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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LINDA S. MITLYNG,

Plaintiff and Respondent,

v.

WESLEY I. NUNN,

Defendant and Appellant.

A134828

(Humboldt County  
Super. Ct. No. DR 090662)

Linda S. Mitlyng, an attorney, sued her client Wesley I. Nunn for outstanding legal fees, and Nunn countersued for malpractice. After a bench trial, the court awarded Mitlyng her fees and rejected the malpractice claim. Nunn appeals, alleging reversible procedural errors, mistakes of law, and findings unsupported by substantial evidence. We affirm.

**I. BACKGROUND**

We begin with the facts in the underlying litigation in which Mitlyng represented Nunn. In May 2004, at about the time Nunn ended a personal relationship with Jennifer Fenswick, Nunn granted real property (a single family residence in Crescent City; hereafter Meridian Street Property) to Melissa A. LeBlanc, who later married Fenswick's son. Nunn alleged that he deeded the property to LeBlanc in exchange for a release of all of Fenswick's financial claims against him. A June 15 release (Release) signed by Fenswick states, "Upon the execution of the Grant Deed for the [Meridian Street Property] to Melissa A. LeBlanc, your financial obligation to me is paid in full to date . . . ."

In June 2005, Fenswick sued Nunn, claiming an interest in revenues from real property that had been acquired during their relationship.<sup>1</sup> (*Fenswick v. Nunn* (Super. Ct. Del Norte County, 2009, No. CVUJ 05-1431) (*Fenswick*).) Nunn retained Mitlyng and, in November 2005, Mitlyng filed two separate actions on Nunn's behalf, one against Fenswick and another against LeBlanc. In *Fenswick*, Mitlyng filed a cross-complaint alleging that Fenswick breached a several oral contracts to pay Nunn money (oral promises to repay a loan, pay rent, purchase an automobile, and cover credit card charges) and conspired with LeBlanc to fraudulently obtain the Meridian Street Property by falsely representing that the property transfer would satisfy all of Nunn's financial obligations to Fenswick. LeBlanc was not named as a defendant on the cross-complaint. Instead, Mitlyng filed a separate complaint against LeBlanc (*Nunn v. LeBlanc* (Super. Ct. Del Norte County, 2009, No. CVUJ 05-1527) (*LeBlanc*)), making similar allegations regarding the transfer of the Meridian Street Property.<sup>2</sup> Both the *Fenswick* cross-complaint and the *LeBlanc* complaint sought damages, but the *LeBlanc* complaint also sought rescission of the property contract and recovery of the Meridian Street Property.

In August 2007, Nunn discharged Mitlyng. When he picked up his case files, Mitlyng presented him with a bill for more than \$13,000 in outstanding fees. Nunn refused to pay. Nunn hired new counsel, whose first action was to file a motion to consolidate *Fenswick* and *LeBlanc*; the motion was denied.

On April 6, 2009, the trial court (Hon. Philip Schafer) issued a judgment in *Fenswick*. The court found: "1) . . . [Fenswick] has not sustained the burden of proof to establish either an express or an implied contract [that she would share in the proceeds of real estate investments made during her relationship with Nunn]. [¶] 2) Neither party

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<sup>1</sup> The complaint and amended complaint in *Fenswick* are not in the record, but the record includes the court's judgment in *Fenswick*, which summarizes Fenswick's claims.

<sup>2</sup> A 2006 second amended complaint in *LeBlanc* further alleged that, after Nunn transferred the Meridian Street Property to LeBlanc, Fenswick and LeBlanc agreed that they shared ownership of the property, they established a real estate investment partnership, and they used their equity in the Property to secure a line of credit and make real estate investments.

fraudulently induced the other for any purpose. [¶] 3) [The Release] is a release and settlement of all financial obligations of the parties to the date of the agreement.

[¶] 4) Neither has been unjustly enriched at the expense of the other. Each has been amply rewarded financially for their efforts while together. . . .”

On August 5, 2009, the court (Hon. J. Michael Brown) dismissed *LeBlanc* on res judicata and collateral estoppel grounds. “[T]he issues raised by the pleadings, as they are now framed, have been resolved by the findings necessarily made by the trial judge when reaching his decision in [*Fenswick*]. Once having found that Fenswick had not committed fraud as to Nunn, no subsequent finding to the contrary can be made regarding LeBlanc, as there are no independent allegations against LeBlanc. All allegations against her are premised on her association with Fenswick, who had been held innocent of fraud towards Mr. Nunn.”

On July 31, 2009, Mitlyng filed this action against Nunn seeking recovery of her outstanding fees. Nunn cross-claimed for legal malpractice and related causes of action. His first amended cross-complaint (FACC) alleged that Mitlyng committed malpractice when she filed two separate actions against Fenswick and LeBlanc, a tactic that allegedly violated claim-splitting rules. “[H]ad Mitlyng not filed the matters as two separate actions, or, if she had timely joined the actions, the [*LeBlanc*] action would not have been vulnerable to claims of res judicata . . . .” Moreover, “[s]ince the [*LeBlanc*] action was framed by Mitlyng as the only action for recovery of the [Meridian Street Property], all potential for recovery was lost upon dismissal of that action.” Absent Mitlyng’s negligence, Nunn allegedly would have obtained a more favorable result in the litigation.

On August 23, 2010, Mitlyng demurred to the FACC. She argued in part that all of Nunn’s claims were barred by the statute of limitations set forth in Code of Civil Procedure section 340.6.<sup>3</sup> “[T]he period for commencement of Nunn’s legal action began in August 2007, when Nunn fired Mitlyng. [Nunn] admits in his [FACC] that in

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<sup>3</sup> All statutory references are to the Code of Civil Procedure unless otherwise indicated.

August 2007 he fired Mitlyng because he believed that ‘Mitlyng was not proficient at civil litigation’ (FACC ¶ 20) . . . .” Thus, “it is apparent that . . . Nunn believed at that time that he had suffered actual damages.” In opposition, Nunn argued that under section 340.6 “the one year time limit does not accrue until the injury is sustained, and not from the time when Nunn became aware of the malpractice. [¶] . . . [¶] The gravamen of Nunn’s FACC is based on the injury sustained to Nunn after the [*LeBlanc*] action was dismissed on August 5, 2009 . . . .” The trial court (Hon. John T. Feeney) summarily overruled the demurrer.

The case was set for trial on June 13, 2011. On that date, Mitlyng filed a motion in limine “requesting dismissal of defendant’s cross-complaint as barred by the statute of limitations.” The motion was substantively identical to Mitlyng’s demurrer to the FACC. Nunn’s opposition to the motion incorporated by reference the arguments he raised in his opposition to the demurrer and additionally argued the issue had already been decided by Judge Feeney and could not be reconsidered by the trial court, Judge Dale A. Reinholtsen. A minute order for the June 14, 2011 court session stated, “Motion in Limine is heard. [¶] The Court will consider statute of limitation after he has heard all of the evidence.” The trial took place on June 14, 15 and 16. The court took the case under submission on June 16 and directed the parties to file closing briefs.

In her closing brief, Mitlyng argued in part that Nunn had failed to establish his malpractice claim because he presented no expert testimony to establish any violation of the professional standard of care. She renewed her argument that the malpractice claim was time-barred. In his closing brief, Nunn argued in part that expert testimony was not necessary because specialized legal services were not involved, the negligence was “ ‘readily apparent from the facts of the case’ ” and the trial judge could himself determine whether “recovery was destroyed by the attorney’s negligence.” In response to the trial court’s initial statement of decision, which denied the malpractice claim on statute of limitations grounds, Nunn further argued that his claim was timely filed because he suffered damages only when *LeBlanc* was dismissed in 2009. Nunn also insisted that he was entitled to an offset to Mitlyng’s fee claim pursuant to section 431.70

even if the claim was time-barred. Finally, he complained of procedural irregularities in the trial proceedings.

On December 5, 2011, the court filed a final statement of decision and judgment. The trial court found that Nunn and Mitlyng entered into a written legal services contract on July 20, 2005, which provided that Nunn would pay Mitlyng for her services at the rate of \$225 per hour and that a retroactive interest charge of 1.5 percent monthly would be payable once the bill was overdue by 60 days. The court found, “The evidence presented did not establish that the activities charged for in the final bill were not appropriate for the prosecution and defense of the lawsuits.” The court awarded Mitlyng her full fee demand (\$13,876.26) with interest (\$10,192.43).

The court rejected Nunn’s cross-claim for malpractice. First, the court ruled that expert evidence was necessary to prove the malpractice because “[t]he court does not find that the alleged negligence by cross-defendant Mitlyng is readily apparent from the evidence presented.” Second, the court ruled that Nunn’s claims were barred by the statute of limitations in section 340.6. “The evidence establishes that . . . Nunn had reason to believe he had been damaged by the acts of [Mitlyng] and had a factual basis for a cause of action against [her] in August, 2007.” The court did not expressly address Nunn’s section 431.70 offset argument. The court entered judgment for Mitlyng in the amounts of \$13,876.26 in damages, \$10,192.43 in prejudgment interest, and \$410.16 in costs.

Nunn moved for a new trial. As relevant here, he renewed his arguments that the court erred in ruling that his malpractice claim was time-barred, failing to award Nunn an offset against the fee award even if the malpractice claim was time-barred, ruling that expert evidence was necessary to prove malpractice, making findings unsupported by the evidence, and exercising jurisdiction despite a conflict of interest and despite inadequate notice to Nunn regarding the last-minute assignment of the trial judge. The court denied the motion in a summary order.

## II. DISCUSSION

### A. *Irregularities in the Proceedings*

Nunn argues his motion for new trial should have been granted based on irregularities in the proceedings. He argues that Judge Reinholtsen had a conflict of interest that necessarily disqualified him from serving as the trial judge and also that his due process rights were violated because he was given only four days' notice of the identity of the trial judge. We are unpersuaded by either argument.

#### 1. *Disqualification of Judge Reinholtsen*

Nunn argues Judge Reinholtsen had a disqualifying conflict of interest because his son worked at the Janssen Malloy law firm which represented LeBlanc in the underlying *LeBlanc* litigation. He argues the firm “was interested enough in the instant case to order copies of a decision [citation] where [sic] the outcome of this case may have impact on the outcome of an action against Ms. LeBlanc.” In support of this statement, Nunn cites the register of actions for this case, which indicates the “Janssen Law Firm” paid \$9.00 in copy fees on May 25, 2011. The register does not indicate which court records were copied. In May 2011, trial preparations were underway, with trial commencing on June 14. However, Nunn does not explain how the outcome of the trial could have had an “impact on the outcome of an action against Ms. LeBlanc.” Nunn’s action against LeBlanc was dismissed in 2009.

Nunn cites no legal authority on the disqualification issue. We look to the statutory grounds for automatic disqualification of a judge. Section 170.1, subdivision (a)(5) provides: “A judge shall be disqualified if . . . [¶] . . . [¶] . . . [a] lawyer or a spouse of a lawyer in the proceeding is the . . . child[] . . . of the judge . . . or if such a person is associated in the private practice of law with a lawyer *in the proceeding.*” (Italics added.) Assuming Nunn’s factual allegations are true, Judge Reinholtsen’s son is “associated in the private practice of law with a lawyer” who represented LeBlanc, who was not a party in the instant action, in a prior proceeding. Nothing in the record indicates that Judge Reinholtsen was disqualified under section 170.1, subdivision (a)(5).

Section 170.1, subdivision (a)(6)(A)(iii) provides, “A judge shall be disqualified if . . . [¶] . . . [¶] . . . [f]or any reason: [¶] . . . [¶] . . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” Nunn suggests that the law firm’s act of copying documents in May 2011, shortly before the trial, manifested a level of interest in the instant case that would cause a reasonable person to doubt Judge Reinholtsen’s impartiality. However, Nunn cites no authority that these or similar circumstances would automatically disqualify a judge. Moreover, he provides no evidence that Judge Reinholtsen had any awareness of the law firm’s apparent interest in the instant case, suggests no reason for the law firm’s interest, and the partial record provided to us in this appeal (which notably lacks reporter’s transcripts or a settled statement of the evidence presented at trial) does not allow us to glean a reason from the record. The firm’s mere act of copying documents in this case does not self-evidently disqualify the judge. Because Nunn has failed to support his argument with legal argument and citations to legal authority or with a sufficient factual record, the argument is forfeited. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116 (*Guthrey*) [appellate court may deny claim on appeal that is unsupported by legal argument applying legal principles to the particular facts of the case on appeal]; *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46 (*Rancho Santa Fe*) [failure to provide adequate record results in forfeiture].) The claim is subject to forfeiture because the orders of a disqualified judge are not void, but merely voidable upon a procedurally proper challenge. (*In re Steven O.* (1991) 229 Cal.App.3d 46, 54–55.)<sup>4</sup>

## 2. *Lack of Notice Regarding Assignment of Trial Judge*

Nunn argues that his due process rights were violated when he was “first noticed of the change of trial judge only four court days before trial.” In support of this argument, Nunn averred that “[a]t the commencement of this action the Court assigned

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<sup>4</sup> Even a constitutional claim of judicial bias infringing on party’s due process rights may be forfeited. (*People v. Brown* (1993) 6 Cal.4th 322, 335–336 [criminal defendant’s due process challenge to biased judge may be forfeited if section 170.1 challenge not timely pursued and statutory remedies exhausted].)

the Honorable John T. Feeney to the case as trial judge and provided notice of such to the parties. [¶] . . . At the pretrial conference on June 9, 2011, in which Judge Dale A. Reinholtsen appeared, I stated words to the effect that I was surprised that Judge Feeney was not present. Judge Reinholtsen stated words to the effect that the judges had moved their departments and that Judge Feeney was now doing the juvenile court calendar and that he [Judge Reinholtsen] would be conducting the trial.” Nunn averred that he never received written notice of the change in assignment. In his motion for new trial, Nunn asserted, “Under normal proceedings a party is informed early in the litigation as to the assignment of the judge,” and he argued that he was prejudiced by the lack of notice because he did not have time to research Judge Reinholtsen’s potential conflicts of interest and because he had “reasonably relied on Judge Feeney’s ability to recognize malpractice and provide a fair decision without the necessity of an expert.”

Nunn has not supported his argument with a full factual record. Specifically, he does not produce the alleged assignment of the case to Judge Feeney at the commencement of the action. Nunn also does not support his argument with relevant legal authority. He cites *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164 for the purported rule that “upon the designation of a case as a ‘long cause’ the parties could rely on the assignment of a judge for all purposes . . . .” However, the cited passage of *Lavi* discusses the practices of the Los Angeles County Superior Court’s central district in 1993. (*Id.* at p. 1181.) The Supreme Court does not purport to describe the practices of all superior courts at all times, much less describe legal *requirements* for any judicial assignments. The legal issue before the court in *Lavi* was the application of time limits on the filing of disqualification motions under section 170.6, which vary according to the type of judicial assignment at issue. (*Id.* at p. 1170.) That legal issue is not relevant to this appeal, and Nunn has not cited any other legal authority that is relevant to the appeal. The issue is forfeited. (See *Rancho Santa Fe, supra*, 115 Cal.App.4th at p. 46; *Guthrey, supra*, 63 Cal.App.4th at pp. 1115–1116.)

In any event, even assuming error, Nunn’s allegations of prejudice are not substantiated. As noted *ante*, his conflict of interest claim fails because it is unsupported

by legal authority. Nunn’s argument that he was prejudiced because the change of judge led to a need for expert testimony also fails because, as explained *post*, Nunn has not demonstrated prejudice.

Nunn has failed to demonstrate that a new trial should have been granted on the grounds of irregularities in the proceedings.

B. *Cross-Complaint for Legal Malpractice*

Nunn raises several arguments in defense of his legal malpractice claim. He argues the trial court erred in (1) failing to afford Nunn a fair opportunity to be heard on the statute of limitations issue; (2) improperly reconsidering Judge Feeney’s ruling on the statute of limitations issue; (3) ruling the malpractice claim was barred by the statute of limitations; (4) failing to award Nunn malpractice damages as an offset against Mitlyng’s award pursuant to section 431.70 (even if the malpractice claim was time-barred); (5) ruling the malpractice claim could not be proven without expert testimony; and (6) crediting Mitlyng’s evidence and discrediting Nunn’s evidence on the issue. We need not address any of these issues because Nunn has not established that he would have prevailed on his malpractice claim if the aforementioned errors had not occurred.<sup>5</sup> (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772–773 [“appellant bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice”].) Specifically, he has not demonstrated that, but for Mitlyng’s alleged professional negligence, he would have obtained a more favorable result in the *Fenswick* or *LeBlanc* litigation.

“ ‘Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, causation, and damage. The elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between

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<sup>5</sup> While we do not need to reach the issue, we note that Nunn, in his pro per opening brief, admits that he “recognized [Mitlyng’s] failures” in filing separate actions as negligence and complained to Mitlyng prior to June 2007.

the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.” [Citation.]’ (*Loube v. Loube* (1998) 64 Cal.App.4th 421, 429.) . . . [¶] . . . ‘To show damages proximately caused by the breach, the plaintiff must allege facts establishing that, “but for the alleged malpractice, it is more likely than not the plaintiff would have obtained a more favorable result.” [Citations.]’ (*Charnay v. Cobert* [(2006)] 145 Cal.App.4th 170, 179, italics omitted.)” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1508–1509, parallel citation omitted.)

Nunn states that the “main basis” for his malpractice claim was Mitlyng’s decision to file two actions against Fenswick and LeBlanc, rather than asserting claims against both defendants in the *Fenswick* action. This strategic error allegedly resulted in the dismissal of *LeBlanc* on res judicata and collateral estoppel grounds. Nunn, however, makes no showing on appeal, and insofar as the appellate record discloses he made no showing in the trial court, that he would have achieved a different and more favorable result if Mitlyng had asserted claims against both defendants in the *Fenswick* action. Moreover, it does not appear that he could do so. In *Fenswick*, the trial court found that the Release was a valid release and settlement of all financial obligations of the parties to the date of the agreement and further found that Fenswick did not commit fraud against Nunn or unjustly enrich herself at his expense. It necessarily followed that Nunn granted LeBlanc the Meridian Street Property in May 2004 for valid consideration (in the form of the Release) and that he had no grounds to set aside the transfer and recover the property. Had Mitlyng asserted all claims against LeBlanc in *Fenswick*, rather than asserting them in a separate action, the evidentiary findings precluded any recovery by Nunn against LeBlanc and the result would have been the same.<sup>6</sup>

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<sup>6</sup> Nunn also suggests that Mitlyng committed malpractice by “set[ting] up the actions so that fraud would first have to be proved . . . to recover real property . . . .” However, he does not explain why the Release would not be a bar to nonfraud causes of action seeking recovery of the property, or why he would not have faced the same evidentiary hurdles in a joint trial.

We reject Nunn’s claims that the trial court erred in rejecting his malpractice claim or in failing to award him malpractice damages as an offset to Mitlyng’s claim for fees.

C. *Mitlyng’s Claim for Fees*

Nunn argues the trial court’s decision to award Mitlyng the full amount of her fee demand was not supported by substantial evidence.<sup>7</sup> He argues the court summarily accepted Mitlyng’s evidence and summarily rejected his own. These arguments are all forfeited for failure to provide a sufficient factual record or failure to provide cogent argument on appeal supported by legal authority.

Nunn specifically faults the trial court for ignoring Mitlyng’s “total failure to answer the Demand for Bill of Particulars.” Mitlyng’s response to Nunn’s demand for bill of particulars (defendant’s trial exhibit A) consists primarily of a table entitled “Nunn Final Bill for Services and Amounts Due and Unpaid.” The table identifies dates when legal services that were provided, describes the services provided, and identifies the number of hours billed on each date. Between December 1, 2006, and March 6, 2007, the described services included communications with Nunn, Fenswick and others; drafting of court papers; depositions; travel; and court appearances for a total of 50.4 billed hours. Between March 7 and July 20, 2007, the services consisted solely of telephone conversations with Nunn for a total of 6.4 billed hours. In its final statement of decision, the trial court found, “The evidence presented did not establish that the activities charged for in the final bill were not appropriate for the prosecution and defense of the lawsuits.” In his motion for new trial, Nunn argued, “The Statement of Decision infers that Ms. Mitlyng made no mistakes whatsoever in her last billing cycle. Irrespective of other issues, the Demand for Bill of Particulars and response (trial Exhibit

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<sup>7</sup> Nunn also argues the statement of decision contains contradictory findings: “while the court finds that Mr. Nunn had grounds in 2007 to bring a malpractice action, the court also states it finds no wrongdoing on the part of Ms. Mitlyng to apply as an offset to [her] action.” We need not address this argument because we have concluded that all of Nunn’s arguments related to his malpractice claim necessarily fail because Nunn has not shown that he would have received a more favorable outcome absent the alleged malpractice.

‘A’) alone proves that [Mitlyng] was unable to substantiate her billing . . . .” He argued that Mitlyng’s response “[f]ailed to substantiate [the reported] phone calls”; “[f]ailed to explain her practice of block-billing”; and “[f]ailed to explain charging thousands of dollars while the case was off-calendar.” The motion for new trial was denied.

Nunn has not provided a full factual record on which we could assess whether the trial court’s finding was supported by substantial evidence. Specifically, no reporters’ transcript or settled statement of the evidence presented at trial is included in the appellate record. Accordingly, the substantial evidence argument is forfeited. (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274 (*County of Solano*) [party challenging court’s factual findings must set forth all relevant evidence or argument is forfeited].)

Nunn’s other challenges to the trial court’s findings fail for the same reason and also for failure to present cogent arguments on appeal. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 (*Badie*) [“[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived”].) The argument consists of nothing more than a listing of evidence the trial court allegedly “summarily disregarded.” Nunn does not describe the evidence in detail or explain why, in the context of all evidence presented at trial, the cited evidence compelled findings contrary to those reached by the trial court. Thus, the challenges are forfeited. (*County of Solano, supra*, 75 Cal.App.4th 1274.)

Finally, Nunn argues the trial court erred in excluding an exhibit as hearsay. The exhibit is an unexecuted draft “Nonmarital Cohabitation Agreement” between Nunn and Fenswick, dated 2003, with unfilled blanks and handwritten notations. Nunn states that one of his witnesses, Victoria Dickey, testified at trial regarding the creation of the document, but does not describe her testimony or explain how the exhibit was material to Mitlyng’s claim for fees or his cross-claim for malpractice. The argument is therefore forfeited. (*Badie, supra*, 67 Cal.App.4th at pp. 784–785.)

### **III. DISPOSITION**

The judgment is affirmed. Nunn shall pay Mitlyng’s costs on appeal.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.