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3-480

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 69,202

AFM CORPORATION,

Plaintiff/Appellee,

vs.

SOUTHERN BELL TELEPHONE
AND TELEGRAPH CO.,

Defendant/Appellant.

FILED
SD J. WHITE

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AMICUS CURIAE BRIEF OF
THE ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL)
SUPPORTING POSITION OF PLAINTIFF/APPELLEE

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

Table of Citations	ii
Preface	iv
Statement of the Case and the Facts	1
Certified Questions	3
CAN A PLAINTIFF SUING EXCLUSIVELY IN TORT RECOVER LOST PROFITS?	
CAN NEGLIGENT OR WILLFUL BREACH OF A CONTRACT ALONE CONSTITUTE AN INDEPENDENT TORT?	
CAN SUCH A TORT BE THE BASIS OF AN AWARD OF PUNITIVE DAMAGES IF THE OTHER CRITERIA FOR AWARDED PUNITIVE DAMAGES ARE MET?	
Summary of Argument	5
Argument - Certified Question One	7
Certified Question Two	15
Certified Question Three	17
Conclusion	19
Certificate of Service	20
Appendix	Attached to this Brief

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
<u>Ashland Oil Inc. v. Pickard,</u> 269 So.2d 714 (Fla. 3d DCA 1972) cert. den. 285 So.2d 18 (Fla. 1973)	7, 8, 10, 11
<u>Atlanta and S.A.B.R. Co. v. Thomas,</u> 53 So. 510 (Fla. 1910)	12
<u>Banfield v. Addington,</u> 140 So. 893 (Fla. 1932)	11, 12
<u>Doyle v. City of Coral Gables,</u> 33 So.2d 41 (Fla. 1947)	13, 15, 17
<u>Greater Coral Springs Realty, Inc. v.</u> <u>Century 21 Real Estate of Southern</u> <u>Florida, Inc.,</u> 412 So.2d 940 (Fla. 3rd DCA 1982)	7, 8, 9, 10, 11, 13
<u>Harper v. Bronson,</u> 139 So. 203 (Fla. 1932)	11
<u>Holbrook v. City of Sarasota,</u> 58 So.2d 862 (Fla. 1952)	14, 15, 17
<u>Nicholas v. Miami Burglar Alarm Co., Inc.,</u> 339 So.2d 175 (Fla. 1976)	16, 17
<u>Parrish v. Clark,</u> 145 So. 848 (Fla. 1933)	11, 12, 14, 15, 16, 17
<u>Safeco Title Insurance Company v. Reynolds,</u> 452 So.2d 45 (Fla. 2d DCA 1984)	13
<u>Sprayberry v. Sheffield Auto and Truck</u> <u>Service, Inc.,</u> 422 So.2d 1073 (Fla. 1st DCA 1982)	7, 8, 10, 11, 13
<u>Western Union Tel. Co. v. Taylor,</u> 114 So. 529 (Fla. 1927)	12
<u>White Construction Co., Inc. v. DuPont,</u> 455 So.2d 1026 (Fla. 1984)	17

Cases:

Page

Woodbury v. Tampa Water Work Company,
49 So. 556 (Fla. 1909)

11, 12

Federal Rules:

Fed.R.Civ.P. 8(e)

14

Florida Rules:

Fla.R.App.P. 9.150 (1986)

14

Fla.R.Civ.P. 1.110(g)

14

PREFACE

Appellant/Defendant, Southern Bell Telephone and Telegraph Company was the Defendant in the trial court and Appellant in the United States Court of Appeal and will be referred to in this Brief as "Southern Bell". Citations to Southern Bell's initial brief will be made with the letter "AB" followed by the page number. Appellee/Plaintiff, AFM Corporation was the Plaintiff in the trial court and the Appellee in the United States Court of Appeal of the Eleventh Circuit and will be referred to in this Brief as "AFM". Amicus Curiae, The Academy of Florida Trial Lawyers, will be referred to as "the Academy". The Court of Appeals of the Eleventh Circuit will be referred to as the "Eleventh Circuit".

STATEMENT OF THE FACTS AND THE CASE

The Academy does not have a copy of the complete record on appeal and must rely on the facts set forth in the written opinion of the Eleventh Circuit, a copy being attached to this Brief as an Appendix. According to the Eleventh Circuit:

AFM was (In July, 1981, AFM executives decided to abandon AFM and form a new corporation with a different name that carried on the same business. The decision to change the corporation's name was not caused by the alleged negligence of Southern Bell.) a Florida corporation specializing in the sale and servicing of copy machines and related business equipment. Prior to August 1, 1980, AFM's business office was located in Hallandale, Florida, which is in southern Broward County near the Dade County line. AFM's principle form of advertising was through space purchased in the yellow pages published by Southern Bell. AFM advertised in the Miami yellow pages because of its business dealings in Dade County.

In March, 1980, AFM and Southern Bell entered into an agreement for the inclusion of AFM's advertisement in the 1980-81 yellow pages. At the time of this contract, AFM executives were considering moving their office from Hallandale, Florida, to Hollywood, Florida. They were told by Southern Bell employees that such a move would result in significantly higher toll charges for AFM's Dade County phone number. (Previously, AFM's Miami customers could call a Dade County number and the call would be automatically transferred to the Hallandale office

without incurring long distance charges). AFM sought alternatives and Southern Bell advised that a referral call service could be inaugurated whereby callers who phoned AFM's old number would be referred to the new Hollywood number by a taped voice. By employing this method, AFM could avoid using the old phone number and not incur the additional costs. The parties agreed that if AFM moved and changed its phone number, Southern Bell would provide this referral service.

In late July, 1980, AFM moved its office to Hollywood and was given a new phone number by Southern Bell. At that time, Southern Bell set up the referral system so that customers who called AFM's old Dade County number would be told of the new number. In September, 1980, the yellow pages were distributed carrying AFM's advertisement but listing AFM's incorrect old phone number.

On November 21, 1980, Southern Bell mistakenly assigned AFM's old Dade County phone number to a new customer which resulted in the premature disconnection of the referral system. AFM discovered the mistake and notified Southern Bell of the problem. Immediately thereafter, Southern Bell reconnected the old number thereby reinstating the reference. In April, 1981, however, the reference was again disconnected by mistake. This error was not discovered until June, 1981. As soon as Southern Bell was notified of the mistake, the reference of calls was reestablished.

AFM filed an action in a Florida state court against Southern Bell alleging both negligence and breach of contract. The case was removed to the United States District Court for the Southern District of Florida on January 11, 1982. At the trial, AFM introduced evidence that Southern Bell had agreed to provide the referral system and that the system had been prematurely disconnected between April and June, 1981. (AFM did not seek damages for the first disconnection of the referred calls system). AFM's sole expert evidence of damages was presented by Dr. Frederick Landsea who testified that AFM lost \$21,800.00 in lost profits because of Southern Bell's failure to properly maintain the referral calls. At the close of the evidence, AFM's counsel withdrew all of the contract claims and elected to proceed solely in tort. After the jury returned a verdict in favor of AFM for both compensatory and punitive damages, Southern Bell filed a motion for judgment withstanding the verdict or in the alternative a motion for a new trial. These motions were denied by the district court on July 29, 1985, and Southern Bell filed a timely appeal.

The Eleventh Circuit recited the above facts and the contentions of the parties relative to the issues, stated that there is a conflict of Florida law on those issues, then certified the following questions pursuant to Rule 9.150, Fla.R.App.P. (1986):

CAN A PLAINTIFF SUING EXCLUSIVELY
IN TORT RECOVER LOST PROFITS?

CAN NEGLIGENT OR WILLFUL BREACH
OF A CONTRACT ALONE CONSTITUTE AN
INDEPENDENT TORT?

CAN SUCH A TORT BE THE BASIS OF AN
AWARD OF PUNITIVE DAMAGES IF THE
OTHER CRITERIA FOR AWARDING PUNITIVE
DAMAGES ARE MET?

In accordance with the Eleventh Circuit statement that they did not intend the particular phrasing of these questions to limit this Court in its consideration of the problems posed by the case and in light of the requirement of Rule 9.150, Florida Rules of Appellate Procedure, that the answer to a question certified under the rule be determinative of the cause, the Academy suggests the questions be rephrased as follows because the instant case does not involve allegations of willfulness on the part of Southern Bell:

CAN A PLAINTIFF SUING EXCLUSIVELY FOR
NEGLIGENT BREACH OF A DUTY ARISING
FROM CONTRACT RECOVER LOST PROFITS?

CAN NEGLIGENT BREACH OF A DUTY ARISING
FROM CONTRACT ALONE CONSTITUTE AN
INDEPENDENT TORT?

CAN AN INDEPENDENT TORT INVOLVING
NEGLIGENT BREACH OF A DUTY ARISING
FROM CONTRACT BE THE BASIS OF AN
AWARD OF PUNITIVE DAMAGES IF THE
OTHER CRITERIA FOR AWARDING PUNITIVE
DAMAGES ARE MET?

The Academy will address those questions in this Brief.

SUMMARY OF ARGUMENT

Certified Question One

The Academy supports the position of AFM that a plaintiff suing exclusively for negligent breach of a duty arising from contract can recover lost profits. The confusion on this issue is created by two decisions of Florida District Courts of Appeal which rely on authority which has nothing to do with the issue. Generally, a plaintiff in a negligence action is entitled to recover those general and special damages, which are the natural, proximate, probable and direct consequence of that negligence. This Court has consistently held that a plaintiff who was tortiously injured has the election to sue in tort or in contract. The fact that a plaintiff elects one remedy rather than the other should not preclude recovery of lost profits.

Certified Question Two

The Eleventh Circuit's statement that there is no controlling precedent of the Supreme Court of Florida on this issue is incorrect. This Court has consistently held that a plaintiff who was tortiously injured has the election to sue in tort or in contract. Thus, negligent breach of a duty arising from contract alone can constitute an independent tort.

Certified Question Three

By the form, the Eleventh Circuit has answered its own question. This Court has clearly defined the character of negligence which must be proven to sustain an award of punitive damages. If you assume that the plaintiff can meet that burden in an action for negligent breach of a duty arising from contract, an assumption implicit in the Eleventh Circuit's question, the plaintiff can recover punitive damages because negligent breach of a duty arising from contract is an independent tort.

ARGUMENT

CERTIFIED QUESTION ONE:

A PLAINTIFF SUING EXCLUSIVELY FOR
NEGLIGENT BREACH OF A DUTY ARISING
FROM CONTRACT CAN RECOVER LOST PROFITS.

The Academy supports the position of AFM that a plaintiff suing exclusively in negligent breach of a duty arising from contract can recover lost profits. While two of Florida's District Courts of Appeal have ruled that lost profits are contractual damages which are not recoverable in tort actions, those rulings are not supported by Florida law. An analysis of those decisions, their supporting authority and other case law shows that a plaintiff suing exclusively in tort arising from negligent breach of a duty arising from contract can recover lost profits which are a natural, proximate, probable and direct consequence of that breach.

The Eleventh Circuit questions whether a plaintiff suing exclusively for negligent breach of a duty arising from contract can recover lost profits because of two decisions - Sprayberry v. Sheffield Auto and Truck Service, 422 So.2d 1073, 1075 (Fla. 1st DCA 1982); Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., 412 So.2d 940, 941 (Fla. 3rd DCA 1982). In Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., which is the earlier of the two decisions, the court relied on Ashland Oil, Inc. v. Pickard, 269 So.2d 714 (Fla. 3d DCA 1972) cert. den. 285 So.2d 18 (Fla. 1973), as the authority for its

ruling. Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., supra, at 941. In Sprayberry v. Sheffield Auto and Truck Service, the court cited Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc. for the general rule then stated that the rule is subject to a limited exception found in Ashland Oil, Inc. v. Pickard. Sprayberry v. Sheffield Auto and Truck Service, supra at page 1075. In fact, the Court, in Ashland Oil, Inc. v. Pickard, stands for neither the general rule nor a limited exception.

In Ashland Oil, Inc. v. Pickard, the plaintiffs (an individual and his two closely held corporations) sued the defendants (three related corporations and an officer of all three) claiming fraud in the inducement of a contract and claiming damages for breach of that same contract. Ashland Oil, Inc. v. Pickard, supra at 715-716. The defendants appealed a jury verdict awarding compensatory damages, including lost profits, and punitive damages. The issue on appeal relating to lost profits was whether lost profits in that particular case were based only upon speculative evidence and had nothing to do with whether a plaintiff suing exclusively in tort may recover lost profits. Ashland Oil, Inc., v. Pickard, Id. at page 723.

The apparent confusion that has resulted from this decision stems from the fact that the Third District Court of Appeal, "for clarity", began its discussion of the issue of lost profits

with a point about election of remedies, "which was not discussed by the parties, in light of the different measure of damages recoverable in actions in tort and for breach of contract". Id. For reasons which do not appear in the opinion, the court felt the need to explain that the doctrine of election of remedies did not apply in that case because the courts have consistently recognized that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action with separate and consistent remedies. Id. Other than stating there is a "different measure of damages recoverable in actions for tort and for breach of contract", the Court did not discuss the rules of law relating to either. Id.

In Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., the Third District Court of Appeal considered an action in which the plaintiff sued the defendant seeking specific performance, injunctive relief and damages for breach of contract, and damages, including punitive damages, for fraud and deceit. Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., supra at 940-941. After a nonjury trial, the trial court found no evidence to support the claim for breach of contract, dismissed all claims except the fraud and deceit claim and entered judgment for nominal and punitive damages.

As authority for affirming the trial court's refusal to award lost profits on the tort claim, the Third District Court

of Appeal cited Ashland Oil, Inc. v. Pickard and a section from McCormick's treatise on damages. As stated previously, the recovery of lost profits in a tort claim was not an issue in Ashland Oil, Inc. v. Pickard and should not have been cited. Similarly, the section of McCormick's which the Third District Court of Appeal cited is unrelated to the issue. It is, instead, a bare statement that in tort actions the measure of damages seeks to restore the victim to the position he would have been in had the wrong not been committed, while in contract actions the aim is to place the plaintiff in the position he would have been in if the contract had been fulfilled. The court did not attempt to explain why a plaintiff suing exclusively in tort arising from breach of a duty arising from contract cannot recover lost profits which are the natural, proximate, probable and direct consequence of that breach.

This Court cannot really tell the basis of the ruling in Sprayberry v. Sheffield Auto and Truck Service, because the First District Court of Appeal did not give a complete statement of the facts or the case in their opinion. Sprayberry v. Sheffield Auto and Truck Service, supra at 1074. The court expressly ruled, however, that the issue of lost profits should not have gone to the jury because there was no breach of contract claimed. Id. at 1075. As in Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., the court did not attempt to explain why. They simply

stated the "rule" citing Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., as authority.

The First District Court of Appeal must not have reviewed the case law, however, because after stating the "rule", they stated that it was subject to the limited exception found in Ashland Oil, Inc., v. Pickard. Id. Again, neither the general rule nor any limited exception were an issue in Ashland Oil, Inc. v. Pickard.

The Academy suggests, therefore, that the rulings in Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., and Sprayberry v. Sheffield Auto and Truck Service are not the law of Florida. The general rules relating to both contract and tort actions allow the recovery of lost profits and in the proper case, a plaintiff suing exclusively for negligent breach of a duty arising from contract may recover such damages.

The essential elements of any cause of action, whether in contract or tort, are the existence of a legal right in the plaintiff, with a corresponding legal duty in the defendant, coupled with the violation of that duty that results in consequential injury or damage to the plaintiff. Woodbury v. Tampa Water Works Company, 49 So. 556 (Fla. 1909); Parrish v. Clark, 145 So. 848 (Fla. 1933). The duty may arise ex delicto, from a contractual arrangement between the parties or may be imposed by positive law independent of contract. Banfield v. Addington, 140 So. 893 (Fla. 1932); Harper v. Bronson, 139

So. 203 (Fla. 1932); Woodbury v. Tampa Water Works Company,
supra.

Breach of that duty may also arise from a positive tort committed by the violation of a duty arising from the assumption of a contractual relationship. Banfield v. Addington, supra at 896. In such a case, the right of action on the contract, and the right to sue for breach of the collateral duties arising therefore are distinct. Parrish v. Clark, supra at 850. Although he cannot be compensated twice for the same wrong, the injured party is entitled to sue for both the breach of contract and for the tort. Id.

In order to recover, a plaintiff must, however, demonstrate some injury resulting from the breach of that duty and connection between the act complained of and the damage alleged. The concurrence of the wrongful act and the loss resulting constitute the cause of action. Western Union Tel Co. v. Taylor, 114 So. 529 (Fla. 1927). The wrong need not, however, be contemporaneous with the injury. Parrish v. Clark, supra. What is essential is that the wrongful act charged be the proximate cause of the damage complained of, without any intervening, independent, efficient cause. Woodbury v. Tampa Water Works, supra at 566. This is true in actions on contract, as well as actions in tort. Atlanta and S.A.B.R. Co. v. Thomas, 53 So. 510 (Fla. 1910); Woodbury v. Tampa Water Works Company, supra at 566.

Thus, under these general rules there is no logical reason that a plaintiff suing exclusively for negligent breach of a duty arising from contract can recover lost profits which are a natural, proximate, probable and direct consequence of that breach. They also are the reason for the Second District Court of Appeals recognition in Safeco Title Insurance Company v. Reynolds, cited by the Eleventh Circuit as conflicting with Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc. and Sprayberry v. Sheffield Auto and Truck Service of the "long established general principle that injuries caused by the negligent performance of a contractual duty may be redressed through a tort action and statement that a plaintiff may recover special damages, such as lost profits, in addition to general damages naturally resulting from negligent breach of a contractual duty. Safeco Title Insurance Company v. Reynolds, 452 So.2d 45, 48-49 (Fla. 2d DCA 1984).

This Court has consistently held that a person who was negligently injured in a contractual setting has the election to sue in tort or in contract. For example, this Court has allowed a passenger claiming damages for personal injuries resulting from the negligence of a common carrier to sue in tort or in contract for wrongful injury. Doyle v. City of Coral Gables, 33 So.2d 41 (Fla. 1947). Similarly, this Court has held that a hospital patient negligently injured by a nurse may sue for breach of the hospital's contract to furnish room and nursing care or for the positive tort committed by the violation of a

duty arising out of the assumption of the contractual relationship. Parrish v. Clark, supra. Further, this Court has ruled that even though the plaintiff has the option of which action to bring, it cannot be compelled to bring one rather than the other. Holbrook v. City of Sarasota, 58 So.2d 862 (Fla. 1952). The right of action on the contract and the right to sue for the breach of the collateral duty are distinct, the only limitation on the suit for either being that the same party cannot collect twice for the same wrong. Parrish v. Clark, supra at 850.

In its brief, Southern Bell suggests that recovery of lost profits is allowed only where a plaintiff pursues both contract and tort claims and that AFM waived its claim for lost profits by dropping its contract claim. (AB 8-11). That suggestion flies in the face of the previous decisions of this Court just cited and right of a pleader to set up in the same action as many claims or causes of action or defenses in the same right as he has, and claims for relief may be stated in the alternative if separate items may up the cause of action, or if two or more causes of action are joined. Rule 1.110(g), Fla.R.Civ.P.; Rule 8(e), Fed.R.Civ.P.

Finally, the Academy has not addressed the additional issues contained in Southern Bell's Brief because they do not relate to the questions certified by the Eleventh Circuit and are, therefore, outside the scope of review as permitted by Rule 9.150, Fla.R.App.P. (1986).

ARGUMENT

CERTIFIED QUESTION TWO:

NEGLIGENT BREACH OF A DUTY ARISING FROM
CONTRACT ALONE CAN CONSTITUTE AN INDEPENDENT TORT.

In question two, the Eleventh Circuit asks whether negligent or willful breach of a duty arising from contract can constitute an independent tort. The Eleventh Circuit's statement that there is no controlling precedent of the Supreme Court of Florida on this issue is incorrect.

As stated previously, this Court has consistently held that a person who was tortiously injured has the election to sue in tort or in contract. For example, this Court has allowed a passenger claiming damages for personal injuries resulting from the negligence of a common carrier to sue in tort or in contract for wrongful injury. Doyle v. City of Coral Gables, supra. Similarly, this Court has held that a hospital patient negligently injured by a nurse may sue for breach of the hospital's contract to furnish room and nursing care or for the positive tort committed by the violation of a duty arising out of the assumption of the contractual relationship. Parrish v. Clark, supra. Further, this Court has ruled that even though the plaintiff has the option of which action to bring, it cannot be compelled to bring one rather than the other. Holbrook v. City of Sarasota, supra. The right of action on the contract

and the right to sue for the breach of the collateral duty are distinct, the only limitation on the suit for either being that the same party cannot collect twice for the same wrong.

Parrish v. Clark, supra. Finally, this Court has held that a burglar alarm company under contract to monitor an alarm system may be sued for negligently failing to inform the police or warehouse owner of a trouble signal its employees had received. Nicholas v. Miami Burglar Alarm Co., Inc., 339 So.2d 175 (Fla. 1976).

Since the case cited by the Eleventh Circuit as conflicting with this precedent is of an inferior court, the rulings of this Court prevail. There is controlling precedent of this Court and the answer to the Eleventh Circuit's second question must be "yes".

ARGUMENT

CERTIFIED QUESTION THREE:

AN INDEPENDENT TORT INVOLVING NEGLIGENT BREACH OF A DUTY ARISING FROM CONTRACT CAN BE THE BASIS OF AN AWARD OF PUNITIVE DAMAGES IF THE OTHER CRITERIA FOR AWARDING PUNITIVE DAMAGES ARE MET.

By the form, the Eleventh Circuit answered its own question. In order to meet the other criteria necessary to support an award of punitive damages arising from negligent conduct, the complaining party must prove that the character of negligence in question is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there was an entire want of care which would raise the presumption of conscious indifference to consequences, which shows wantonness or recklessness, or grossly careless disregard of the safety and welfare of the public, or there was reckless indifference to the rights of others which was the equivalent to an intentional violation of them. White Construction Co., Inc. v. DuPont, 455 So.2d 1026 (Fla. 1984).

As stated previously, this Court has consistently held that a person who is tortiously injured has the election to sue in tort or in contract so that negligent breach of contract must be an independent tort. Holbrook v. City of Sarasota, supra; Doyle v. City of Coral Gables, supra; Parrish v. Clark, 145 So.2d 848 (Fla. 1933); Nicholas v. Miami Burglar Alarm

Company, supra. If you assume that a plaintiff can show negligence of a character to justify an award of punitive damages, an assumption implicit in its question, the plaintiff is, therefore, entitled to recover punitive damages in an action for such negligent breach of a duty arising from contract.

CONCLUSION

For the foregoing reasons, the certified questions posed by the Eleventh Circuit should be answered in the affirmative and the cause remanded to the Eleventh Circuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Stephen B. Gillman, Esquire, Shutts & Bowen, Suite 1500, 100 Chopin Plaza-Miami Center, Miami, Florida 33131; and Christopher Lynch, Esquire, Adams, Hunter, Angones, Adams, Adams & McClure, 66 West Flagler Street, Miami, Florida 33130, this 9th day of December, 1986.

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