O/A 9-9-86

IN THE SUPREME COURT
STATE OF FLORIDA

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MARGARET E. BUTLER, as)
Personal representative)
of the Estate of HENRY)
LEE SANDERS, a minor)

Petitioner,)

vs.)

SARASOTA COUNTY, FLORIDA)
a corporate body politic,)

Respondent.)

SUPREME COURT OF FLORIDA
CASE NO. 67,869

APPLICATION FOR CONSTITUTIONAL CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

PAGE

CITATIONS OF AUTHORITY ii

SUMMARY OF ARGUMENT. 1

STATEMENT OF THE CASE AND FACTS. 3

ARGUMENT

POINT ONE
WHETHER THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, FAILED TO PROPERLY APPLY FLORIDA LAW IN REVERSING THE FINAL JUDGMENT RENDERED IN THE TRIAL COURT 5

POINT TWO
WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE DEAD BODY (PX5). 12

POINT THREE
WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DAMAGES 14

POINT FOUR
WHETHER PETITIONER'S CLAIM, AS A MATTER OF LAW, WAS BARRED BY THE UNFORESEEN INTERVENING CAUSE DOCTRINE 16

POINT FIVE
WHETHER THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE APPLICABLE LAW 17

CONCLUSION 18

CERTIFICATE OF SERVICE 19

CITATIONS OF AUTHORITY

PAGE

Banat v. Armando,
430 So.2d 503 (Fla. 3d DCA 1983),
reh. den. 446 So.2d 503. 16

Bankers Multiple Line Insurance Company v. Farish,
464 So.2d 530 (Fla. 1985). 5

Barrera v. State of Florida Department of Transportation,
470 So.2d 750 (Fla. 3d DCA 1985). 8

Bould v. Touchette,
349 So.2d 1181 (Fla. 1977) 5

City of Delray Beach v. Watts,
461 So.2d 142 (Fla. 4th DCA 1984). 9

City of St. Petersburg v. Collom,
419 So.2d 1082 (Fla. 1982). 1,2,7,8,
10,11,17

City of Sarasota v. Eppard,
455 So.2d 623 (Fla. 2d DCA 1984) 16

Commercial Carrier Corp. v. Indian River County,
371 So.2d 1010 (Fla. 1979). 7

Dania Jai-Ali Palace, Inc. v.Sykes,
450 So.2d 1114 (Fla. 1984) 5

Department of Transportation v. Neilson,
419 So.2d 1071 (Fla. 1982). 1,7

Emig v. State,
456 So.2d 1204 (Fla. 1st DCA 1984) 6

Evangelical United Brethren Church v.State,
67 Wash. 2d 246,407 P.2d 440 (1965). 10

Garza v. Hendry County, Florida,
457 So.2d 602 (Fla. 2d DCA 1984) 8,9

Henninger v. State,
251 So.2d 862 (Fla. 1971). 12

Higden v. Metropolitan Dade County,
446 So.2d 203 (Fla. 3d DCA 1984) 6,7

Hill v. City of Lakeland,
466 So.2d 1231 (Fla. 2d DCA 1985) 8

Jenkins v. City of Miami Beach,
389 So.2d 1195 (Fla. 3d DCA 1980). 6

Metropolitan Dade County v. Colina,
456 So.2d 1233 (Fla. 3d DCA 1984). 16

Pan Am Tobacco Corporation v. Department of Corrections,
471 So.2d 4 (Fla. 1984). 7

Paneque v. Metropolitan Dade County,
__ So.2d__ (Fla. 3d DCA 1985) (10 FLW 2486). . . . 9

Payne v. Broward County,
461 So.2d 63 (Fla. 1984) 8,9

Ralph v. City of Daytona Beach,
471 So.2d 1 (Fla. 1985) 8

Relyea v. State,
385 So.2d 1378 (Fla. 4th DCA 1980) 6

Sarasota County, Florida v. Butler,
476 So.2d 216 (Fla. 2d DCA 1985). 5,6,7,10

Savignac v. Department of Transportation,
406 So.2d 1143 (Fla. 2d DCA 1981). 9

Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service,
444 So.2d 926, 928 (Fla. 1983) 7

Trianon Park Condominium Association v. City of Hialeah,
468 So.2d 912 (Fla. 1985) 1,7,9,10,18

Walker v. City of Miami,
377 So.2d 1003 (Fla. 3d DCA 1976). 12

Windham v. Florida Department of Transportation,
476 So.2d 735, 740 (Fla. 1st DCA 1985) 8

OTHER CITATIONS:

55 FLA. JUR. 2d, Trial §148. 12

Florida Statute §768.21. 14

Florida Statute §90.403. 12

SUMMARY OF ARGUMENT

Point One - The Second District's opinion in the instant case correctly applied the warning requirements set forth in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) and City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982) in holding that this cause was barred by the doctrine of sovereign immunity. The Second District's opinion was entirely consistent with Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985). Even if the Second District erred in its analysis of the warning issue the trial court committed reversible error in allowing the lifeguard issue to be presented to the jury.

Point Two - The trial court committed reversible error in admitting into evidence a gruesome photograph of HENRY LEE SANDERS because it served absolutely no relevant or useful purpose and only was introduced to inflame the passions of the jury.

Point Three - The trial court committed reversible error in allowing the Petitioner to present otherwise impermisible evidence of loss of net accumulations to the estate under the guise of "loss of earned income on the part of HENRY LEE SANDERS that would be available for his mother for her support." Therefore the jury's verdict was not based on competent evidence as to the issue of damages.

Point Four - Petitioner's claim is, as a matter of law, totally barred by the doctrine of unforeseen intervening cause because it was totally unforeseeable that an adult

would let a nine (9) year old non-swimmer swim in a pass under only the supervision of a twelve (12) year old who mistakenly thought he could swim.

Point Five - The trial court committed reversible error in incorrectly instructing the jury under Collom, supra, because the jury instruction omitted the requirement that the known dangerous condition be created by SARASOTA.

STATEMENT OF THE CASE AND FACTS

Petitioner states that "during the time that the Respondent operated the beach - park facility, prior to HENRY LEE SANDERS' death, it never posted any warnings to swimmers using the waters in the park facility warning them of the known hazards present in the recreational beach facility (R-214)" (Brief pg. 2). In fact, the record at page 214 reflects only SARASOTA's admission that "there were no signs located on or near this beach alerting swimmers to the characteristics of the offshore currents on the Big Pass side, tides on the Big Pass side." (R:214) Respondent also fails to point out that after SARASOTA received title to South Lido Beach it made very few improvements on the land and did not in any way interfere with the currents in the pass adjacent to South Lido. (R:289-290) Furthermore, as of June 10, 1981 there had never been lifeguards at South Lido (R:290) and there had never been a drowning at South Lido (R:288).

Petitioner's rendition of how the actual drowning occurred (Brief pg. 2) is, at best, incomplete. Prior to June 10, 1981 HENRY LEE SANDERS had been to South Lido with his mother. (R:277) On June 10, 1981 the mother, MARGARET BUTLER, allowed her aunt, Nora Newell, (age 42) (R:304) to take her son, HENRY LEE SANDERS, (age 9) and seven (7) other small children (oldest was twelve (12) years old) (R:277) to South Lido. When they arrived at South Lido, Nora Newell remained near the car in the picnic area and told one of the children, Laura (the oldest at age 12), to watch the other

children at the beach. (R:277) Approximately thirty (30) minutes later (R:331) two of the children were trying to pull HENRY LEE SANDERS out of the water when their sister Laura (also called Regina) (R:270) told them to let go of him (R:269,330-331) because Laura mistakenly thought he could swim. (R:270) When they let go, HENRY LEE SANDERS drowned.

ARGUMENT

POINT ONE

WHETHER THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, FAILED TO PROPERLY APPLY FLORIDA LAW IN REVERSING THE FINAL JUDGMENT RENDERED IN THE TRIAL COURT.

INTRODUCTION

As noted by the Second District in Sarasota County, Florida v. Butler, 476 So.2d 216 (Fla. 2d DCA 1985) the complaint in the instant case specifically alleged that SARASOTA was negligent because it: 1) failed to post warning signs or other warning devices alerting beach-goers to the dangerous conditions; 2) failed to provide lifeguards or other protection; and 3) failed to provide safety or rescue equipment to be used in emergencies. Id. at 217. The Second District further noted that SARASOTA raised five points on appeal but that its decision on the sovereign immunity point made it unnecessary to reach the remaining four. Due to this Court's acceptance of conflict jurisdiction these four points will be raised later in this Brief. Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984); Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985).

FAILURE TO PROVIDE SAFETY OR RESCUE EQUIPMENT

There was absolutely no testimony or evidence presented in support of this allegation at trial.

FAILURE TO PROVIDE LIFEGUARDS

SARASOTA unsuccessfully repeatedly argued in the trial court by Motion to Dismiss (R:7), Motion for Summary Judgment (R:62-63) and Affirmative Defense (R:66-68) that this allegation was barred by the doctrine of sovereign immunity. Petitioner presented evidence at trial that there were no lifeguards at South Lido Beach on the date of the drowning. (R:219-220) Although there was no special interrogatory used it must be assumed that the jury considered this evidence in reaching its verdict.

Testimony at trial was clear that the decision not to staff South Lido Beach with lifeguards was a classic planning decision which is immune from suit. (R:281,282,287-290,293). Florida law is absolutely clear that under the doctrine of sovereign immunity the establishment of security measures such as lifeguards is a planning level activity for which sovereign immunity is not waived. Jenkins v. City of Miami Beach, 389 So.2d 1195 (Fla. 3d DCA 1980) (failure to supervise park at night); Relyea v. State, 385 So.2d 1378 (Fla. 4th DCA 1980) (failure to provide security guards, parking attendants and security gates); Emig v. State, 456 So.2d 1204 (Fla. 1st DCA 1984) (failure to have security measure at detention center); and Higden v. Metropolitan Dade County, 446 So.2d 203 (Fla. 3d DCA 1984) (handling and warning of riot).

Petitioner's Brief wholly fails to address that portion of Butler in which the Second District correctly found the presence or absence of lifeguards to be a judgmental,

planning level function immune from consequential liability. Id. at 217 and, therefore, Petitioner admits error in the trial court on this point.

FAILURE TO PROVIDE WARNINGS

Petitioner in its Brief focuses entirely on this allegation of its complaint and relies totally on alleged conflict between Butler and Trianon.

In Butler the Second District, in a post Trianon decision, correctly applied Neilson, supra and Commercial Carrier Corporation v. Indian River County, 371 So.2d 1010 (Fla. 1979) in concluding that the presence or nonpresence of warning signs or other devices falls wholly within the concept of a judgmental, planning level function immune from consequential liability. Butler at 217. This analysis is fully consistent with Florida law. See, e.g., Higdon, supra, (failure to warn of riot conditions immune).

The Second District further recognized the exception[1] to be applied was set forth by this Court in Collom, supra. This exception is that even if, as in the instant case, the subject action is otherwise immune under the doctrine of sovereign immunity, if the government: (1) creates a

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[1] It is a basic principle that in Florida sovereign immunity is the rule, rather than the exception, Pan-Am Tobacco Corporation v. Department of Corrections, 471 So.2d 4 (Fla. 1984) and a waiver of sovereign immunity should be strictly construed in favor of the state and against the claimant, Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, 444 So.2d 926, 928 (Fla. 1983).

dangerous condition; (2) which it knew to be dangerous; and (3) such danger was not readily apparent to those persons who might sustain injury as a result of it the government must warn of same. This exception has been consistently narrowly construed by the courts. Hill v. City of Lakeland, 466 So.2d 1231 (Fla. 2d DCA 1985); Barrera v. Department of Transportation, 470 So.2d 750 (Fla. 3d DCA 1985); Payne v. Broward County, 461 So.2d 63 (Fla. 1984); Garza v. Hendry County, Florida, 457 So.2d 602 (Fla. 2d DCA 1984); Windham v. Florida Department of Transportation, 476 So.2d 735, 740 (Fla. 1st DCA 1985); and Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1985). Even Petitioner recognized the applicability of Collom, since, as discussed in more detail later in this Brief, she asked for and received a (partially correct) Collom jury instruction in the trial court.

In the instant case the Second District correctly held that Petitioner had failed to meet its burden under Collom because she totally failed to show that SARASOTA had created the dangerous condition; to wit, the hazardous waters of Big Pass at South Lido Beach. It was not the beach nor the operation of it, but the water, which caused the child's death. cf. Hill v. City of Lakeland, supra, (lake a naturally occurring, potentially hazardous condition which the City did nothing to create).

It should further be noted that the testimony at trial was that HENRY LEE SANDERS had previously been to South Lido Beach with his mother (R:277) and there was no evidence that

the dangerous condition was not readily apparent. Florida law recognizes that a property owner generally cannot be held liable for dangerous conditions which exist in natural or artificial bodies of water unless they are so constructed as to constitute a trap or unless there is some unusual danger not generally existent in similar bodies of water. Savignac v. Department of Transportation, 406 So.2d 1143 (Fla. 2d DCA 1981). See also, Paneque v. Metropolitan Dade County, ___ So.2d ___ (Fla. 3d DCA 1985) (10 FLW 2486), (Dangers of crossing roadway readily apparent); Payne, supra, (government has no duty to warn pedestrians of routine dangers of crossing street midblock); City of Delray Beach v. Watts, 461 So.2d 142 (Fla. 4th DCA 1984), (danger of dumpster obvious); and Garza v. Hendry County, supra, (relevance of evidence of no prior accident).

As noted earlier, Petitioner in its Brief totally ignores the foregoing established Florida case law and, instead, urges conflict with this Court's decision in Trianon, supra. In Trianon this Court held that a municipality could not be subjected to tort liability for damages sustained as a result of its building inspection personnel's failure to adequately enforce its building code. In Trianon this Court specifically recognized in dicta the current state of sovereign immunity that for there to be governmental tort liability there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. Trianon at 917. There has never been such a duty requiring a governmental entity to

build and maintain a public beach. Even if such a common law or statutory duty did exist the creation and management of South Lido Park would clearly be immune from suit under the four-pronged analysis prescribed in Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965).

In Trianon this Court further specifically recognized and cited the aforesaid Collom exception in connection with capital improvements. Id at 920. There is absolutely no conflict between the Second District's reliance on Collom in Butler and this Court's citation to Collom in Trianon.

Petitioner in its Brief raises the broad concept that under common law the owner of real property has the duty to give persons using the property warning of any "latent and concealed dangers" known to the owner and "which were not known to the invitee and which by the exercise of due care could not have been known by the person using the premises." Even assuming arguendo that said general law applied to SARASOTA in the instant case, there is simply no evidence in the record of any such latent or hidden defect which HENRY LEE SANDERS or his aunt would not know about by the exercise of due care. A nine (9) year old child and his forty-two (42) year old aunt should certainly have known that it is dangerous to swim in the waters of a pass which, like all passes, has strong currents and dropoffs.

Petitioner's reliance on cases dealing with the "operation and maintenance of playgrounds or recreational

activities" is simply far beyond the specific allegations of negligence upon which the instant case proceeded to trial. As noted earlier, these three alleged negligent acts by SARASOTA in the operation of South Lido beach are all barred by the doctrine of sovereign immunity.

Petitioner in this cause is, in effect, urging this Court to abandon the portion of the Collom exception requiring that the dangerous condition be created by the governing body. Besides flying in the face of settled law such a ruling by this Court would have far reaching effects on every governing body throughout this State. For example, would a warning be required as to the presence of sharks or other animals in the ocean, the possible exposure to cancer by too much sun at the beach, the danger of cuts to feet from seashells, the dangers of windsurfing in a strong breeze? How many and what type of warnings are required? Are warnings required wherever there is water or just at designated swimming areas? SARASOTA submits that under the doctrine of separation of powers these are all decisions properly left to the governing bodies. Collom and Neilsen represent a proper balancing test by requiring warnings where the governing bodies create a known dangerous condition not readily apparent to users and SARASOTA urges this Court not to depart from same.

POINT TWO

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE DEAD BODY (PX5).

Prior to trial SARASOTA by Motion in Limine sought to exclude from evidence a gruesome photograph (PX5, R:499) of the body of HENRY LEE SANDERS after he had been dead in the water for approximately twenty-four (24) hours. MARGARET BUTLER admitted at trial that she never saw the body in the condition depicted in the photograph. (R:307) In seeking to introduce the photograph, Petitioner's attorney stated as follows:

> "As to the photographic evidence I propose to introduce one of a series of photographs that the police took and primarily for identification purposes to show to the man that took the body out of the water for him to identify the body ask the one, and to his mother for identification of the body as Henry Lee Sanders . ..." (R:191)

In response SARASOTA offered to stipulate (and had previously stipulated) to the above. (R:193) The photograph was admitted over objection. (R:304-305) While the court admittedly has some discretion in this area, Walker v. City of Miami, 377 So.2d 1003 (Fla. 3d DCA 1976), based on the test of relevancy, Henninger v. State, 251 So.2d 862 (Fla. 1971), SARASOTA submits that this discretion was abused in the instant case.

Florida Statute §90.403 states as follows:

> "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cummulative evidence. This section shall not be construed to

mean that evidence of the existence of available third-party benefits is inadmissible."

In the instant case the only real reason to place this photograph into evidence was to inflame the passions of the jury. Even if relevant, said photograph was not admissible under Florida Statute §90.403. The trial court committed reversible error in allowing this highly prejudicial photograph into evidence.

POINT THREE

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF DAMAGES.

The Petitioner in its complaint sought damages as follows:

1. loss of services;
2. mental pain and suffering; and
3. loss of net accumulations.

At trial the attorney for Petitioner stipulated that his damage expert, Mr. Davis, would not testify as to damages for lost services. (R:227) There was no other testimony or evidence as to the value of lost services.

Mr. Davis did spend a considerable length of time testifying (over objection) as to the One Hundred Twenty-Five Thousand, Eight Hundred Eighty-Three Dollars ($125,883.00) to Four Hundred Ten Thousand, Forty-One Dollars ($410,041.00) that he testified represented "the loss of earned income on the part of HENRY LEE SANDERS that would be available for his mother for her support." (R:228-229, R:265-266) If this testimony was in support of Petitioner's claim for loss of net accumulations it was received in error because under Florida Statute §768.21(6)(a)[2] the personal representative could not recover for the loss of net accumulations to the

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[2]Florida Statute §768.21(6)(l) provides that loss of prospective net accumulations of an estate may be recovered by the decedent's personal representative if the decedent's survivors include a surviving spouse or lineal descendant or if the decedent is not a minor child. Neither situation existed in this case.

estate because HENRY LEE SANDERS' survivors did not include a spouse or lineal descendant.

If Mr. Davis' testimony was directed to a claim for loss of support it was incorrectly received because (1) this was not an item of damages requested in the complaint and, more importantly, (2) the testimony was not relevant to this claim because it only indicated money "available" for the mother. In fact this was simply a thinly veiled disguise for prohibited testimony as to loss of net accumulations and the reception of same was clearly prejudicial error because this was the only damage testimony presented to the jury upon which it could have based its verdict of One Hundred Twenty-Five Thousand Dollars ($125,000.00).

POINT FOUR

WHETHER PETITIONER'S CLAIM, AS A MATTER OF LAW, WAS BARRED BY THE UNFORESEEN INTERVENING CAUSE DOCTRINE.

As noted earlier, this drowning occurred when the mother, MARGARET BUTLER, entrusted HENRY LEE SANDERS to her aunt, Nora Newell without even checking as to where they were going, who was going, or whether there would be any other adults. (R:306) When Nora Newell arrived at the beach she stayed at the car in the picnic area and told a twelve (12) year old girl, Laura, to watch the other six (6) small children. The children were playing in the water with two of the children holding onto HENRY LEE SANDERS. Laura thought he could swim and told the two other children to let go. They did and he drowned.

A governmental body cannot be held liable for highly unusual, extraordinary, or bizarre consequences. City of Sarasota v. Eppard, 455 So.2d 623 (Fla. 2d DCA 1984); Metropolitan Dade County v. Colina, 456 So.2d 1233 (Fla. 3d DCA 1984). Furthermore, the law is clear that if the original negligence is remote and only furnishes the occasion of the injury, it is not the proximate cause thereof. Banat v. Armando, 430 So.2d 503 (Fla. 3d DCA 1983), reh. den. 446 So.2d 99.

In the instant case it is evident that HENRY LEE SANDERS' drowning was a result of a series of unfortunate and highly unusual acts by the mother, the aunt, and the sister and, therefore, as a matter of law SARASOTA cannot be held liable for same.

POINT FIVE

WHETHER THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE APPLICABLE LAW.

At Petitioner's request the trial court instructed the jury as follows: (R:473-474)

> "The Court has determined and now instructs you as a matter of law that the circumstances at the time and place of the incident complained of in this case was such that if South Lido Beach were dangerous in a way that was not readily apparent to a person using the facility, and if such danger was known to Sarasota County, Florida, or in the exercise of reasonable care should have been known to Sarasota County,Florida, then it was the duty of Sarasota County to warn the public or protect the public from the known danger."

The above instruction is not a correct statement of the law since it fails to mention that the dangerous condition _must have been created_ by SARASOTA. _Collom_, _supra_. This is a crucial element of the exception to sovereign immunity carved out by _Collom_ and the failure to include same was highly prejudicial to SARASOTA. _See generally_, 55 FLA. JUR. 2d _Trial_ §§147, 148.

CONCLUSION

The opinion of the Second District was a correct application of settled Florida law. It did not in any way conflict with this Court's prior decision in Trianon. The opinion of the Second District should be affirmed in all respects.

If this Court feels that the opinion of the Second District was not correct it should still reverse the Final Judgment rendered herein and order a new trial because (1) the lifeguard issue was improperly presented to the jury resulting in the Final Judgment and (2) the issues raised in Points Two through Five contained herein.

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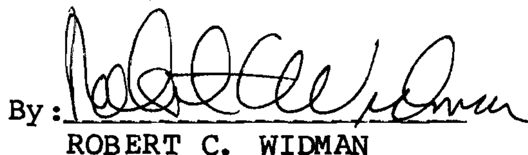

By: ______________________
ROBERT C. WIDMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Answer Brief has been furnished by U. S. Mail to Robert Jackson McGill, Esquire, Post Office Box 1725, Venice, Florida 34284, and John P. Graves, Jr., 1970 Main, Sarasota, Florida 33577, this the 10th day of April, 1986.

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