias. Instead, the bias manifested by Dr. Polack was explicit and outright. In his questionnaire, Dr. Polack, himself, used the phrase "personal bias" to describe the way that he felt about Mrs. Black's attorneys, making this a perfect example of how "actual bias can be shown [] by a juror's own admission of bias" O'Dell at 288, 565 S.E.2d at 410. As such, the Circuit Court should have struck Dr. Polack for cause immediately, because further probing into the facts and background of a juror is allowed by O'Dell only when a prospective juror has made "an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or prejudice." Id. at 290, 565 S.E.2d at 412. And certainly Dr. Polack's statement in his questionnaire—that he was personally biased against Mrs. Black's attorneys—was not inconclusive or vague, but rather was a clear admission of bias. Such actual bias necessitated that he be automatically struck from the jury panel for cause, pursuant to this Court's mandate that: "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." Id.

Even so, the Circuit Court allowed Dr. Polack to be questioned regarding his answer on the questionnaire. But when confronted on the question of this "personal bias," he did not equivocate, but actually further confirmed that this bias existed. He confirmed this by first of all

admitting that he felt personal animosity towards Plaintiff's counsel, and hence towards Mrs. Black herself, when he stated that "Physicians tend not to like trial lawyers." R. 20 at p. 19. Plaintiff's counsel then pressed on in his questioning to discover if there were any other ways in which Dr. Polack might be biased. In response, Dr. Polack next explicitly admitted that he was personally biased against Mrs. Black's case, stating: "My personal bias is about asbestos, because a lot of the issues about asbestos are not science" R. 20 at 19.

Later on, the trial judge again asked Dr. Polack to confirm whether he was personally biased against "personal injury lawyers." To this, Dr. Polack once again admitted his bias, stating: "That's correct." R. 20 at p. 122. The judge then asked Dr. Polack what it would take for him to overcome this bias against trial lawyers, to which Dr. Polack responded in circular fashion: "Credibility on the part of the ... trial lawyers." R. 20 at p. 122. In essence, Dr. Polack's answer here demonstrated that nothing could overcome his pre-existing bias against Mrs. Black's case. This is because his prejudice stems from the belief that personal injury lawyers have no credibility to begin with, which raises the question of how Mrs. Black's attorneys could suddenly become credible in Dr. Polack's eyes, such that his bias would disappear before Mrs. Black presented her case. The answer is that there is no way that Plaintiff's counsel could have gained credibility in Dr. Polack's eyes, leaving Dr. Polack in an admittedly biased position. Unfortunately, Dr. Polack's bias and ill-will towards trial lawyers is only compounded by, and doubtless a product of, the extremely heated litigation climate between physicians and attorneys at the present time in West Virginia. Common sense and human nature tells us that this lamentable state of affairs would create suspicion of bias on the part of any prospective juror in the medical field, yet we need not be suspicious in this case, because Dr. Polack was very forthcoming with his negative attitudes towards Mrs. Black's attorneys.

Moreover, Dr. Polack presented bias and prejudice not only towards her lawyers, but also towards the underlying case in chief of Mrs. Black, specifically, her evidence of causation. As shown by his testimony, Dr. Polack undoubtedly conveyed an ardent bias against asbestos-related lawsuits. If his answers to the written questions were not enough to have the court strike him for cause, his testimony definitely should have been:

Dr. Polack: My personal bias is about asbestos, because a lot of the issues about asbestos are not science, and I'm perfectly willing to listen to the data, but I will have to be convinced predicated on scientific information, not emotional information.

R. 20 at p. 19. If this too were insufficient to strike Dr. Polack for cause, the following testimony was then given, which may be the most telling of all:

Mr. Daley: You couldn't award damages on anything other than pure, objective science based on your answer to No. 46?

Dr. Polack: That's correct.

R. 20 at p. 19.

In essence, Dr. Polack testified that he would require a higher level of proof of causation than the law requires, stating that only "pure, objective" science would satisfy him on the issue of causation. As this Court well knows, very little about science in asbestos litigation can be fairly characterized as completely pure or completely objective. Because much remains debatable concerning the connection between asbestos exposure and colon cancer, Mrs. Black's experts would be presenting scientific ideas and theories to the jury that, although legally admissible and scientifically sound, would almost certainly not be considered "pure or objective" by Dr. Polack. Simply put, his testimony makes it clear that he would be biased towards any science that has not been proven beyond a shadow of a doubt. But in any colon cancer case, a primary battleground will undoubtedly be medical evidence that is impossible to confirm as

completely pure and objective. This Court has recognized that such standards are too high, and has required only that admissible evidence reflect scientific knowledge, be derived by scientific method, amount to good science, and be relevant to the task at hand. Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995). But by requiring a higher threshold for Mrs. Black's evidence than West Virginia law requires, Dr. Polack clearly indicated that he was prejudiced against Mrs. Black's case, especially in light of the fact that it was Mrs. Black who carried the burden of proof. As such, Dr. Polack's bias in this regard also made him unqualified to be a juror under O'Dell, and the Circuit Court should have struck him for cause.

Still, even after these numerous admissions of actual bias against Mrs. Black's attorneys and her asbestos cause of action, the Circuit Court came to the conclusion Dr. Polack would be a fair and impartial juror. This is because the Circuit Court impermissibly rehabilitated Dr. Polack by using a form of the "magic question," *i.e.*, the judge asked Dr. Polack his own opinion of whether he was capable of being fair and impartial. This "magic question" is essentially a relinquishment of the judge's determination of the juror's qualification to the juror himself. This is improper, because in the jury selection process, it is not the province of the potential juror to decide whether he is qualified to render a verdict; rather:

The discretion to decide whether a prospective juror can render a verdict solely on the evidence is an issue for the trial judge to resolve. It is not enough if a juror believes that he can be impartial and fair. The court in exercising [its] discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial becomes less meaningful in light of other testimony and facts which at least suggest the probability of bias.

O'Dell at 289, 565 S.E.2d at 411. In this regard, "[t]rial judges must resist the temptation to 'rehabilitate' prospective jurors simply by asking the 'magic question' to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror

could be reasonably questioned.” Id. at 290, 565 S.E.2d at 412. Yet this is exactly what happened with Dr. Polack in this case.

In O’Dell, this Court gave the following as an example of the “magic question”: “After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, ‘yes.’”

Id. In the present case, the Circuit Court asked a substantially identical “magic question” of Dr. Polack twice:

The Court: Based upon what I told you, do you believe that you’ll be able to sit as a juror in this case, listen to the evidence from the witness stand, the law that will be given to you at the close of the case, and you’re going to be asked to marry the facts as you determine them to the law as I give them.

Dr. Polack: Yes.

R. 20 at pp. 21-22.

The Court: So we get back really to, any verdict that you would reach would be based upon the evidence from the witness stand and the law given you by the Court?

Dr. Polack: That’s correct.

R. 20 at pp. 122-123. Furthermore, Dr. Polack’s answer to the second “magic question” was disingenuous. Just two questions earlier he had admitted that his decision-making ability depended on the credibility of Mrs. Black’s attorneys, giving no regard to the evidence. The Circuit Court then corrected Dr. Polack’s disregard for the evidence by suggesting to him in the next question: “And the evidence?”, basically pointing out to him that he should also look to the credibility of the evidence in rendering a verdict. The judge then once again asked Dr. Polack the “magic question,” to which he predictably responded in the affirmative.

Altogether, Dr. Polack's questioning in the juror selection process amounted to at least five unequivocal statements or confirmations of bias by Dr. Polack. This bias was only toned down by his giving affirmative answers to two improper "magic questions." These "magic questions" were meaningless because they constituted impermissible attempts to rehabilitate a clearly biased prospective juror. O'Dell squarely addressed such situations in favor of striking the juror in question, and because a new trial was granted in that case based only on suspicion of bias, then, *a fortiori*, a new trial must be granted in this case where the bias was clearly expressed numerous times by the prospective juror, against both the Plaintiff's attorneys and her case in general.

Despite this clear mandate from O'Dell, CSX may argue that several recent holdings by this Court require a different result. First, the case of State ex rel. Quinones v. Rubenstein, 218 W.Va. 388, 624 S.E.2d 825 (2005), involved a criminal defendant convicted of murder for killing a man in the midst of a dispute over some cocaine. The criminal defendant based his appeal to this Court, in part, on the fact that one of the jurors should have been struck for cause because the juror had indicated that "he had serious concerns with people who use alcohol and drugs since both of his children had tragically died, one due to a drunk driver." Id. at 396, 624 S.E.2d at 833. This Court held that the juror's "serious concerns" did not represent prejudice beyond question so as to indicate that he had a present and fixed view of the case, and therefore ruled against the appellant. Id.

The problem with any potential application of the Quinones decision to the present situation is that the opinion does not go into any detail regarding just how serious the juror's "concerns" actually were over drugs and alcohol. Of course, practically every juror imaginable would agree that he or she has serious concerns about such subject matter, and the Quinones

juror's statements may have simply been a further reflection of this. Furthermore, the juror's statements in Quinones cannot be compared with the instant case, because Dr. Polack's statements here did not amount to "concerns"; rather, his statements were *per se* admissions of actual bias on his part, requiring that he be automatically struck for cause. On the other hand, the juror's "serious concerns" in Quinones were a perfect example of the "inconclusive or vague statement" contemplated in O'Dell.

It may be helpful to consider what would have happened in Quinones, had the questionable juror actually stated that he harbored "personal bias" against criminal defense attorneys, or had he stated, "My personal bias is against the exculpatory forensic evidence to be presented by the defendant, e.g., DNA evidence"—if he had made such extreme declarations, then most certainly the holding in O'Dell would have required a new trial for the Quinones defendant.

Likewise, to the extent that CSX may rely on the case of Thomas v. Makani, 218 W.Va. 235, 624 S.E.2d 582 (2005), such reliance is also misplaced. The questionable juror in that medical malpractice case had previously been treated by the defendant doctor, and indicated that he had a "good experience" with the doctor, and that he might possibly "lean toward" him, especially since he did not know anything about medicine. Id. at 237-38, 624 S.E.2d at 584-85. This Court did not believe that these statements were strong enough to show actual bias, and therefore further questioning by the trial court was appropriate. Upon this further questioning, the juror clearly disaffirmed any bias, and stated that he "would be swayed by the evidence itself and the manner in which it was presented." Id. at 238, 624 S.E.2d at 585. The juror expressly stated that, "as far as picking him [the defendant doctor] over another doctor, I mean, I wouldn't." As a result of the juror's disavowal of any bias upon further questioning, this Court

was unable to conclude that the juror made a clear statement of disqualifying bias toward the defendant physician, sufficient to disqualify him from serving on the jury; hence, the trial court's ruling was upheld. Id.

But, once again, the Thomas decision is distinguishable due to the fact that the Thomas juror's initial questionable statement, although stronger than that in Quinones, was nowhere near as strong as the bias displayed by Dr. Polack. The juror did not initially indicate any definitive bias, but only responded that he *might possibly* "lean toward" the defendant in response to questioning by plaintiff's counsel. This assertion by the Thomas juror was highly equivocal, and furthermore was not indicative of any particular ill-feeling by this juror against the plaintiff or the plaintiff's attorneys. Dr. Polack's statement, on the other hand, was a calculated expression of outright prejudice and animosity towards Mrs. Black, as seen by the fact that on the juror questionnaire, in response to a very generalized question about whether he would have any difficulty being a juror, Dr. Polack took the time to actually make a typewritten statement of his own accord that he felt "personal bias" in this case. Furthermore, in contrast to both Thomas and Quinones, Dr. Polack's initial statement on the questionnaire expressed a complete unwillingness to look at the evidence as instructed by the judge pursuant to the standard in Gentry, and he stated several more times in later questioning that he would hold, in effect, Mrs. Black's case to a higher standard than the law allowed, requiring pure, objective science in order for her to make a successful claim.

But where Mrs. Black's case really stands apart from Thomas is in the respective jurors' comments after the courts' attempts to rehabilitate them. In Thomas, the juror clearly clarified his apparent bias by stating that he would base his decision solely on the evidence, and that he would not pick one doctor over another. But in the present case, even though rehabilitation was

improper, Dr. Polack continued to remain biased. He answered affirmatively numerous times in response to outright questioning as to whether he was biased. And he even once again used the word "bias" to describe how he felt about Mrs. Black's cause of action. He never once stated that he would not choose one medical expert over another, as the juror did in Thomas. The bottom line is that, unlike the jurors' testimony in the Thomas and Quinones cases, Dr. Polack never disavowed his bias against either Mrs. Black's attorneys, or the evidence supporting her cause of action; therefore, the outcomes of those cases should not be applied to the present case now before this Court.

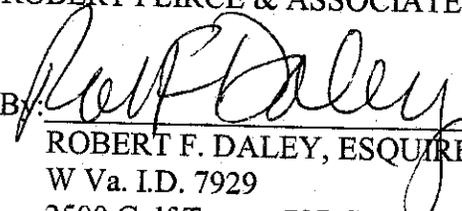
In conclusion, the O'Dell holding requires that a prospective juror be struck for cause upon a clear display of bias. The only time a juror may be subjected to further questioning is when that juror has initially made a vague or inconclusive statement. Moreover, it is reversible error for a trial court to rehabilitate clearly biased juror by asking him what O'Dell refers to as the "magic question," *i.e.*, whether he could set aside his preconceptions and decide the case solely on the evidence and the law. In this case, Dr. Polack made clear admissions of bias on his questionnaire against both Mrs. Black's attorneys and her cause of action. Under O'Dell, the trial court should have struck him for cause upon receiving this questionnaire, and should not have attempted to rehabilitate him. Even so, upon further questioning, Dr. Polack continued to display this bias openly. The Circuit Court, once again, should have resolved any doubt of possible bias or prejudice in favor of Mrs. Black, and granted her Motion to Strike Dr. Polack for cause at this point. The court should not have further attempted to rehabilitate him by asking him the "magic question." Accordingly, the Circuit Court committed reversible error, and its decisions on this matter must be overturned.

V. PRAYER FOR RELIEF

Wherefore, for the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the decision of the trial court and remand this matter for a new trial.

Respectfully submitted,

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SALLY BLACK, as Executrix of the Estate of Charles A. Black, Deceased

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CSX TRANSPORTATION, INC.,

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CERTIFICATE OF SERVICE

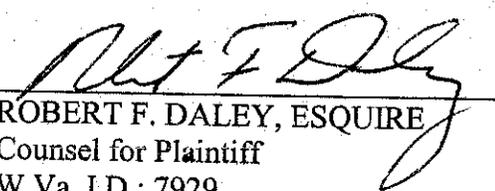
I hereby certify that a true and correct copy of the BRIEF OF APPELLANT was served
this 1 day of Feb, 2007, by first class United States mail, postage pre-paid,
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