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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**YVONNE CERVANTES,**

**Plaintiff and Appellant,**

v.

**JEFFREY STARR,**

**Defendant and Respondent.**

**A141684**

**(San Mateo County  
Super. Ct. No. CIV 518693)**

Yvonne Cervantes appeals from a judgment entered in favor of her former employer, respondent Dr. Jeffrey Starr, in her action against him. Cervantes sued Dr. Starr under the California Fair Employment and Housing Act, Government Code section 12900 et seq. (FEHA),<sup>1</sup> claiming he had failed to accommodate her pregnancy-related disability, failed to engage in a good faith interactive process to find a reasonable accommodation, and discriminated against her on the basis of her disability. The trial court granted Dr. Starr's motion for summary judgment, finding there were no disputed issues of material fact on any of Cervantes's claims.

Our review of the record and the parties' arguments persuades us the trial court did not err. Accordingly, we will affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

Cervantes worked as a registered dental assistant for Dr. Starr from August 2004 until March 2011. She was one of approximately five employees in Dr. Starr's dental

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<sup>1</sup> All statutory references are to the Government Code.

office but was his only registered dental assistant. Cervantes described her job duties as seating patients, taking x-rays and molds, setting up the operatory for procedures, assisting the dentist during procedures, handing the dentist instruments, handing the dentist the suction or whatever else he needed, and essentially working side by side with the dentist when he was treating patients.

Cervantes learned she was pregnant in January 2011 and spoke to Dr. Starr on a number of occasions regarding her concerns about nitrous oxide use in the office. Cervantes believed that any exposure to nitrous oxide, no matter how little, was harmful to her fetus. She wrote Dr. Starr a letter in March 2011 informing him she would completely remove herself from the office whenever nitrous oxide was being used.

Dr. Starr and Cervantes discussed possible accommodations. Dr. Starr wrote to Cervantes's doctor explaining his office's policies for minimizing exposure to nitrous oxide and asking whether the steps were sufficient. The letter set out the following precautions: "1) The assistant is not allowed in the operatory while nitrous is being used [¶] 2) A scavenger system is used to expel used nitrous<sup>[2]</sup> [¶] 3) Windows are left open to assist in clearing the room [¶] 4) Mrs. Cervantes wears a monitor to evaluate actual exposure levels[.]" Dr. Starr also requested a letter from Cervantes's physician "outlining any limitations that Mrs. Cervantes may have during the course of her pregnancy."

In response to her request, Cervantes' doctor provided a letter regarding the potential health effects of occupational exposure to unscavenged nitrous oxide. The letter referred to studies showing "a relative risk of spontaneous abortion . . . associated with exposure to unscav[e]nged nitrous oxide." Based on this research, Cervantes's doctor recommended she "not participate in or be present in the same general area or room" when nitrous was used during her pregnancy. Dr. Starr called Cervantes's physician to clarify what the recommendation meant, but he received no response.

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<sup>2</sup> When nitrous oxide is "scavenged," it is expelled into the outdoor air as a patient exhales.

Dr. Starr employed several safety measures to address Cervantes's concerns and to ensure there were no unsafe levels of nitrous oxide in the office. He used a scavenger system to direct used nitrous oxide outside the office, opened the windows of the operatory whenever nitrous was used, and insisted that Cervantes wear a nitrous oxide monitoring device. Cervantes deemed these measures inadequate to protect her fetus and wanted either to leave the office or work in a different area any time nitrous oxide was used.<sup>3</sup> Dr. Starr explained he could not accommodate this request. Patients sometimes arrived for appointments and needed to be treated with nitrous oxide without any prior warning. Because Cervantes was Dr. Starr's only qualified dental assistant, no one else could perform her duties if she removed herself from the office. Thus, her request could not be accommodated in his small office without compromising patient care.

On March 11, 2011, Cervantes's health care provider wrote that she should not participate in or be present in the same room when procedures requiring nitrous oxide or other inhaled anesthetics were performed. Three days later, Dr. Starr signed documentation provided by Cervantes's doctor, confirming he could not provide Cervantes with "modified work" and placing her on disability leave. In a March 14, 2011 letter to Cervantes, Dr. Starr explained he understood her to be "fully disabled from working," but he told Cervantes to contact him if his understanding was incorrect. Because of the small size of his dental practice and because Cervantes was his only full-time assistant, Dr. Starr informed her he could not hold her job open for the duration of her disability leave, as it would pose an undue burden on his business. The letter also instructed Cervantes to contact Dr. Starr when she was ready and able to come back to work, in which case she would be considered for any positions then available.

The March 14, 2011 letter was the last contact Cervantes had with Dr. Starr. Cervantes admitted in deposition that when she was ready and able to return to work following the birth of her daughter in September 2011, she made no effort to contact Dr.

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<sup>3</sup> On March 9, 2011, Cervantes sat in her car until after a patient who was being treated with nitrous oxide was finished with the procedure.

Starr about returning to his office. Instead, she filed for unemployment and began searching for jobs closer to her new home.

Cervantes filed a complaint on December 26, 2012, alleging causes of action for (1) sex discrimination, (2) pregnancy discrimination, (3) disability discrimination, (4) failure to make reasonable accommodations, (5) failure to engage in the interactive process, and (6) tortious termination in violation of public policy. Dr. Starr moved for summary judgment, seeking dismissal of all six causes of action. On February 27, 2014, the trial court signed a written order granting summary judgment as to all of Cervantes's causes of action.

Cervantes filed a notice of appeal on April 28, 2014.

#### DISCUSSION

Cervantes challenges the trial court's grant of summary judgment on her claims for failure to provide a reasonable accommodation, failure to engage in the interactive process, and discrimination.<sup>4</sup> She argues there were disputed issues of material fact precluding summary judgment on each of these claims. After we set forth our standard of review and the governing law, we will address her arguments in the order she presents them.

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<sup>4</sup> On appeal, Cervantes does not specifically address her claim for tortious termination in violation of public policy, and we therefore treat it as abandoned. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 970, fn. 7 (*Lui*) [where plaintiff did not argue that trial court erred in granting summary judgment on particular claim, claim was forfeited].) To the extent this claim is encompassed within her discriminatory discharge claims, we deal with it below.

In addition, we could decline to address all of Cervantes's arguments because she does not summarize them in separate headings. (E.g., *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 380, fn. 16 [declining to address contentions not listed in a separate heading or subheading].) General headings such as "Failure to Reasonably Accommodate" do not satisfy the requirement for separate headings that summarize her arguments. (*Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858, fn. 9 (Cantil-Sakauye, J.) [general argument headings like "Statutory Analysis" and "Case Analysis" do not satisfy requirements of Cal. Rules of Court, rule 8.204(a)(1)(B) for separate headings summarizing argument].)

I. *Standard of Review and Governing Law*

We review the trial court's grant of summary judgment de novo and independently determine whether the record supports its conclusion that Cervantes's discrimination claims failed as a matter of law. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003 (*Scotch*)). In ruling on a motion for summary judgment in a FEHA action, the court must view the evidence in the light most favorable to the opposing party and resolve any doubts in her favor. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 539.)

FEHA prohibits discrimination by employers because of physical disability, sex, and pregnancy. (§ 12940, subd. (a); see § 12926, subd. (r)(1)(A) [“ ‘Sex’ ” includes “[p]regnancy or medical conditions related to pregnancy”].) It also establishes causes of action for certain unlawful employment practices, including failure to make a reasonable accommodation for a disability and failure to engage in a good faith interactive process to determine a reasonable accommodation. (§ 12940, subds. (m), (n) [unlawful for employer to “fail to make reasonable accommodation for the known physical or mental disability of an . . . employee” or “to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations . . .”]; § 12945, subd. (a)(3)(A) [refusal “to provide reasonable accommodation for an employee for a condition related to pregnancy”]; *Lui, supra*, 211 Cal.App.4th at p. 970.) “Although section 12940 proscribes discrimination on the basis of an employee's disability, it specifically limits the reach of that proscription, excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties: “This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations[.]”” (*Liu, supra*, at p. 970.)

To prevail on her claims of sex discrimination, pregnancy discrimination, and disability discrimination under section 12940, subdivision (a), Cervantes bore the burden

of showing “(1) that . . . she was discharged because of a disability, and (2) that . . . she could perform the essential functions of the job with or without accommodation (in the parlance of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., that . . . she is a qualified individual with a disability).” (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 962 (*Nadaf-Rahrov*); *Liu, supra*, 211 Cal.App.4th at pp. 970-971) In this case, the parties do not dispute that Cervantes was pregnant and thus disabled within the meaning of FEHA and that she experienced changes in the terms and conditions of her employment that were arguably detrimental. The dispute centers on the second element of her claim—whether she met her burden of showing she was otherwise qualified to perform the essential functions of her job as a registered dental assistant. (See *Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 963.)

The same burden applies to Cervantes’s claim for failure to provide a reasonable accommodation under sections 12940, subdivision (m) and 12945, subdivision (a)(3)(A). (*Liu, supra*, 211 Cal.App.4th at p. 971.) Thus, she had to show she was able to perform the essential functions of the position of registered dental assistant. (*Ibid.*) Whether an employer has failed to provide a reasonable accommodation is generally a question of fact for the jury. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193 (*Wilson*)). Nevertheless, summary judgment may properly be granted on this issue if there is no dispute of material fact. (See *Scotch, supra*, 173 Cal.App.4th at p. 1012.)

“To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred.” (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 (*Nealy*)). Although an employee cannot be expected to identify and request all possible accommodations during the interactive process itself, “the employee should be able to identify specific, available reasonable accommodations through the litigation process, and particularly by the time the parties have conducted discovery and reached the summary judgment stage.” (*Ibid.*) If the employee is unable identify such a reasonable accommodation after discovery in litigation, she has suffered

no remediable injury from any violation of section 12940, subdivision (n). (*Scotch, supra*, 173 Cal.App.4th at p. 1019.)

Because the objectives and wording of the ADA are similar to those of the FEHA, California courts often look to federal decisions interpreting the ADA when construing the FEHA. (*Reno v. Baird* (1998) 18 Cal.4th 640, 647.) Thus, we may rely on federal cases decided under the ADA where the provisions of the two acts are similarly worded. (*Lui, supra*, 211 Cal.App.4th at pp. 971-972, fn. 9.)

## II. *Reasonable Accommodation Claim*

Cervantes first contends the trial court erred in granting summary judgment on her claim for failure to provide a reasonable accommodation of her pregnancy-related disability. Her opening brief asserts, “multiple, material facts in Plaintiff’s case dispute Defendant’s argument that Plaintiff’s accommodation request was unreasonable.” As we explain, Cervantes misconceives the issue before the trial court.

Under the FEHA, Dr. Starr had an obligation to accommodate Cervantes’s *disability*. (§ 12940, subd. (m) [unlawful for employer “to fail to make reasonable accommodation for the known physical . . . disability of an . . . employee”]; § 12945, subd. (a)(3)(A) [unlawful for employer “to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy”].) This did not obligate him to agree to Cervantes’s preferred accommodation. (*Wilson, supra*, 169 Cal.App.4th at p. 1194 [“an employer is not required to choose the best accommodation or the specific accommodation the employee seeks”].) Instead, the statute requires only that the employer’s proposed accommodation be reasonable (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222), and the employer retains the ultimate discretion to choose between effective accommodations. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) Cervantes’s argument presumes Dr. Starr was obligated to grant her request so long as it was not unreasonable.<sup>5</sup> This is simply not the law.

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<sup>5</sup> Indeed, in her opening brief, Cervantes faults Dr. Starr for not “accommodating [her] simple, pregnancy related *request*[.]” (Italics added.) As the cited cases demonstrate, an

As the trial court recognized, it was undisputed Dr. Starr had offered Cervantes a number of accommodations, all of which she refused as inadequate. He employed a scavenger system to direct nitrous oxide out of the building, arranged to monitor the air quality in his office to ensure safe levels of nitrous oxide, and purchased a nitrous oxide monitoring device Cervantes refused to wear. Dr. Starr testified without contradiction that using the scavenger system and leaving the windows open kept nitrous oxide in the air at levels the Occupational Safety and Health Administration (OSHA) has determined to be safe.

Cervantes fails to explain why these measures would not reasonably accommodate her disability by protecting her from exposure to unsafe levels of nitrous oxide. She points to a letter written by her physician, but that letter itself refers to the limits OSHA has established for occupational exposure to nitrous oxide. And Dr. Starr testified in deposition that the measures he took would keep nitrous oxide within those limits. Furthermore, the letter discusses only the risks of occupational exposure to *unscavenged* nitrous oxide, and it therefore does not address whether there is any risk from exposure in settings, such as Dr. Starr's office, where the gas is scavenged.<sup>6</sup> Thus, Dr. Starr presented undisputed evidence showing he had offered reasonable accommodations to Cervantes, and she failed to counter that evidence by showing the measures Dr. Starr took would be insufficient to accommodate her disability. This is fatal to her claim. (See, e.g., *Hedrick v. Western Reserve Care System* (6th Cir. 2004) 355 F.3d 444, 457 ["if an individual rejects a reasonable accommodation, the individual will no longer be considered a qualified individual with a disability"].)

Moreover, the only accommodation Cervantes proposed was one that would require other employees to assist Dr. Starr whenever nitrous oxide was used. The FEHA does not require an employer to shift a disabled employee's functions to other employees.

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employer need only accommodate an employee's disability, not an employee's specific request.

<sup>6</sup> At her deposition, Cervantes conceded there was no unscavenged nitrous oxide in Dr. Starr's office.

(*Nealy, supra*, 234 Cal.App.4th at p. 375, citing *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1089.) An accommodation that would require Dr. Starr’s other employees to work harder or longer is neither reasonable nor required by the statute. (*Rehrs v. Iams Co.* (8th Cir. 2007) 486 F.3d 353, 357; *Mason v. Avaya Communications, Inc.* (10th Cir. 2004) 357 F.3d 1114, 1121, fn. 3; *Turco v. Hoechst Celanese Corp.* (5th Cir. 1996) 101 F.3d 1090, 1094; see *Lui, supra*, 211 Cal.App.4th at p. 985.) Yet this is precisely what Cervantes argues Dr. Starr should have done. In the trial court, she did not dispute Dr. Starr’s statement that she “expected that if a patient needed nitrous oxide, another employee in [his] office would stop their work and replace [Cervantes] in that particular operatory.” As explained above, however, the FEHA did not require Dr. Starr to reassign Cervantes’s duties to accommodate her pregnancy.

### III. *Interactive Process Claim*

Cervantes next argues disputes of material fact precluded summary judgment on her claim for failure to engage in the interactive process. (§ 12940, subd. (n).) She contends: (1) the undisputed efforts Dr. Starr made to engage in the process are insufficient to satisfy the interactive process requirement; (2) Dr. Starr was completely responsible for the breakdown in the communication process; and (3) Dr. Starr was not agreeable to her reasonable request for accommodation. We disagree.

Turning to Cervantes’s first contention, she appears to argue Dr. Starr’s efforts at engagement are insufficient as a matter of law to meet his obligation under the statute. All that the FEHA requires, however, is “an informal process with the employee to attempt to identify reasonable accommodations[.]” (*Nealy, supra*, 234 Cal.App.4th at p. 379.) “Ritualized discussions are not necessarily required.” (*Wilson, supra*, 169 Cal.App.4th at p. 1195.) Here, Cervantes did not dispute she and Dr. Starr discussed her concerns about working around nitrous oxide “[a] lot” or “[o]ver three” times. She also did not dispute that Dr. Starr had written to and called her physician regarding accommodations for her pregnancy. She further agreed the two of them were trying to come up with a workable solution to her concerns in early March 2011. Thus, the record

demonstrates Dr. Starr engaged in a process aimed at trying to accommodate her. (*Id.* at p. 1195.)

But even if it did not, Cervantes’s claim would fail for another reason. “To prevail on a claim for failure to engage in the interactive process, the employee must identify a *reasonable accommodation* that would have been available at the time the interactive process occurred.” (*Nealy, supra*, 234 Cal.App.4th at p. 379, italics added.) As we explained in the preceding section of this opinion, the only accommodation Cervantes proposed—having other employees perform her duties—was not reasonable. Before Dr. Starr can be held liable under section 12940, subdivision (n), Cervantes bears the burden of proving a reasonable accommodation was available. (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 984.) Since she did not show a reasonable accommodation existed, Cervantes failed to meet her burden on summary judgment. (*Nealy, supra*, 234 Cal.App.4th at p. 380 [summary judgment for employer proper where accommodations proposed by employee were not reasonable]; *Scotch, supra*, 173 Cal.App.4th at p. 1019 [same].)

This same analysis disposes of Cervantes’s claim that Dr. Starr was responsible for a breakdown in the interactive process. Even at this stage of the case, “after litigation with full discovery,” Cervantes has failed to identify a reasonable accommodation for her disability. (*Scotch, supra*, 173 Cal.App.4th at p. 1019.) Without evidence of a reasonable accommodation, Cervantes cannot have been damaged by any breakdown in the interactive process—assuming such a breakdown occurred—because she has not shown there was a reasonable accommodation that was objectively available during that process. (*Ibid.*)

#### IV. *Discrimination Claims*

Cervantes argues the trial court erred in granting summary judgment on her discrimination claims because she was otherwise qualified to do her job, since she “could have continued to perform her essential job duties which had nothing to do with nitrous oxide.” She asserts that other employees could have assisted Dr. Starr on the few occasions on which a patient required use of the gas.

In the trial court, Cervantes did not dispute she was Dr. Starr's only registered dental assistant. Dr. Starr argues, and Cervantes also does not dispute, that her position is regulated by the Dental Board of California and requires additional schooling and experience.<sup>7</sup> In addition, it is undisputed Cervantes was one of only five employees in the office, and none of the others possessed her training and experience or had the time to do her duties. The parties agree Cervantes's duties included assisting Dr. Starr during procedures and working side by side with him.

Thus, Cervantes did not dispute she was Dr. Starr's *only* registered dental assistant and that her job required her to be present in the operatory working side by side with him. She did not contend procedures involving nitrous oxide did not need to be performed. She also does not contend *she* was either willing or able to perform the undisputed duties of her position, as she refused to be physically present when nitrous oxide was used. (See *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012) 675 F.3d 1233, 1239 [physical attendance was essential function of nurse's job].) Instead, her argument is that *other* employees could have assisted Dr. Starr in performing her duties, or he could have performed them himself. As we have already explained, requiring either Dr. Starr or his other employees to perform additional work is not a reasonable accommodation.

Moreover, at her deposition, Cervantes was asked to identify the other employees who could have assisted Dr. Starr when she was absent, and she named three. However, one worked only part-time, one was the office manager, and the third was the receptionist. Cervantes admitted that the latter two employees had a "full plate of work up at the front desk[.]" For his part, Dr. Starr testified in deposition there was no one else in the office who could fulfill Cervantes's responsibilities "and that compromises patient

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<sup>7</sup> Registered dental assistants are licensed by the Dental Board of California. (Bus. & Prof. Code, §§ 1741, subd. (a), 1752.1, subd. (a).) The board's regulations prescribe the duties registered dental assistants may perform and the settings in which they may work. (See Cal. Code Regs., tit. 16, § 1085.)

care.”<sup>8</sup> Cervantes acknowledged that sometimes patients would arrive at the office unexpectedly and require administration of nitrous oxide. Dr. Starr explained that in his small office, he could not manage having a key employee dismiss herself from the office for an extended period of time on an irregular basis. (See *Holbrook v. City of Alpharetta, GA.* (11th Cir. 1997) 112 F.3d 1522, 1528 [where need for particular function was unpredictable, employer was not required to accommodate disabled employee by reallocating that function to others; summary judgment for employer affirmed].)

We note that under this heading of her opening brief, Cervantes contends assisting with nitrous oxide procedures was not an “essential function” of her job because such procedures were only rarely performed. (§ 12926, subd. (f).) This argument is forfeited for two reasons. First, it was not specifically raised in Cervantes’s papers below. (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1465 [party opposing summary judgment may not raise an issue for first time on appeal].) Second, she did not present it in a separate heading in her opening brief in this court. (*Citizens Opposing a Dangerous Environment v. County of Kern, supra*, 228 Cal.App.4th at p. 380, fn. 16.) In any event, although a job function is only infrequently required or performed, this does not, as a matter of law, demonstrate it is nonessential. (See *Kees v. Wallenstein* (9th Cir. 1998) 161 F.3d 1196, 1199 [function may be essential even if not regularly performed], cited with approval in *Lui, supra*, 211 Cal.App.4th at p. 984; *Brickers v. Cleveland Bd. of Educ.* (6th Cir. 1998) 145 F.3d 846, 849-850 [particular job function may be essential even when “seldom, if ever” required]; *Holbrook v. City of Alpharetta, GA., supra*, 112 F.3d at p. 1527 [function essential even if rarely required].) Similarly, “[t]he mere fact that others could do [plaintiff’s] work does not show that the work is nonessential.” (*Basith v. Cook County* (7th Cir. 2001) 241 F.3d 919, 929.)

There was no dispute Cervantes could not perform the essential functions of her position with or without reasonable accommodation. She therefore was not a qualified

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<sup>8</sup> Dr. Starr explained that other employees could assist him with “simple thing[s] like mixing some cement,” but that would require “another employee [to] break away from their duties for just a minute to help [him] out.”

individual with a disability and thus did not come within the coverage of section 12940, subdivision (a)(1). (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [§ 12940 excludes from antidiscrimination provision persons who are not qualified to perform essential job duties even with reasonable accommodation].) Accordingly, we hold the trial court did not err in granting summary judgment on Cervantes's discrimination claims.

#### DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.