No. 2D17-3148

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

RONALD HOWARTH, Individually and as Successor Trustee of the WILLIAM HOWARTH TRUST u/t/d 1980 as Amended and Restated on April 29, 2011,

Appellant,

v.

BETTIE BALL and KEITH HOWARTH,

Appellees.

On Appeal from the Circuit Court of the Sixth Judicial Circuit
in and for Pasco County, Florida
L.T. No. 13-CA-5383, Hon. Kimberly Sharpe Byrd

INITIAL BRIEF OF RONALD HOWARTH

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STATEMENT OF THE CASE AND FACTS

Nature Of The Case

This nonfinal appeal arises from an inheritance dispute. Appellees, Bettie Ball and Keith Howarth, sued their brother, Appellant, Ronald Howarth, to set aside their father's third trust restatement, to set aside their father's *inter vivos* gift of precious metals to Ronald, and to impose a constructive trust on Ronald for unjust enrichment as donee of the *inter vivos* gift. App. 37 at 2-5; 60 at 2-4. After a six-day bench trial (Tr. 1-1148), the trial court entered a 39-page nonfinal order, which contained findings of fact and conclusions of law in favor of Bettie and Keith on all three counts. App. 263 at 1-39. In addition to setting aside the trust restatement and the *inter vivos* gift, that order also imposed a constructive trust on Ronald. App. 263 at 37-38. On appeal, Ronald contends the imposition of a constructive trust was invalid because Bettie and Keith, as mere beneficiaries of their parents' estates and trusts and not their personal representatives or trustees, lacked standing to bring suit to set aside the *inter vivos* gift and for unjust enrichment.

Course Of The Proceedings

In case 13-CA-5383, Bettie and Keith initially sued Ronald to set aside William Howarth's trust restatement for undue influence and duress and to remove Ronald as trustee. App. 2 at 2-4. Proceeding *pro se*, Ronald generally denied the allegations and demanded a jury trial. App. 19 at 1.

In a separate case, 13-CA-5384, Bettie and Keith sued Ronald to set aside Hilda Howarth's trust restatement for incapacity and to remove Ronald as trustee. App. 60 at 2-4. Proceeding *pro se*, Ronald generally denied the allegations and demanded a jury trial. App. 70 at 1.

The trial court eventually consolidated case 13-CA-5383 with case 13-CA-5384. App. 56 at 1. The causes of action asserted in case 13-CA-5384 were not litigated at the bench trial from which this appeal arises. *See* Tr. 1-1148.

At any rate, in case 13-CA-5383, Bettie and Keith then filed an amended complaint, which alleged five causes of action to set aside the trust restatement, to set aside an *inter vivos* gift, to impose a constructive trust on the *inter vivos* gift, for breach of fiduciary duty as trustee, and to remove Ronald as trustee. App. 37 at 2-7. Still proceeding *pro se*, Ronald denied almost all the allegations, again demanded a jury trial, and asserted a few affirmative defenses. App. 38 at 1-2. In particular, as affirmative defenses, Ronald asserted Bettie and Keith lacked standing because they were not the personal representatives or trustees of their parents' estates and trusts. App. 38 at 1-2.

On the basis that the amended complaint sought only equitable relief, Bettie and Keith moved to strike Ronald's jury demand. App. 48 at 1-2. Still proceeding *pro se*, Ronald opposed the motion. App. 102 at 1. After a hearing, the trial court

entered an order striking Ronald's jury demand. App. 105 at 1. Thereafter, Ronald sought reconsideration (App. 109 at 1), which was denied (App. 127 at 1).

Meanwhile, Bettie and Keith moved to compel Ronald to produce and secure the "property in dispute" (*i.e.*, the precious metals that were the subject of the *inter vivos* gift) by "storing it with a neutral third party." App. 99 at 1. The trial court denied the motion, except "to the extent" it ordered Ronald "shall continue to securely hold the subject personal property listed on Exhibit A attached hereto in the locked vault on his property located in Pasco County, Florida."[1] App. 110 at 1. Still proceeding *pro se*, Ronald moved for clarification (App. 112 at 1), which was denied (App. 130 at 1).

Thereafter, Bettie and Keith moved to compel an inspection of that personal property. App. 135 at 1-11. The trial court convened a motion hearing. App. 139 at 1-2. After Ronald objected to the proposed order (App. 144 at 1; 145 at 1-2), the trial court ordered an inspection (App. 148 at 1-2).

Finally represented by counsel, Ronald moved for summary judgment. App. 177 at 1-4; 178 at 1-2. Bettie and Keith opposed. App. 185 at 1-46. The motion was denied. App. 219 at 1.

Meanwhile, the trial court scheduled a bench trial. App. 165 at 1-9. The parties submitted a joint pretrial statement, which described their respective views of

[1] The attached inventory list (App. 110 at 2) set forth the objects of a March 27, 2011 *inter vivos* gift. *See infra* Statement Of The Facts D.

the case. App. 201 at 1-4. Five days before trial, and after the previously ordered inspection indicated the personal property was not in Ronald's vault, Bettie and Keith moved for an order to show cause. App. 256 at 1-19. The trial court did not enter a written order on that motion; instead, the trial court orally ordered a further inspection of the other vaults on Ronald's property. Tr. 870-880. After six days of testimony (Tr. 1-1148), the trial court entered a nonfinal order in favor of Bettie and Keith (App. 263 at 1-39). This nonfinal appeal followed.[2] App. 265 at 1-40.

Statement Of The Facts

A. William And Hilda Amass $1.2 To $1.5 Million In Savings

William and Hilda Howarth were born in Detroit, Michigan in 1919 and 1920. App. 263 at 1. They married in 1943 and had three children: Ronald; Bettie; and Keith. App. 263 at 1. By 2007, William and Hilda had a net worth between $1.2 and $1.5 million. App. 263 at 5; Tr. 6. William and Hilda lived in Michigan until late 2009 (Hilda) and early 2010 (William), when they moved to Florida to join Ronald. App. 263 at 1, 8.

[2] This Court has jurisdiction. *See* Fla. R. App. P. 9.130(a)(3)(B) (permitting appeals from nonfinal orders that "grant, continue, modify, deny, or dissolve injunctions"); *id.* 9.130(a)(3)(C)(ii) (permitting appeals from nonfinal orders that "determine the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment"); *Carollo* v. *Carollo*, 972 So. 2d 930, 931 (Fla. 3d DCA 2007) (permitting immediate appeal from nonfinal order imposing constructive trust).

B. William And Hilda Establish And Restate Their Trusts Twice

In 1980, William and Hilda had established revocable trusts. App. 263 at 3. Originally, each trust provided for the other spouse first, then for their three children equally. App. 263 at 3. In 1998, William and Hilda made a first amendment to their trust to provide $5,000 devises to Bettie's two children and $1,250 to a long-time friend. App. 263 at 3. In 2010, William and Hilda made a second amendment to their trusts to make Ronald first in line as trustee after William passed away. App. 263 at 12.

C. Bettie Files Guardianship Cases Against William And Hilda

Bettie filed actions for guardianship against her parents in February 2011. App. 263 at 15. On April 14, 2011, the guardianship court found Hilda was incapacitated. App. 263 at 17. On May 5, 2011, the guardianship court appointed a guardian for Hilda. App. 263 at 17. By a 2-1 vote, an examining committee found William was not incapacitated, so the guardianship court appointed no guardian for him. App. 263 at 17.

D. Meanwhile, William Makes An *Inter Vivos* Gift To Ronald And Restates His Trust A Third Time

An inventory list dated March 27, 2011 indicated William made an *inter vivos* gift to Ronald. App. 263 at 23. In addition to listing a parcel of real property in Michigan, a car, and $50,000, the inventory list gave Ronald the following precious metals: 14,883 ounces of various silver ingots; three 100-ounce silver ingots;

10,000 ounces of large silver ingots (approximately totaling a quantity of ten); 10,500 silver eagles; 63 one-ounce gold Suisse credits; 11 one-ounce gold coins; and 150 ounces of platinum ("the precious metals"). App. 110 at 2.

In addition to this *inter vivos* gift, on April 9, 2011, William restated his trust a third time. App. 263 at 17-18. His restated trust specifically eliminated Bettie, her husband, and her children as beneficiaries. App. 263 at 18. Instead, the sole remaining beneficiaries were Keith and Ronald. App. 37 at 12.

E. William And Hilda Pass Away

William and Hilda both died in October 2012. App. 263 at 1. Although William's estate was never probated (*see* Tr. 537), his final will nominated Ronald to serve as personal representative (Tr. 538). But Ronald was statutorily ineligible to serve as personal representative. Tr. 538; *see* § 733.303(1)(a), *Fla. Stat.* The record does not indicate whether Hilda's estate was probated, where it was probated, or who was nominated to serve as personal representative.

F. Keith And Bettie Assert Causes Of Action To Set Aside William's Trust Restatement, To Set Aside William's *Inter Vivos* Gift, And To Impose A Constructive Trust On Ronald's Possession Of The Precious Metals And Their Proceeds

In case 13-CA-5383, Bettie and Keith asserted a cause of action to set aside the William E. Howarth Trust u/t/d 5/9/1980, as amended and restated on April 9, 2012 ("William's trust restatement"). App. 37 at 2-3. The amended complaint alleged Ronald, in an effort to "punish" Bettie for filing guardianship petitions

against her 90-year-old father and 89-year-old mother, "played an active role in the procurement of" William's trust restatement. App. 37 at 2-3. Although William's trust restatement specifically removed Bettie, her husband, and her children as beneficiaries, the amended complaint alleged William "did not have the free will to resist [Ronald's] control and influence." App. 37 at 2-3.

Bettie and Keith also alleged a cause of action to set aside the March 27, 2011 *inter vivos* gift because (1) it was procured to "punish" Bettie through Ronald's undue influence on William, and (2) it improperly included property that was the jointly owned marital property of William and Hilda, who was incapacitated at the time of the gift. App. 37 at 4. On information and belief, the amended complaint further alleged the March 27, 2011 *inter vivos* gift was actually backdated from sometime after an April 14, 2011 guardianship hearing at which a trial court ruled Hilda was completely incapacitated. App. 37 at 4.

Finally, as a remedy for setting aside the March 27, 2011 *inter vivos* gift, Bettie and Keith asserted a cause of action for unjust enrichment to impose a constructive trust on Ronald's possession of the precious metals and their proceeds. App. 37 at 5.

Disposition In The Lower Tribunal

After extensive pretrial proceedings, the case proceeded to a bench trial. Tr. 1-1148. During opening statements, Bettie and Keith attacked Ronald's character

by asserting he had committed a youthful indiscretion, was a Scientologist, engaged in other quirky and eccentric behavior, and was estranged from his family before he swindled his parents. *See* Tr. 6-35. As relief, Bettie and Keith explained that they sought "to have the gift rescinded" and to have Ronald "account for them and to turn them over to the correct party, which would either be Mr. [William] Howarth's estate and possibly Hilda Howarth's estate." Tr. 8.

Ronald, on the other hand, had a different story. He took the position that William had cut Bettie out of his trust in angry retaliation for her aggressive pursuit of expensive and emotionally distressing guardianship proceedings against her parents. *See* Tr. 36-55. Moreover, Ronald explained that any dispute over investment decisions William and Hilda made before the trust restatement or the *inter vivos* gift was not framed by the pleadings. Tr. 47.

After six days of testimony from many witnesses (*see* Tr. 1-1480), the trial court entered a nonfinal order in Bettie and Keith's favor (App. 263 at 1-39). The nonfinal order set aside William's trust restatement, set aside the *inter vivos* gift, and imposed a constructive trust on the precious metals listed in William's inventory list. App. 263 at 32-39.

Specifically, the trial court set aside William's trust restatement because it concluded Ronald had unduly influenced William in executing it. App. 263 at 32. Similarly, the trial court set aside the *inter vivos* gift because it concluded William

(1) lacked the requisite intent to transfer title to the precious metals, (2) never delivered them to Ronald with such intent, (3) had not signed the March 27, 2011 inventory list (*i.e.*, it was a forgery), (4) had no authority to give precious metals that properly belonged to Hilda's trust, and (5) was unduly influenced by Ronald in making the gift. App. 263 at 36. Finally, given the invalidated *inter vivos* gift, the trial court found Ronald was unjustly enriched, so it imposed a constructive trust on his possession of the precious metals and their proceeds. App. 263 at 37-39.

SUMMARY OF ARGUMENT

The imposition of a constructive trust was invalid because Bettie and Keith, as mere beneficiaries of their parents' estates and trusts rather than their personal representatives or trustees, lacked standing to bring suit against Ronald to set aside the *inter vivos* gift.

Rather than suing Ronald in his personal capacity, Bettie and Keith had two options. They could have convinced the personal representative(s) or trustee(s) to bring suit in the estates' or trusts' names against Ronald in his personal capacity as donee. Or they could have sued the personal representative(s) or trustee(s) for breach of fiduciary duty (which, when compensatory damages are sought, is an ac-

tion at law, not in equity, and must be heard by a jury when demanded)[3] in failing to sue Ronald in his personal capacity for unjust enrichment as donee.

Instead, Bettie and Keith sought a constructive trust by directly suing Ronald in his personal capacity for unjust enrichment as donee of an invalid gift. Alas, as mere beneficiaries, they lacked standing to do so at the inception of their lawsuit. And the statute of limitations within which to sue the personal representative(s) or trustee(s) to invalidate an *inter vivos* gift from 2011 has long since expired. Because Bettie and Keith lack standing to sue Ronald for unjust enrichment, this Court should vacate the imposition of the constructive trust.

ARGUMENT

I. ISSUE: DID BETTIE AND KEITH HAVE STANDING TO SUE RONALD FOR UNJUST ENRICHMENT BASED ON AN *INTER VIVOS* GIFT AND OBTAIN A CONSTRUCTIVE TRUST WHEN THEY WERE MERE BENEFICIARIES, NOT PERSONAL REPRESENTATIVES OR TRUSTEES?

The imposition of a constructive trust was invalid because Bettie and Keith, as mere beneficiaries of their parents' estates and trusts rather than their personal

[3] *See, e.g.*, *First Nat'l Bank & Trust Co. of the Treasurer Coast* v. *Pack*, 789 So. 2d 411, 413 (Fla. 4th DCA 2001) (breach of fiduciary duty was action at law tried to jury); *King Mountain Condo. Ass'n, Inc.* v. *Gundlach*, 425 So. 2d 569, 570 (Fla. 4th D.C.A. 1982) (whether breach of fiduciary duty "will lie at law, in equity, or both depends on the nature of the breach and the remedy sought"); RESTATEMENT OF RESTITUTION § 138 cmt. a (1937) ("A fiduciary who commits a breach of his duty as fiduciary is guilty of tortious conduct and the beneficiary can obtain redress either at law or in equity for the harm done.").

representatives or trustees, lacked standing to bring suit against Ronald for unjust enrichment in receiving the *inter vivos* gift.

Standard Of Review

Standing is reviewed de novo. *Found. for Developmentally Disabled, Inc.* v. *Step By Step Early Childhood Educ. & Therapy Ctr., Inc.*, 29 So. 3d 1221, 1223 (Fla. 2d DCA 2010) ("a trial court's decision regarding a party's standing to file suit is reviewed using the de novo standard of review"); *accord LaFrance* v. *U.S. Bank N.A.*, 141 So. 3d 754, 755 (Fla. 4th DCA 2014) ("'Whether a party is the proper party with standing to bring an action is a question of law to be reviewed de novo.'" (citation omitted)).

Merits

As mere beneficiaries of their parents' estates and trusts, Bettie and Keith lacked standing to sue Ronald, based on the *inter vivos* gift, for unjust enrichment. Without standing to assert a cause of action for unjust enrichment, they were not entitled to impose a constructive trust (which is a remedy, not a cause of action). As such, the imposition of the constructive trust must be vacated.

A. Plaintiffs Cannot Assert Causes Of Action For Which They Lack Standing

The judicial system is not an arena where any plaintiff can sue any defendant for any remedy willy-nilly; instead, it is a place where certain plaintiffs can sue

specified defendants for limited kinds of redress of their grievances—but only if they have standing to do so.

"Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it." *Gen. Dev. Corp.* v. *Kirk*, 251 So. 2d 284, 286 (Fla. 2d DCA 1971); *accord Khazaal* v. *Browning*, 707 So. 2d 399, 400 (Fla. 5th DCA 1998) ("one has standing if he or she has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation"). Nevertheless, "standing encompasses not only this 'sufficient stake' definition, but the at least equally-important requirement that the claim be brought by or on behalf of one who is recognized in the law as a 'real party in interest,' that is, 'the person in whom rests, by substantive law, the claim sought to be enforced.'" *Kumar Corp.* v. *Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985). A plaintiff must establish standing at the inception of the lawsuit. *E.g.*, *Focht* v. *Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013).

B. Bettie And Keith Lacked Standing To Assert A Cause Of Action For Unjust Enrichment Against Ronald, So They Were Not Entitled To A Constructive Trust

Bettie and Keith were not entitled to a constructive trust because they lacked standing to assert a cause of action for unjust enrichment against Ronald.[4]

[4] A constructive trust is an "extraordinary" remedy, not a cause of action in and of itself. *Collinson* v. *Miller*, 903 So. 2d 221, 228 (Fla. 2d DCA 2005).

"'The elements of an unjust enrichment claim are "a benefit conferred upon a defendant *by the plaintiff*, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'" *Fla. Power Corp.* v. *City of Winter Park*, 887 So. 2d 1237, 1242 n.4 (Fla. 2004) (emphasis added) (quoting *Ruck Bros. Brick, Inc.* v. *Kellogg & Kimsey, Inc.*, 668 So. 2d 205, 207 (Fla. 2d DCA 1995)). Here, Bettie and Keith (the plaintiffs) did not confer any benefit on Ronald (the defendant). Instead, at most Ronald's benefit was conferred by William and Hilda, who, like their estates, are not parties to this litigation.

As such, to the extent William and Hilda had any causes of action for unjust enrichment against Ronald, those *choses in action* were William's and Hilda's personal property. *Candansk, LLC* v. *Estate of Hicks ex rel. Brownridge*, 25 So. 3d 580, 583 (Fla. 2d DCA 2009) (a "'vested cause of action, or '*chose in action*' is personal property'"). And as personal property that was never titled in the trusts, those causes of action became part of William's and Hilda's estates upon their deaths. *See* § 731.201(14) (defining estate), (32) (defining property).

Because those causes of action for unjust enrichment, which had been personal to William and Hilda, became part of the estates, only a personal representative could have brought lawsuits on behalf of the estates for unjust enrichment against Ronald. *See* § 733.612(20), *Fla. Stat.* (authorizing only personal repre-

sentative to "[p]rosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative."). In that regard, two cases are illustrative.

First, in *McMonigle* v. *McMonigle*, this Court held a beneficiary of an estate "[c]learly … did not have standing" to bring a separate civil action without the personal representative's authorization to set aside an *inter vivos* gift to a different beneficiary. 932 So. 2d 369, 371 (Fla. 2d DCA 2006). There, a father had devised his estate equally to his four children. *Id.* at 370. He nominated one son, Ronald, as the personal representative. *Id.* During the last three years of his life, Ronald had assisted his father with banking and business affairs. *Id.* In fact, Ronald stopped working and asked his father for financial assistance. *Id.* Over those three years, the father paid Ronald $84,000, which he did not repay. *Id.*

During probate proceedings, another son, Robert, took the position that the $84,000 was a loan, not an *inter vivos* gift. *Id.* To ensure Ronald would repay the loan to the estate, Robert (improperly) filed in the probate court a statement of claim for $80,000. *Id.* Moreover, believing probate law required him to file a civil action within 30 days, Robert sued Ronald for $80,000 and asked for a constructive trust. *Id.* Ronald moved to dismiss on the basis that Robert lacked standing to file an action on behalf of the estate to recover the funds. *Id.*

While that motion was pending, Robert petitioned in the probate case to remove Ronald as personal representative due to his supposed conflict of interest (*i.e.*, as beneficiary of the estate and recipient of an *inter vivos* gift). *Id.* In that petition, Robert asked the probate court to determine whether the $84,000 payment was a gift or a loan. *Id.* at 370-71. The probate court concluded it was a gift and declined to remove Ronald as personal representative. *Id.* at 371. Immediately thereafter, Robert dismissed his civil action against Ronald. *Id.*

Nevertheless, Ronald sought attorney fees in the civil action as a sanction pursuant to § 57.105, *Fla. Stat.*, based on his belief that Robert's case was frivolous. *Id.* The trial court awarded fees, and Robert appealed. *Id.*

In reversing, this Court observed that Robert clearly did not have standing to bring his civil action to set aside the *inter vivos* gift. *Id.* Instead, his only proper procedural avenue to obtain relief was to petition to remove Ronald as the personal representative. *Id.* Because Robert eventually filed that petition and, when it was denied, immediately dismissed his civil action, this Court concluded sanctions were not warranted. *Id.*

Second, *Traub* v. *Zlatkiss*, 559 So. 2d 443 (Fla. 5th DCA 1990), involved a widow who became frustrated with the personal representative of her husband's estate and took matters into her own hands. Before the widow's husband died, he made *inter vivos* gifts to his business partner and his business partner's wife. *Id.* at

444. The widow's husband's will nominated the business partner as personal representative. *Id.* After the widow chose her elective share, she objected to the personal representative's inventory as not including the assets that were part of the *inter vivos* gift. *Id.* at 444-45. Her objections were overruled. *Id.* at 445. Then, she sued the business partner and his wife. *Id.* The trial court dismissed her lawsuit. *Id.*

On appeal, the Fifth District affirmed. *Id.* at 447. In rejecting her lawsuit on substantive grounds, the Fifth District also noted the widow faced a significant "procedural impediment":

> Even in cases where transfers by decedents are subject to rescission upon classic grounds such as fraud, undue influence, mistake, or lack of mental capacity (or assets subject to administration are held in a constructive trust for the decedent), *the cause of action for rescission, or to establish a constructive trust, is in the personal representative of the decedent's estate and cannot be directly asserted by the widow*.

Id. (emphasis added).

Read together, *McMonigle* and *Traub* are fatal to the constructive trust imposed here. Consistent with § 733.612(20), *Fla. Stat.*, both of those cases indicate only a personal representative—not a beneficiary—may sue other beneficiaries to set aside an *inter vivos* gift. Here, because Bettie and Keith were mere beneficiaries rather than personal representatives, they had no authority to sue. Absent standing, they were not entitled to a constructive trust.[5]

[5] Relatedly, it makes no difference that William's and Hilda's estates were not probated and that no personal representatives were appointed. As interested

Summary

No personal representative for William's estate or Hilda's estate filed or authorized the cause of action for unjust enrichment against Ronald. As such, in light of *Florida Power Corp.*, *McMonigle*, *Traub*, § 733.612(20), *Fla. Stat.*, and other authorities, Bettie and Keith lacked standing to bring it, and the constructive trust on the precious metals listed in William's March 27, 2011 *inter vivos* gift should be vacated.

CONCLUSION

The Court should vacate the imposition of a constructive trust on the precious metals in the Order of July 17, 2017 and remand for further proceedings.

Respectfully submitted,

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persons, *see* § 731.201(23), *Fla. Stat.* (defining interested person as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved"), both Bettie and Keith were free to petition for administration of their parents' estates at any time, *see* § 733.202, *Fla. Stat.* ("Any interested person may petition for administration.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2018, I electronically served the following via eDCA and email:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

January 12, 2018

/s/ Thomas Burns
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