COURT OF APPEAL FOR ONTARIO

CITATION: Fleming v. Massey, 2016 ONCA 70
DATE: 20160126
DOCKET: C59738

2016 ONCA 70 (CanLII)

Feldman, Juriansz and Brown JJ.A.

BETWEEN

Derek Fleming

Plaintiff (Appellant)

and

Andrew Massey, Lombardy Raceway Park, Lombardy Karting, Lombardy Agricultural Society and the National Capital Kart Club (NCKC)

Defendants (Respondents)

Paul J. Pape and Joanna Nairn, for the appellant

M. Susan Guzzo and Katarina Germani, for the respondents

Heard: September 30, 2015

On appeal from the judgment of Justice Richard G. Byers of the Superior Court of Justice, dated November 17, 2014.

Juriansz J.A.:

[1] This is an appeal from a summary judgment dismissing the appellant's action against the respondents in which he sought damages for injuries suffered at a go-kart race at which he was the race director. The respondents are Andrew Massey, who drove the go-kart that injured the appellant; Lombardy Raceway Park, the track where the accident occurred; Lombardy Karting, which co-

organized the race event; the National Capital Kart Club, which co-organized the race event and which arranged for Mr. Fleming to act as race director; and Lombardy Agricultural Society, which owns the property on which the track operated.

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[2] On October 3, 2010, the respondents Lombardy Karting and the National Capital Kart Club held a go-kart event. During such events, a race director is required. Since the regular race director was not available, the appellant Derek Fleming filled the role. Mr. Massey was driving a go-kart that day and crashed into hay bales lining a corner of the track. Mr. Fleming was injured in the accident. The respondents argued that the appellant had signed a waiver releasing the respondents from liability for all damages associated with participation in the event due to any cause, including negligence.

[3] In brief reasons, the motion judge found that the appellant was not an employee but rather a volunteer who received a stipend, that he signed the waiver, that he knew generally what signing the waiver would mean and that the wording of the waiver was broad enough to cover all eventualities.

[4] The appellant submitted that the motion judge erred in finding the appellant understood the effect of the waiver when he signed it. While the appellant stated on discovery that he understood the effect of a waiver, counsel urged his evidence be interpreted to say he learned what a waiver was during the litigation

process. I am satisfied the record considered as a whole amply supports the conclusion the appellant signed the waiver knowing it was a legal document affecting his rights and that in all the circumstances the respondents could reasonably assume he understood and consented to it.

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A. THE PUBLIC POLICY ARGUMENT

[5] The appellant's main submission is that the waiver was void because it violated public policy, as the appellant was an employee. Before us, the appellant recast the argument to rely on the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A ("WSIA"), a statute that he did not rely on before the motion judge.

[6] I agree with the appellant's argument that the motion judge erred in finding the appellant was not an employee. On discovery, the representative of the National Capital Kart Club admitted the appellant was a paid employee on the day of the accident. The respondents do not resile from that admission. I proceed to consider whether the waiver signed by the appellant is voided by the public policy of the WSIA because he signed it as an employee.

[7] The parties agree that the appellant is not an insured worker under the Act. That is because go-kart tracks are classified as "non-covered" by the Workplace Safety and Insurance Board and workers at such facilities are not insured unless the employer has applied for WSIA coverage. The respondent track has not

applied for coverage. Consequently, the respondent track and the appellant fall under Part X of the Act. Section 113(1) provides:

> [Part X] applies with respect to industries that are not included in Schedule 1 or Schedule 2 and with respect to workers employed in those industries.

[8] Workers under Part X, unlike insured workers, are allowed to sue their employers for workplace accidents. Section 114(1) provides:

> A worker may bring an action for damages against his or her employer for an injury that occurs in any of the following circumstances:
>
> 1. The worker is injured by reason of a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises used in the employer's business or connected with or intended for that business.
>
> 2. The worker is injured by reason of the employer's negligence.
>
> 3. The worker is injured by reason of the negligence of a person in the employer's service who is acting within the scope of his or her employment.

[9] The appellant submits that public policy prevents workers from contracting out of the protection afforded by s. 114. That public policy, explicitly stated in s. 1 of the Act, includes ensuring employees injured in workplace accidents receive compensation. The appellant submits that allowing Part X employers to require their employees to waive their right to seek compensation would frustrate this public policy goal. In advancing the argument, the appellant relies on the following proposition from *Halsbury's Laws of England* that the Supreme Court of

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Canada cited with approval in its decision in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202:

> **421. Contracting out.** As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement; and, in certain circumstances, it is expressly provided that any such agreement shall be void.
>
> By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee. [Emphasis added.]

[10] The appellant submits the waiver he signed should be declared void given the importance of the public policy in favour of workers' compensation.

[11] It must be said that the appellant did not make this argument to the motion judge, and that before us it was advanced only on a general level. Nevertheless, the argument raises an important question of public policy and we entertained it. After the hearing, it was necessary to ask the parties for written submissions on particular provisions of the statute.

[12] I begin with an overview of the legislation, including a review of its history.

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(1) Overview of the WSIA

[13] At common law, before the advent of workers' compensation schemes, a worker's action against an employer to recover damages for an injury suffered in the workplace faced formidable hurdles.

[14] First, there was the doctrine of voluntary assumption of risk. The common law presumed the worker voluntarily assumed the ordinary risks of his or her employment. At common law, it is an implied term of a contract of service "that a servant takes upon himself the risks incidental to his employment": 22 Halsbury's Laws of England, 2nd ed. p. 176, s. 296. See also: this court's decision in *Manor v. Marshall*, [1955] O.R. 586, [1955] 4 D.L.R. 584.

[15] Second, the doctrine of common employment meant that the employer was not liable for a worker's injury that resulted from the negligence of a co-worker: *Priestley v. Fowler* (1837), 150 E.R. 1030 (Exch.).

[16] Third, the employer was not responsible for workplace injuries caused by defects in machinery, equipment or tools used in the workplace.

[17] Fourth, in accordance with the general common law tort principle regarding contributory negligence, an injured worker who was just slightly negligent was barred any recovery from the employer: *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 205.

[18] Fifth, in order for a worker's action to be successful, the worker had to prove the employer's personal negligence was the direct and proximate cause of the injury: *Jamieson v. Harris* (1905), 35 S.C.R. 625.

[19] An older version of Halsbury's provided a concise summary of the common law:

> It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment. Apart from special contract or statute, therefore, he cannot call upon his master, merely upon the ground of their relation of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties, whether in consequence of the dangerous character of the work upon which he is engaged, or of the breakdown of machinery, or of the negligence or default of his fellow servants or strangers. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents. [22 Halsbury's Laws of England, 2nd ed. p. 176, s. 296]

[20] The common law's treatment of workplace injuries meant a great many workers and their survivors were unable to recover medical expenses, lost wages or damages. Workers voluntarily assumed the ordinary risks of their employment.

[21] The Legislature responded in 1914 by enacting workers' compensation legislation. The overarching purpose of the legislation was to provide compensation and other benefits to workers injured at work regardless of fault. The main thrust of the legislation was to set up an administrative scheme that

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provided no-fault loss of earnings benefits for workplace injuries that completely displaced all common law rights of action that workers may have had against their employer. A small minority of workers were not included in the general scheme. They were given access to new statutory rights of action for damages.

[22] While the legislation has been amended many times, the basic scheme remains much the same. The WSIA is its present incarnation. Under the WSIA, the general rule is that an insurance fund guarantees payment of benefits to workers who suffer injuries in the workplace no matter how the injuries are caused. Employers fund the insurance plan. The scheme is administered by an independent agency. There are Schedule 1 and Schedule 2 employers. Employers in Schedule 1 industries are liable to contribute to the insurance fund and employers in Schedule 2 are individually liable to pay benefits under the insurance plan under the Act's general provisions.

[23] In exchange for certain and secure compensation for their injuries, workers in Schedule 1 and Schedule 2 industries give up their right to sue their employer for their injuries. Several sections of the Act provide for this trade-off. Section 26(1) provides that "[n]o action lies to obtain benefits under the insurance plan," but all claims for benefits will be determined by the Board that administers the Act. Section 26(2) provides that "[e]ntitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise)" that a worker has or may have against the employer for or by reason of a workplace accident. Section

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28 provides that workers are not entitled to commence an action against a Schedule 1 or Schedule 2 employer. Section 29 provides that an employer who is found to be at fault or negligent in respect of an accident or disease that gives rise to entitlement to benefits under the Act is not liable to pay any damages to a worker or to contribute to or indemnify another person who may be liable to pay such damages. Section 31 of the Act provides the Appeals Tribunal, established by the Act, the exclusive jurisdiction to determine whether the Act takes away a worker's right to commence an action.

[24] In short, the legislation makes absolutely clear that the general scheme that provides no-fault loss of earnings benefits to workers completely displaces all common law rights of action that workers may have had against their employer.

[25] Part X of the WSIA is a small exception to this general scheme. Part X applies to the small number of workers not employed in either Schedule 1 or Schedule 2 industries. Employers under Part X neither contribute to the insurance fund nor are liable to pay benefits. Rather, Part X provides workers with certain statutory rights of action for damages that abrogate some of the common law doctrines that restricted a worker's right to recover.

[26] First, s. 114(1)1 allows a worker to sue the employer for an injury resulting from "a defect in the condition or arrangement of the ways, works, machinery,

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plant, buildings or premises used in the employer's business or connected with or intended for that business". Second, s. 114(1)3 allows the worker to sue the employer for an injury caused by the negligence of persons in the employer's service acting within their scope of employment. Third, in some circumstances s. 115 allows an injured worker to sue the person for whom work is being done under a contract and the contractor and subcontractor, if any. Fourth, s. 116(3) provides that "contributory negligence by the worker is not a bar to recovery". Fifth, s. 116(2) provides that "[a]n injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers." Sixth, s. 116(1) curtails the common law doctrine of voluntary assumption of risk, but does not eliminate it. Section 114(1)2, which provides a worker may bring an action against his or her employer when injured by the employer's negligence, should also be noted. When considered in the context of the above mentioned provisions, s. 114(1)2 allows a much broader action for an employer's negligence than was possible at common law.

[27] The legislation contains an additional measure to ensure workers receive the damages awarded. Section 117 of the WSIA deems any employer's insurance for its liability for damages to be for the benefit of the worker, and prohibits an insurer from paying insurance proceeds to the employer without the consent of the worker until the worker's claim has been satisfied.

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[28] Plainly, Part X's statutory actions serve the general public policy of the WISA to ensure workers receive compensation for injuries they suffer in the workplace.

(2) Interim Conclusion

[29] In my view, absent some legislative indication to the contrary, it would be contrary to public policy to allow individuals to contract out of the protection of the WSIA.

[30] *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14, and *Craton v. Winnipeg School Division No. 1*, [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1, two cases in which the Supreme Court concluded individuals could not contract out of a particular public statute, both involved human rights codes. However, McIntyre J., writing for the unanimous court in *Etobicoke*, used language that makes clear the principle isn't limited to human rights legislation. He said, at pp. 213-14:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.
>
> …

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> *The Ontario Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract …

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[31] In supporting his conclusion, McIntyre J. cited *R. v. Roma*, [1942] 3 W.W.R. 525, a decision of the British Columbia Supreme Court in which Robertson J. found the *Government Vessels Discipline Act*, R.S.C. 1927, c. 203, to be "a public Act designed as a matter of public policy to protect all seamen proposing to engage in service on government vessels" and that its provisions accordingly could not be waived.

[32] McIntyre J. also cited *Dunn v. Malone*, [1903] O.J. No. 180, 6 O.L.R. 484, a decision of the Divisional Court that concluded that the *Interest Act*, *1897*, was enacted on public policy grounds for the benefit of borrowers and its application could not be waived.

[33] Recently, the British Columbia Court of Appeal held that, given that the province had enacted a comprehensive universal automobile insurance scheme, it would be contrary to public policy to allow an owner/operator of a motor vehicle to contract out of liability for damages for injuries sustained in a motor vehicle accident. N.J. Garson J.A., writing for the majority in *Niedermeyer v. Charlton*, 2014 BCCA 165, 374 D.L.R. (4th) 79 at para. 114, concluded:

> In my view, the ICBC regime is intended as a benefit for the public interest just as is human rights legislation. It would be contrary to public policy and to a harmonious

> contextual interpretation of the legislation to allow private parties to contract out of this regime. As such, to the extent that the Release purports to release liability for motor vehicle accidents it is contrary to public policy and is unenforceable. The judge erred in finding that the public policy interest exemplified in a compulsory universal insurance scheme was incapable of defeating society's interest in freedom of contract.

[34] I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

[35] I turn now to a consideration of whether there is in the WSIA some contrary legislative indication.

(3) Section 16

[36] The Legislature did address the subject of waiver in s. 16 of the Act. Section 16 is found in Part III of the Act, which deals with "Insured Employment". Section 16 prohibits waiving the entitlement to <u>benefits under the insurance plan</u>. The section provides:

> An agreement between a worker and his or her employer to waive or to forego any benefit to which the worker or his or her survivors are or may become entitled under the insurance plan is void.

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[37] By contrast, Part X of the Act contains no provision equivalent to s. 16. This raises the question whether the canon of construction *expressio unius est exclusio alterius*, i.e. the implied exclusion principle, applies. Should the Legislature's narrow focus in s. 16 on prohibiting waiver of only the benefits under the insurance plan be understood as an implicit indication that the Legislature did not intend to prohibit the waiver of the rights of action available under Part X?

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[38] This court applied the implied exclusion principle in *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485, 208 D.L.R. (4th) 459. In that case, the court was faced with the question whether the Network, created by the amalgamation of three health facilities, was exempt from paying retail sales tax. The court held that the inclusion of an explicit tax exemption in the amalgamation legislation of another health care facility and the absence of such an exemption in the amalgamation legislation of the Network indicated that the Legislature did not intend the Network to have an exemption.

[39] Writing for the court, Laskin J.A. cited, at para. 31, a principle explained by Professor Ruth Sullivan in *Driedger on the Construction of Statutes* 3d ed. (Toronto: Butterworths, 1994) at p. 168:

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.

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[40] Laskin J.A. explained, at para. 32, that "legislative exclusion can be implied when an express reference is expected but absent."

[41] However, there are many cases in which the principal is not applied. The Supreme Court declined to apply the principle in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, [1929] 4 D.L.R. 1028. Writing for the court, Newcombe J. recognized, at p. 71, that the principle could prove useful but also observed that "while it is often a valuable servant, it is a dangerous master to follow." The context must always be considered and general rules of interpretation are not always in the mind of the drafter "so the axiom is held not to be of universal application."

[42] In *Jones v. Canada (Attorney General)*, [1975] 2 S.C.R. 182 at pp. 195-96, 45 D.L.R. (3d) 583, Laskin C.J., writing for the court, said:

> Heavy reliance was placed by the appellant upon the canon of interpretation expressed in the maxim *expressio unius est exclusio alterius*. This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions.

[43] More recently, the Supreme Court declined to apply the principle in *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency,* 2007 SCC 42, [2007] 3 S.C.R. 217. Rothstein J. wrote, at para. 15, that "arguments based on implied meaning must be viewed with caution." He approved of Professor Sullivan's statement at p. 266 of her book:

> While reliance on implied exclusion for this purpose [determining if a provision is exhaustive] can be helpful, it can also be misleading. What the courts are looking for is evidence that a particular provision is meant to be an exhaustive statement of the law concerning a matter. To show that the provision expressly or specifically addresses the matter is not enough. [Footnote deleted.]

[44] Rothstein J. reiterated, at para. 16, that the modern approach to statutory construction is "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

[45] Reading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation. It employs two different means to accomplish that objective. The first means provides workers with an insurance plan and completely eliminates workers' civil actions. In the part of the Act dealing with the first means, it was necessary to prohibit only the waiver of benefits under the insurance plan. The second means, Part X, makes numerous changes to the common law to achieve the same statutory objective by providing workers with rights of action for damages. It seems to me that applying the implied exclusion principle to s. 16 to infer a worker can waive the rights provided by Part X would fundamentally undermine what the Legislature is trying to achieve in Part X.

[46] Hence, I would conclude that a reading of the Act as a whole does not support interpreting s. 16 as impliedly indicating that the Legislature intended to

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permit the waiver of the statutory actions created by Part X. The two different means by which the object of the Act is secured must each be interpreted on its own terms.

(4) Section 116(1)

[47] Section 116(1) of the WSIA provides:

> An injured worker shall not be considered to have voluntarily incurred the risk of injury in his or her employment solely on the grounds that, before he or she was injured, he or she knew about the defect or negligence that caused the injury. [Emphasis added.]

[48] The original version of s. 116(1) in the 1914 Act, s. 106(4), provided:

> A workman shall not by reason only of his continuing in the employment of the employer with knowledge of the defect or negligence which caused his injury be deemed to have voluntarily incurred the risk of the injury." [Emphasis added.]

[49] The word "only" has been included in every version of the legislation from 1914 until the WSIA was enacted using the word "solely". I see no difference in the import of the two words.

[50] At first glance, the word "solely" in the present statute and the word "only" in the earlier versions might be taken to indicate the Legislature did not entirely eliminate the common law principle of a worker's voluntary assumption of the ordinary risks in the workplace, but merely limited it.

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[51] Understanding the word “solely” in s. 116(1) to indicate that the Legislature intended to allow a worker, by clear waiver, to voluntarily assume the risk of injury does not sit well with s. 116(2). Section 116(2) provides:

> An injured worker shall not be considered to have voluntarily incurred the risk of injury that results from the negligence of his or her fellow workers.

[52] The word “solely” does not appear in s. 116(2) of the present Act and the word “only” did not appear in earlier versions of the legislation. The legislative scheme would lack coherence and make little sense if it allowed a worker to voluntarily assume the risk of the employer’s negligence but not a co-worker’s negligence. This is particularly so because s. 114(1)3 makes the employer responsible for damages caused by the negligence of the co-worker.

[53] The key, in my view, is to consider again the common law principle that the legislation swept aside. The common law principle was that a servant assumed all of the ordinary risks incident to his or her employment. By entering upon and continuing in the employer’s service, the servant was presumed to take upon himself or herself the natural and ordinary risks and perils of the work.

[54] Eric Tucker explained the rationale for this principle in “The Law of Employers’ Liability in Ontario 1861-1900: The Search for a Theory” (1984) 22:2 Osgoode Hall Law Journal 213:

> An employee who was aware of a particular risk would be deemed to have negotiated for compensation in

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> order to incur that risk. The terms of the contract would reflect the parties' valuation of the risk and therefore it would be unjust and improper for the court to make the employer pay twice by shifting losses from the employee onto the employer.

[55] Tucker identifies this principle, at p. 236, as "[t]he doctrine that most strongly expressed the dominance of the contractual concept in regulating health and safety". The effect of the principle was that the "sole" or "only" basis on which the courts applied the voluntary assumption of risk doctrine was that the worker knew they were engaged in dangerous work. It seems to me that the inclusion of the word "solely" or "only" in various versions of the legislation must have been intended as an emphatic rejection of the common law principle that the worker's knowledge could be the sole or only basis for invoking the voluntary assumption of risk doctrine. Admittedly, the language is awkward. However, ascribing a different meaning to the words of s. 116(1) would construe the statute to permit a worker to contract out of an employer's negligence, but not the negligence of coworkers for which the statute makes the employer responsible. As Professor Sullivan notes, "[e]ven when the ordinary meaning of a legislative text is clear, the courts are obliged to look to other indicators of legislative meaning as part of the work of interpretation. The presumption in favour of ordinary meaning is rebutted by evidence that another meaning was intended or is more appropriate in the circumstances": *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at p. 45. In the circumstances, s. 116(1) must be interpreted

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as a categorical rejection of the common law approach to the voluntary assumption of risk, rather than as allowing workers to contract out of Part X.

(5) Conclusion

[56] Other than for ss. 16 and 116(1), there are no other provisions of the WSIA that could be taken to indicate a legislative intent to permit individuals to contract out of the statute's provisions. There being no legislative indication to the contrary, I conclude it would be contrary to public policy to allow individuals to contract out of the provisions of Part X of the WSIA.

[57] I would allow the appeal, set aside the order of the motion judge granting summary judgment and allow the appellant's action to proceed to trial.

[58] I would set aside the motion judge's costs order but make no other order as to costs. The appellant did not advance the WSIA argument before the motion judge and advanced it in this court in a cursory fashion. Moreover, this case involved a novel and important general point of law.

Released: January 26, 2016 (KF)

"R.G. Juriansz J.A."
"I agree K. Feldman J.A."
"I agree David Brown J.A."

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