

AUTOMOBILES – CRIMINAL LAW: USAGE OF BODY CAMERA FOOTAGE TO CONTRADICT OFFICER TESTIMONY

State v. Boger, 2021 ND 152, 963 N.W.2d 742.

ABSTRACT

In *State v. Boger*, the North Dakota Supreme Court examined a case in which an officer's body camera footage appeared to contradict the officer's sworn testimony. In *Boger*, the district court denied Michael Boger's motion to suppress evidence from a traffic stop that resulted in an arrest because the officer's body camera footage appeared to contradict the arresting officer's stated reason for the stop: that Boger's rear license plate was not illuminated as required by N.D.C.C. § 39-21-04(3). The district court determined the arresting officer had reasonable and articulable suspicion that Boger's rear license plate was not properly illuminated. The North Dakota Supreme Court first *held*, where video evidence indisputably contradicts the district court's findings, relying on such evidence does not constitute reweighing. Second, the court *held* the video evidence clearly rebutted the officer's testimony, and the district court's findings were contrary to the manifest weight of the evidence. Finally, the court *held* any mistake of fact by the officer would have needed to be continuous for an extended period; thus, the mistake was objectively unreasonable. In overturning the decision of the district court, the North Dakota Supreme Court embraced the use of officer body camera footage to challenge sworn officer testimony in cases where the video footage clearly contradicts the officer testimony. This has the effect of qualifying the "almost total deference" that courts show to sworn officer testimony in these narrow circumstances.

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I. FACTS

In *State v. Boger*,¹ the State charged Michael Anthony Boger (“Boger”) with driving under the influence.² On November 24, 2019, at approximately 11:30 p.m., a Minot Police Department officer initiated a traffic stop on the vehicle Boger had been driving.³ The officer stated his reason for initiating the stop was because Boger’s rear license plate was not illuminated, a violation of N.D.C.C. § 39-21-04(3).⁴ Prior to the stop, the officer had been driving eastbound, while Boger had been driving westbound.⁵ The officer testified that as he passed Boger and checked his driver’s side rear view mirror, he noticed Boger’s rear license plate area was not illuminated.⁶ The officer then turned to follow Boger’s vehicle and initiated the stop after

1. 2021 ND 152, 963 N.W.2d 742.

2. *Boger*, 2021 ND 152, ¶ 1, 963 N.W.2d 742.

3. *Id.* ¶ 2.

4. *Id.*

5. *Id.* ¶ 3.

6. *Id.*

approximately five to seven seconds.⁷ As a result of the stop, Boger was charged with driving under the influence.⁸

Boger, after being charged, moved to suppress any evidence obtained in the course of the traffic stop.⁹ Boger argued the officer lacked reasonable and articulable suspicion for the traffic stop because the officer's body camera footage appears to clearly show the license plate illumination was functioning.¹⁰ The officer testified the vehicle's rear license plate was not illuminated when first observing Boger's vehicle, while following Boger's vehicle, and during the traffic stop.¹¹ During cross-examination of the officer, the officer's body camera footage was entered into evidence.¹² Boger argued that the footage clearly showed the rear license plate was illuminated.¹³ He further argued that he checked and verified that his vehicle's license plate illumination light was functioning before he was placed in the officer's vehicle.¹⁴ The officer responded by arguing that the license plate appeared to be illuminated in the footage because of multiple external light sources in the area, rather than the vehicle's required license plate illumination.¹⁵ He pointed out the license plate may have appeared illuminated because of other sources: the lights from an adjacent gas station; the headlights from the officer's patrol vehicle; the red and blue lights from the officer's patrol vehicle; and the spotlight on the officer's patrol vehicle.¹⁶

In denying Boger's motion to suppress, the district court found that because N.D.C.C. § 39-21-04(3) requires license plates to not only be illuminated, but also "legible from a distance of fifty feet [15.24 meters] to the rear," the body camera footage did not show that the vehicle was properly illuminated in accordance with the code.¹⁷ Based on the testimony of the arresting officer, the district court found Boger's vehicle's illumination was not clearly legible to the arresting officer; therefore, the officer had a reasonable and articulable suspicion that the license plate was not properly illuminated.¹⁸ As a result of the district court's denial of the motion to

7. *Id.*

8. *Id.* ¶ 2.

9. *Id.*

10. *Id.* ¶¶ 2, 4.

11. *Id.* ¶ 4.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* ¶ 5.

18. *Id.*

suppress, Boger entered into a conditional guilty plea to driving under the influence.¹⁹

Boger appealed the denial of his motion to suppress to the North Dakota Supreme Court.²⁰ Boger made two arguments to the court. First, that the officer's body camera footage contradicted the officer's testimony by showing that his vehicle's rear license plate was illuminated by the vehicle's license plate light at the time of the stop, and second, that any mistake of fact by the officer in regard to the functioning of the rear license plate lighting was objectively unreasonable.²¹ The North Dakota Supreme Court held there was insufficient indication the officer had any other reason for the stop other than a lack of illumination of the rear license plate.²² The court further held the "manifest weight of the evidence" supported that the rear license plate was illuminated.²³ Finally, it held any mistake of fact by the arresting officer was objectively unreasonable.²⁴

II. LEGAL BACKGROUND

In *Boger*, Chief Justice Jensen identified two major issues that needed to be addressed.²⁵ First, the court needed to determine if it could consider whether the body camera footage contradicted the arresting officer's testimony when the district court had found the video footage unpersuasive.²⁶ Second, the court needed to determine whether the body camera footage was sufficient to show that any mistake of fact the arresting officer might have had was objectively unreasonable.²⁷ The court also found it beneficial to address how other jurisdictions have approached similar situations where body camera footage was presented as evidence contradicting officer testimony.²⁸

A. MAY AN APPEALS COURT CONSIDER WHETHER BODY CAMERA FOOTAGE CONTRADICTS OFFICER TESTIMONY?

When the North Dakota Supreme Court reviews a district court's decision on a motion to suppress, it defers to the district court's findings of fact and will affirm unless there is "insufficient competent evidence to

19. *Id.* ¶ 1.

20. *Id.* ¶ 6.

21. *Id.*

22. *Id.* ¶ 23.

23. *Id.*

24. *Id.*

25. *See id.* ¶¶ 17, 19-20.

26. *Id.* ¶ 17.

27. *Id.* ¶ 20-21.

28. *Id.* ¶ 17.

support the decision, or unless the decision goes against the manifest weight of the evidence.”²⁹ Thus, the court’s review of fact-specific inquiries show great deference to the district court’s findings.

In the case of a traffic stop, an officer must have “reasonable and articulable suspicion the driver has violated or is violating a law.”³⁰ Whether reasonable suspicion exists is a fact-specific inquiry, and the court “employs an objective standard based on the totality of the circumstances.”³¹ “Reasonable suspicion for a stop exists when a reasonable person in the officer’s position would be justified by some objective manifestation to believe the defendant was, or was about to be, engaged in unlawful activity.”³² “Reasonable suspicion of a minor traffic violation will provide a sufficient basis to justify a stop.”³³ However, while the district court is entitled to “almost total deference” in regard to findings of fact, if the district court’s findings are unsupported by the evidence or are contradicted by the manifest weight of the evidence, the North Dakota Supreme Court may still reverse.³⁴

B. WHAT CONSTITUTES A REASONABLE MISTAKE BY AN ARRESTING OFFICER?

The North Dakota Supreme Court previously recognized “an officer’s objectively reasonable mistake, whether of fact or law, may provide the reasonable suspicion necessary to justify a traffic stop.”³⁵ However, “[t]he Fourth Amendment [to the United States Constitution] tolerates only *reasonable* mistakes, and those mistakes . . . must be *objectively* reasonable.”³⁶ The subjective understanding of the officer involved is irrelevant.³⁷

C. HOW HAVE OTHER JURISDICTIONS HANDLED SIMILAR CASES?

The Indiana Supreme Court recently addressed the use of video evidence as a part of appellate review in *Love v. State*.³⁸ In *Love*, the court found the video evidence introduced by the defendant did not indisputably contradict officer testimony; the court built a “narrow failsafe” for video evidence into

29. *Id.* ¶ 7 (quoting *State v. Bolme*, 2020 ND 255, ¶ 5, 952 N.W.2d 75).

30. *Id.* ¶ 8 (citing *State v. Selzler*, 2020 ND 123, ¶ 7, 943 N.W.2d 762).

31. *Id.* (citing *State v. Morsette*, 2019 ND 84, ¶ 6, 924 N.W.2d 434).

32. *Id.* (quoting *State v. Corum*, 2003 ND 89, ¶ 10, 663 N.W.2d 151).

33. *Bolme*, 2020 ND 255, ¶ 8, 952 N.W.2d 75.

34. *See Boger*, 2021 ND 152, ¶¶ 7, 17, 963 N.W.2d 742.

35. *State v. Hirschhorn*, 2016 ND 117, ¶ 14, 881 N.W.2d 244.

36. *Heien v. North Carolina*, 574 U.S. 54, 66 (2014).

37. *Id.*

38. *Love v. State*, 73 N.E.3d 693, 697-700 (Ind. 2017).

its deferential standard of review.³⁹ In creating this “narrow failsafe,” the Indiana Supreme Court shows a continued deference to trial court findings of fact, the same as with other types of evidence, but also allows appellate courts to reverse trial court decisions if the video evidence “indisputably contradicts the trial court’s findings.”⁴⁰ The court determined that in the instances “where the video evidence indisputably contradicts the trial court’s findings, relying on such evidence and reversing the trial court’s findings do not constitute reweighing.”⁴¹ However, the court cautioned that those instances may be rare, and they would be instances in which no reasonable person could determine that the video evidence may not indisputably contract the trial court’s findings.⁴² The court alluded to some of the dangers of video evidence, instructing that courts “should assess the video quality including whether the video is grainy or otherwise obscured, the lighting, the angle, the audio, and whether the video is a complete depiction of the events at issue, among other things.”⁴³

In *Love*, the Indiana Supreme Court also referenced the Supreme Court of Florida’s stance on video evidence.⁴⁴ In *Wiggins v. Florida Dep’t of Highway Safety and Motor Vehicles*,⁴⁵ a case of alleged driving under the influence where the circuit court found the video contradicted officer testimony, the Florida Supreme Court addressed the usage of video evidence when that evidence stands in opposition to officer testimony.⁴⁶ Noting that human memory is not always accurate, the court stated video footage may more accurately reflect the truth of the matter.⁴⁷ Therefore, judges cannot be expected to ignore “objective and neutral video evidence” when it contradicts an officer’s testimonial recollection.⁴⁸

The Court of Criminal Appeals of Texas has also addressed the issue of appellate review where video evidence contradicts officer testimony in *Carmouche v. State*.⁴⁹ In *Carmouche*, the trial court refused to suppress results from a search even after video evidence contradicting officer testimony that the defendant gave consent to a search was presented; upon review, the appellate court vacated the lower court’s judgment that the

39. *Id.* at 699.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. 209 So.3d 1165 (Fla. 2017).

46. *Wiggins*, 209 So.3d at 1172.

47. *Id.*

48. *Id.* at 1173.

49. *Carmouche v. State*, 10 S.W.3d 323, 332-33 (Tex. Crim. App. 2000).

defendant consented based on the video evidence.⁵⁰ The court first recognized that appellate courts “should give almost total deference to a trial court’s determination of the historical facts that the record supports especially when the trial court’s findings are based on an evaluation of credibility and demeanor.”⁵¹ However, the court found the “nature of the evidence presented in the videotape [did] not pivot on an ‘evaluation of credibility and demeanor.’”⁵² Instead, the video evidence presented “indisputable visual evidence” that contradicted essential parts of the officer’s testimony.⁵³ In light of the “narrow circumstances” of the video presenting indisputable video evidence contradicting the officer’s testimony, the court found it could reverse the lower court based on the video evidence.⁵⁴

III. ANALYSIS

The *Boger* opinion divided the North Dakota Supreme Court 3-2.⁵⁵ The majority opinion, written by Chief Justice Jensen and joined by Justice Crothers and Justice Tuft, reversed the denial of *Boger*’s motion to suppress, remanding the case to allow *Boger* an opportunity to withdraw his conditional guilty plea.⁵⁶ The majority opinion held the record indicated the officer stopped the vehicle solely because of the lack of license plate illumination, and the manifest weight of the evidence showed the license plate was illuminated.⁵⁷ Additionally, the majority held that any mistake of fact of the officer was objectively unreasonable.⁵⁸ The dissent, written by Justice McEvers and joined by Justice VandeWalle, expressed skepticism about the majority’s use of body camera footage in overturning the district court, and explains why the district court’s finding should have been affirmed.⁵⁹

A. THE MAJORITY OPINION

The majority opinion is broken into two parts.⁶⁰ In the first part, the court discusses whether the district court’s opinion was supported by the

50. *Id.*

51. *Id.* at 332 (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

52. *Id.*

53. *Id.*

54. *Id.* at 332-33.

55. *State v. Boger*, 2021 ND 152, ¶ 24, 963 N.W.2d 742.

56. *Id.* ¶¶ 23-24.

57. *Id.* ¶ 23.

58. *Id.*

59. *See id.* ¶¶ 40-42.

60. *Id.* ¶¶ 7, 20.

evidence.⁶¹ In the second part, the court examines whether any mistake of fact by the officer was an objectively reasonable mistake.⁶²

1. Whether there was Reasonable and Articulate Suspicion for the Stop

The majority opinion begins by stating it would uphold the district court's denial of Boger's motion to suppress unless "there is insufficient competent evidence to support the decision, or unless the decision goes against the manifest weight of the evidence."⁶³ The court then established a law enforcement officer may initiate a traffic stop if the officer has a "reasonable and articulable suspicion the driver has violated or is violating a law."⁶⁴ Whether the officer in this case had a "reasonable and articulable suspicion" for initiating the traffic stop in *Boger* was determined to be an objective, fact-specific inquiry by the court.⁶⁵

Here, the court primarily reviewed the officer's reasoning behind initiating the stop, which was because Boger violated N.D.C.C. § 39-21-04(3) by not illuminating his vehicle's rear license plate.⁶⁶ The problem for the arresting officer, and for the court, was that the officer's body camera footage appeared to contradict the officer's testimony.⁶⁷ As the officer approaches Boger's vehicle, and again later during the stop, the video shows the vehicle's rear license plate is illuminated by the vehicle's light designed for that purpose.⁶⁸ The majority included two still pictures taken from the video that clearly show this light.⁶⁹

The court then addressed the district court's reasoning, specifically that N.D.C.C. 39-24-04(3) requires rear license plates be "clearly legible from a distance of fifty feet . . . to the rear."⁷⁰ The district court found, based on the officer's testimony, "the alleged illumination did not render the rear license plate clearly legible to [the officer] as the vehicles passed each other."⁷¹ However, the North Dakota Supreme Court noted the officer testified the stop was initiated as a result of the rear license plate not being illuminated and made no mention of legibility.⁷² As a result, the court found there was

61. *Id.* ¶¶ 7-19.

62. *Id.* ¶¶ 20-22.

63. *Id.* ¶ 7.

64. *Id.* ¶ 8.

65. *Id.*

66. *Id.* ¶¶ 10, 12.

67. *Id.* ¶ 13.

68. *Id.*

69. *Id.* ¶ 13 nn.1-2.

70. *Id.* ¶ 15.

71. *Id.* (alteration in original).

72. *Id.*

“insufficient testimony to support the [district] court’s finding that the officer’s testimony established that the rear license plate was not legible or that the officer initiated the stop for any reason other than the rear license plate not being illuminated.”⁷³

The court also addressed the district court’s finding that any illumination of the rear license plate could reasonably have been from external sources.⁷⁴ The court found the officer’s testimony in this regard to be inconsistent with the body camera video evidence.⁷⁵ The court held the still images from the video clearly showed the license plate light was operational.⁷⁶

The court then delved into the issue of using video evidence in appellate review.⁷⁷ While recognizing that appellate courts show great deference to trial courts in fact-specific inquiries, the court followed the example of the Indiana Supreme Court in *Love* by finding that, in situations “where the video evidence indisputably contradicts the trial court’s findings, relying on such evidence and reversing the trial court’s findings do not constitute reweighing.”⁷⁸ Similar to the Indiana Supreme Court in *Love*, the North Dakota Supreme Court recognized that for video evidence to indisputably “contradict the trial court’s findings, it much be such that no reasonable person could view the video and conclude otherwise.”⁷⁹ The court concluded the video clearly showed the license plate was illuminated, and the district court’s finding was “contrary to the manifest weight of the evidence.”⁸⁰

In summary, the court found both of the district court’s reasons for denying Boger’s motion to suppress failed to withstand appellate review.⁸¹ There was insufficient evidence to support a finding that stopping Boger was for any reason other than the officer’s belief that Boger’s rear license plate was not illuminated, and a finding that the rear license plate was not illuminated went against the manifest weight of the evidence.⁸² As a result, the court “reverse[d] the [district] court’s decision denying the defendant’s motion to suppress based on a finding the officer had a reasonable and articulable suspicion the rear license plate was not properly illuminated.”⁸³

73. *Id.*

74. *Id.* ¶ 16.

75. *Id.*

76. *Id.*

77. *Id.* ¶ 17.

78. *Id.* (quoting *Love v. State*, 73 N.E.3d 693, 699 (Ind. 2017)).

79. *Id.* (quoting *Love*, 73 N.E.3d at 699).

80. *Id.* ¶ 18.

81. *Id.* ¶ 19.

82. *Id.*

83. *Id.*

2. *Whether Any Mistake of Fact by the Officer was Objectively Reasonable*

The majority opinion then addressed the State’s alternate argument that even if the license plate on Boger’s vehicle was illuminated properly, “any mistake by [the arresting officer] was reasonable.”⁸⁴ The court recognized an officer’s mistake of fact “may provide the reasonable suspicion necessary to justify a traffic stop.”⁸⁵ However, mistake of fact may only provide the reasonable suspicion to justify a stop if the mistake was objectively reasonable.⁸⁶

The court found, in this instance, any mistake of fact by the arresting officer would have necessarily continued for an extended time.⁸⁷ The officer would have needed to be mistaken when he first passed Boger, continued being mistaken as he followed Boger, and continued being mistaken when Boger had stopped.⁸⁸ Because of this, and based on the record presented to the district court, the court concluded any mistake by the arresting officer regarding a potential lack of rear license plate illumination was objectively unreasonable.⁸⁹ As a result of the officer’s objectively unreasonable mistake and that the “manifest weight of the evidence” did not support a finding that the rear license plate was not illuminated, the court reversed the district court’s denial of Boger’s motion to suppress, and remanded the case to allow Boger to withdraw his conditional guilty plea.⁹⁰

B. THE DISSENT

Justice McEvers’s dissent disagreed with the majority on every aspect essential to the holding.⁹¹ The dissent considered the majority’s use of the body camera video footage to contradict the testimony of the arresting officer an improper weighing of evidence.⁹² Additionally, the dissent would have found that the video evidence did not lead to a conclusion that any mistake made by the officer was objectively unreasonable.⁹³

The dissent agreed with the majority’s use of *Love*, but believed it should have led to a different result.⁹⁴ Similarly, the dissent believed *Carmouche*

84. *Id.* ¶ 20.

85. *Id.* ¶ 21. (quoting *State v. Bolme*, 2020 ND 255, ¶ 8, 952 N.W.2d 75).

86. *Id.* (citing *Bolme*, 2020 ND 255, ¶ 8, 952 N.W.2d 75).

87. *Id.* ¶ 22.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 23.

91. *See id.* ¶ 25.

92. *Id.*

93. *Id.*

94. *Id.* ¶ 26.

supported a different conclusion than the majority's holding.⁹⁵ In both cases, the courts gave "almost total deference" to the trial court's findings of fact unless the "video evidence indisputably contradicts the trial court's findings."⁹⁶

Here, the dissent did not believe the video evidence was as clear-cut as the majority claimed.⁹⁷ Because there were other light sources present, a reasonable person could have concluded that any apparent license plate lighting in the video was due to those sources.⁹⁸ Since the video evidence may reasonably have been "subject to different interpretations," it did not "indisputably contradict the trial court's findings."⁹⁹

The dissent also cautioned the majority not to fall into common traps that accompany video evidence.¹⁰⁰ The dissent pointed out how readily the mind is willing to accept video evidence, even when it is at odds with other credible evidence.¹⁰¹ The dissent also stated that it may have been improper to include and rely on the still image footnotes in the majority opinion, as "the admission or rejection of photographs is within the discretion of the trial court."¹⁰² These still images used by the majority were not admitted into evidence.¹⁰³

As to the potential mistake of fact by the arresting officer, the dissent argued that the evidence did not support a finding that such a mistake was objectively unreasonable.¹⁰⁴ Taking issue with the majority's conclusion that the mistake would need to have been extended and continuous, the dissent pointed out that nothing in the video evidence presented showed how the license plate appeared to the officer when the two vehicles passed each other, or when the officer was following Boger.¹⁰⁵ Therefore, the dissent would not have concluded the evidence supported a finding that the mistake by the officer was objectively unreasonable.¹⁰⁶

The dissent would have deferred to the district court's assessment of the evidence. Since the dissent would have found that the video evidence did not indisputably show the officer lacked "reasonable and articulable suspicion of a violation" of the law, and because the presented video evidence did not

95. *Id.* ¶ 28.

96. *Id.*

97. *Id.* ¶¶ 29-31.

98. *Id.* ¶ 31.

99. *Id.* (quoting *Love v. State*, 73 N.E.3d 693, 699 (Ind. 2017)).

100. *Id.* ¶¶ 32-34.

101. *Id.* ¶¶ 32-33.

102. *Id.* ¶¶ 34-35.

103. *Id.* ¶ 36.

104. *Id.* ¶ 38.

105. *Id.* ¶ 39.

106. *Id.*

show that any mistake of fact by the arresting officer was objectively unreasonable, the dissent would have affirmed the district court's denial of Boger's motion to suppress.¹⁰⁷

IV. IMPACT OF THE DECISION

In *Boger*, the North Dakota Supreme Court addressed the issue of how appellate courts should treat video evidence when that video evidence appears to contradict officer testimony.¹⁰⁸ The court held, in some circumstances, video evidence can be used to find that the district court's findings were against the "manifest weight of the evidence."¹⁰⁹ When the video evidence "indisputably contradicts the trial court findings," an appellate court may rely on this evidence without such reliance constituting impermissible reweighing of the evidence.¹¹⁰

This will have an immediate impact on both North Dakota state's attorneys and criminal defense attorneys. For both sides, video evidence, such as from body camera footage, is likely to be more important after the *Boger* decision. State's attorneys will need to take extra care to ensure available body camera footage confirms what an officer testifies to in court. Criminal defense attorneys may be able to use video evidence to gain an acquittal, even if officer testimony would have made such an outcome unlikely in earlier cases.

It remains to be seen how broad the practical impact of this decision may be for North Dakota's criminal justice system. The vast majority of arresting officers are likely well aware their statements may be compared to their body camera footage. However, unless video evidence is clear and undisputable, the district courts and the North Dakota Supreme Court will continue to give great weight to officer testimony.

V. CONCLUSION

In *State v. Boger*, the North Dakota Supreme Court held video evidence could be used to reverse the district court's findings in cases where the video evidence clearly contradicts those findings.¹¹¹ In cases where "video evidence indisputably contradicts the trial court's findings, relying on such evidence and reversing the trial court's findings do not constitute reweighing."¹¹² The North Dakota Supreme Court held that the officer's

107. *Id.* ¶ 41.

108. *Id.* ¶ 17.

109. *Id.* ¶ 18 (citing *Love v. State*, 73 N.E.3d 693, 699 (Ind. 2017)).

110. *Id.* (quoting *Love*, 73 N.E.3d at 699).

111. *Id.* ¶ 18.

112. *Id.* (quoting *Love*, 73 N.E.3d at 699).

assertion that Boger's rear license plate was not illuminated, an assertion relied upon by the district court, was "contrary to the manifest weight of the evidence."¹¹³ The court also held any mistake of fact by the arresting officer would have needed to be extended and continuous; therefore, the mistake was objectively unreasonable.¹¹⁴ The court ultimately reversed the district court's denial of Boger's motion to suppress.¹¹⁵ As a result of the *Boger* decision, the North Dakota Supreme Court has embraced the expanded use of video evidence, such as body camera footage, under a narrow set of circumstances.¹¹⁶

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113. *Id.* ¶ 19.

114. *Id.* ¶ 22.

115. *Id.* ¶ 23.

116. *Id.* ¶ 18.

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