O.A. 3-7-91 067

IN THE SUPREME COURT OF FLORIDA

MARY EVELYN ELLIS, individually, and as guardian of GILBERT D. ELLIS,

Petitioner,

vs.

CASE NO.: 76,267

N.G.N. OF TAMPA, INC., and NORBERT G. NISSEN,

Respondents.

_____/

RESPONDENTS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Florida Statutes

Laws of Florida

Preface

In this brief, Mary Evelyn Ellis, Plaintiff/Appellant Below, will be referred to as "Petitioner". N.G.N. of Tampa, Inc., and Norbert G. Nissen will be referred to as "Respondents". The record on review will be referred to as (R. Page #). "A#" will reference the Petitioner's Appendix.

Statement of the Case and Facts

This matter is before the Court pursuant to a Notice to Invoke Discretionary Jurisdiction as served by Petitioner on the 3rd day of July, 1990. Petitioner's argument in its Brief on Jurisdiction was that the case sub judice directly and expressly conflicts with the First District's opinion of Pritchard v. Jax's Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), cert. den., 511 (So.2d 298 (Fla. 1987), and the Fifth District's decision in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990). This Court entered its Order Accepting Jurisdiction and Setting Oral Argument on Tuesday, December 11, 1990.

This case brings two issues to the Court: 1) whether Section 768.125 of the Florida Statutes is itself a statutory predicate to a civil cause of action, and 2) whether Section 768.125 provides a first party cause of action for an habitual drunkard who gets himself intoxicated, injures himself because of his intoxication, and seeks to recover. It is the Respondent's position that the answer to both of the foregoing questions is "No."

Without further elaboration, Respondent relies upon its Statement of the Case and Facts as recited in their Answer Brief on the Merits as presented to the Second District Court of Appeal below. Moreover, Respondent asserts that the relevant facts have been adopted and absorbed into the decision of the District Court of Appeal, Second District, in

its Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990) decision, review of which has been brought before this Court by the non-prevailing plaintiff at the trial court and district court appellate level.

The only emphasis which Respondents would place upon the facts of this case for the purpose of this Brief are that 1) the Plaintiff's Complaint did not allege that the bar received the requisite written notice as required as a predicate to liability by Section 562.50, Florida Statutes (1987). (R.8, 25, 45); and 2) that it is Gilbert Ellis through his guardian who claims to have been habitually addicted, who claims to have consumed 20 alcoholic beverages served by Respondent, and who claims that while in an intoxicated state he voluntarily operated his motor vehicle in such a manner so as to cause it to overturn and crash, thereby resulting in brain damage.

Summary of the Argument

Section 768.125 of the Florida Statutes does not create a cause of action but rather serves as a constraint or limitation on the statutory predicate as found elsewhere in the Florida Statutes under Section 562.50. The role of this statute was properly construed by the Second District in its rather lengthy and well-reasoned decision as expressed through the words of its chief judge. The fact that the Second District's opinion conflicts with the First District's opinion in Pritchard v. Jax's Liquor, Inc. is understandable

in light of the fact that Pritchard was shallowly reasoned and was set out in 1986 prior to several Supreme Court decisions which would have steered the First District in the same direction as the Second District.

As to the claimed conflict of the Fifth District's opinion in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990), Sabo does not directly conflict with Ellis v. N.G.N. This is because, apparently, no one argued the two issues presently before the Court in the Sabo case. Rather, Sabo turned upon its facts, and the erroneous conclusion that actual knowledge of a person's habitual addiction to alcohol could be proved through circumstantial evidence.

Lastly, it has never been the intention of any Florida court to allow a first party to consume alcoholic beverages to the point of intoxication, and in an intoxicated state take to the roadways, injure themselves and recover from the party who served them alcoholic beverages. To do so would effectively make every liquor vendor the insurer of every habitual drunkard who was served alcoholic beverages for any injuries which the habitual drunkard may sustain because of his self-proclaimed intoxication. Moreover, to adopt such an argument the Court would have to focus on a remote cause (service) versus the actual proximate cause (consumption).

Argument

The exception contained in Section 768.125 to the absolute bar on liability for the sale of alcoholic beverages which applies to a person who "knowingly serves a person habitually addictedt to the use of any or all alcoholic beverages" must be strictly construed and requires that, before a vendor may be subjected to civil liability for a patron's self-inflicted injuries or injuries to another because of the patron's drunken condition, the vendor must have had written notification that the person served alcoholic beverages is a person habitually addicted; and there is no liability in the State of Florida for service of alcoholic beverages to one who is over the legal drinking age and who, as a result of his own voluntary intoxication, is injured in a one-vehicle accident.

A good starting place for this argument is the year 1980 prior to the effective date of Section 768.125 of the Florida Statutes. At that time, if an habitual drunkard who injured himself wanted to sue for his injuries, then his only cause of action would have arisen under Section 562.50 because there was no liquor liability common law. Section 562.50 reads in pertinent part:

> **Habitual drunkards; furnishing intoxicants to, after notice**
>
> Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to any person habitually addicted to the use of any or all such intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child, or nearest relative that said

> person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Accordingly, without the allegation of written notice as required by Section 562.50, a plaintiff's complaint which attempted to allege liquor liability for service to an habitual drunkard would have been subject to a judgment of dismissal with prejudice. This means that if this Court was reviewing this case prior to the inception of Section 768.125, there would be no question but that the dismissal by the trial court as affirmed by the Second District would be squarely affirmed.

Today, however, we know that in 1980 certain discussions ensued in the Florida Legislature regarding the issue of liquor liability. The central issue of concern to the Florida Legislature was the lack of constraints or limitations upon liquor liability. This problem was made known to the legislators by certain Florida appellate cases which were embarking upon an expansion of liquor liability - that is, a line of cases which attempted to create a a "mere negligence" cause of action for liquor liability in derogation of the common law. See, e.g., USAA v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978).

In responding to this expansion by the courts, the Florida Legislature debated and enacted Section 562.51 of the Florida Statutes, which is today known as Section 768.125. Various parts of that debate were brought to the attention of the Second District Court of Appeal and more recently to this Court in the brief of Petitioner.

To paraphrase the pertinent parts of that debate, there was a deep concern by the Florida Legislature in addressing liquor liability for service to an habitual drunkard. In the legislative discussion it is pointed out that the legislators were concerned about the initial draft of Section 562.51, which required as a condition precedent the misdemeanor conviction as set forth in Section 562.50.

After debate by Representative Gustafson, it was decided that they would lower the standard to a simple violation of Section 562.50 instead of a conviction. (A to Petitioner's Initial Brief on the Merits). The resulting language in Section 562.51 is that which we read today in Section 768.125, (previously Section 562.51).

Thereafter, on or about May 26, 1980, it became known that the then Governor allowed what started as House Bill 1561 to become law without his signature. It was enacted in its present form by the Legislature as Section 562.51 by Chapter 80-37, Laws of Florida. As such, it is clear that it was intended by the Legislature to directly follow Section 562.50. The result being that both Section 562.50 and

Section 562.51 would be consecutively numbered, and both were to be found in the chapter entitled "Beverage Law: Enforcement."

Before Section 562.51 was actually placed in the Statutes, it came under the control of the Joint Legislative Management Committee whose job it became to place the new beverage law into the Florida Statutes. Ultimately, the statute was placed in the "Negligence" chapter and was actually codified as Section 768.125. However, the fact that the statute was codified and placed into the "Negligence" chapter by the Joint Legislative Management Committee has no force or effect on the intent of the Legislature and the effect of the law. This point has already been addressed and discussed at length by this Court in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987).

In Bankston a fallacious argument was made by the plaintiff that because the Legislative Management Committee took Section 562.51 and transferred it to the "Negligence" section that it should provide a negligence cause of action. Bankston, 507 So.2d at 1387. In rejecting this argument, however, along with the argument that the Court should read the plain language of this Statute so as to create a cause of action (in that case against a social host), the Court held:

> [T]o attach legal significance to the placement of 80-37 in the Negligence chapter, instead of its placement in the chapter on beverage law enforcement as directed by the legislature which enacted 80-37, would in effect allow the Joint

> Legislative Management Committee, authorized by Section 11.242(5)(e) to transfer acts, to alter the substance of a statute. This we refuse to do.

Id. at 1387.

In light of the foregoing quote from the Supreme Court, it can only be said that the Petitioner's are now trying to get this Court to do something which it has previously refused to do - that is, elevate the meaning and purpose of Section 768.125.

Having covered, briefly, the historical perspective on liquor liability in the State of Florida prior to and up through the passage of Section 562.51, now 768.125, the question arises of what effect, if any, did or does Section 768.125 have on civil liability. Candidly, perhaps no statute has been more misunderstood or wrongly construed than this statute.

Since the passage of Section 768.125, the Florida Supreme Court has had at least four occasions to directly and expressly rule on the meaning of the Statute: 1) Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984), 2) Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984), 3) Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), and 4) Dowell v. Gracewood Fruit Co., 559 So.2d 217 (Fla. 1990). The issue was also tangentially addressed in Forlaw v. Fitzer, 456 So.2d 432, 433 (Fla. 1984). In each of every one of the foregoing occasions to review the role of the Statute,

this Court has stated and reiterated over and over again the following theme:

> Section 768.125 does not create a cause of action against dispensers of intoxicants, but rather it constitutes a limitation on the already existing liability of commercial vendors of intoxicating beverages.

With the foregoing theme of the Florida Supreme Court and its approach to the role of Section 768.125 in mind, it is illogical and cannot be tenably argued that the Statute now creates a cause of action for Petitioner. An examination of the arguments made by Petitioner and their Amicus demonstrate this to be true.

Amongst the Petitioner's argument is that unlike Section 562.11 which had undergone judicial expansion, Section 562.50 had never been construed and, therefore, never underwent judicial expansion. Thus, the Petitioner's argue, how could the Legislature have passed this Statute to limit an expansion which had not yet occurred. Closer scrutiny of the existing case law at the time and the passage of the Statute is illuminating.

First, there were only two decisions prior to the passage of Section 768.125 which addressed liquor liability for service to a minor: Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963), and Prevatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967). In Davis, the Supreme Court held that a violation of Section 562.11 was negligence per se so as to support an

action for damages in favor of an underaged drinker, himself, or his survivors. Prevatt expanded this in favor of third persons. In other words, neither of these two decisions expanded liquor liability beyond the purview of Section 562.11. So, then, where was this alleged expansion which the legislature was concerned about when it was having its discussions in 1980 which led up to the passage of Section 562.51. The answer is found in cases such as USAA v. Butler, 359 So.2d 498.

In Butler the plaintiff tried to sue under Section 562.11 and under some negliecne theory regardless of the Statute. Although the Butler court disallowed the latter, nevertheless it was an issue. This, evidently, was the proposed expansion. The limitation of this expansion appeared in the first sentence of Section 768.125.

More specifically, it is clear from the passage of Section 768.125 that it was intended to be an anti-dram shop statute versus a dram shop statute. In other words, the statute was designed to stop or limit liability, not create liability. This is shown in the legislative history wherein Representative Gustafson, after proposing his amendment, states, "It still is a reverse dram shop act,... ." (A. to Petitioner's Initial Brief on the Merits.)

In its introductory phrase the Statute effectively codified the common law wherein it provides that "a person who sells or furnishes alcoholic beverages to a person of

lawful drinking age shall not thereby become liable for injury or damage... ." Apparently, since this Statute could have been construed to totally wipe out liquor liability in the State of Florida (i.e., totally override Section 562.11 and Section 562.50), the Florida Legislature went on to engraft these two exceptions into the Statute. The only changes to the engraftment were made by Rep. Gustafson who was concerned that a conviction of Section 562.50 would be too high a standard. (A. to Petitioner's Initial Brief on the Merits.) The result being that the requirement of a conviction under this Statute was stricken by the amendment as discussed above.

The Petitioner's second approach is to attack the idea that Section 562.50 and Section 562.51 (previously Section 768.125), should be read in para materia. Their attack on the in para materia construction of the two consecutively numbered statutes is predicated upon the ill-reasoned decision of the First District Court's opinion of Pritchard v. Jax's Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), cert. den., 511 So.2d 298 (Fla. 1987). Close scrutiny of the Pritchard decision shows why it does not withstand present-day scrutiny.

The Pritchard decision declined to read in para materia Section 768.125 and Section 562.50 for three principle reasons: 1) because the Pritchard court thought that Section 768.125 creates a new right in members of the general public,

2) because the Pritchard court concluded that Section 768.125 was not a penal statute, but was rather passed in derogation of the common law to create a new right, and 3) because Section 562.50 and Section 768.125 were passed at different times. All three conclusions are erroneous.

Attacking the first argument, assuming one is to accept the rule as set forth by the Supreme Court in Migliore, Armstrong, Bankston, and Dowell, one would have to conclude that Section 768.125 does not create a new cause of action, but rather limits pre-existing liability. In other words, either the Pritchard court is right that the Statute creates a "new right" or the Supreme Court in four of its decisions on the issue is wrong.

Second, to come to the conclusion that Section 768.125 is not a penal statute one would have to ignore the genesis of the statute and overbroaden the power of the Joint Legislative Management Committee. That is, one would have to ignore that Section 768.125 is, in fact, a "dyed in the wool" penal statute which was originally number 562.51. Moreover, one would have to elevate the power of the Joint Legislative Management Committee to a committee which can create a cause of action by the shifting of any statute into the "Negligence" section. This is essentially what is offered by the Petitioner in its lengthy discussion of Section 11.242(1) of the Florida Statutes.

The only concession which Petitioner is willing to admit is found on Page 24 in an "even-if" argument which essentially suggests that even if one were to follow what the Florida Supreme Court said in Bankston, nevertheless other "considerations" should countervail. This statement by the Petitioner suggests that this Court should somehow overlook Bankston, somehow overlook the fact that Section 768.125 was originally passed as 562.51, and, finally, ignore the fact that the Joint Legislative Management Committee cannot create a civil predicate by simply transferring a beverage law into the "Negligence" section. What the Petitioner's would have this Court do is overlook all of these things and rule in favor of other "considerations."

As to the third argument of the Pritchard court, this is perhaps the most meritless. According to the Pritchard court on Page 928 and continuing on 929, Section 562.50 and Section 768.125 should not be read together because they were "enacted at different times for entirely different purposes." It is presumed the First District could have only made this statement because the attorneys that came before them did not enlighten them as to the legislative history of the Statute, the prevailing case law at the time, and the interplay between Section 562.11 (the Statute which serves as a predicate for service to minors) and Section 768.125.

In making the statement as recited immediately above from Page 129 of the Pritchard decision, the First District

could not have been aware of the legislative discussions which have been brought to the attention of the Second District and this Court. Obviously, if they had been aware, they would have known that Section 768.125 was created as a statutory limitation on the broadening liability as discussed by this Court at length in the Bankston decision.

Moreover, the First District must not have been aware of the fact that Section 768.125 was originally passed as 562.51. Not only is it not discussed in the case, but to make the statement that it was enacted for an entirely different purpose would be to overlook the fact that it was passed as a beverage law.

Lastly, the First District makes a point of the fact that Sections 768.125 and 562.50 were passed at different times. This is true, but so too were Section 768.125 and Section 562.11, the Statute which is used as a predicate for civil liability for service to a minor. In fact, Section 562.11 was enacted as Chapter 16774, Section II, Laws of Florida, in 1935. Notwithstanding its passage at that time, the courts have not hesitated to construe that Statute in para materia with Section 768.125 to create a civil cause of action today. Accordingly, it is incongruous that a court should not read Section 562.50, which was passed in 1945 as Chapter 22633, Laws of Florida, in para materia with Section 768.125.

The bottom line is that if the Court can read together a 1935 statute with a 1980 statute, then why cannot the Court read together a 1945 statute with a 1980 statute which was sequentially numbered with the former statute.

In sum, if the First District were to decide Pritchard today, it would necessarily have to change its rationale and conclusion. Today the First District would have the benefit of at least four Florida Supreme Court decisions instructing them that Section 768.125 does not create an independent cause of action but rather limits other pre-existing causes of action. Second, they would know that Section 768.125 was originally passed as a penal statute numbered 562.51 and was merely transferred into the "Negligence" section by the Legislative Management Committee. Finally, and most important, they would know that in order to create a civil cause of action for service of alcohol to a minor the courts must read together Section 562.11, a statute passed in 1935, along with Section 768.125. They would also know, therefore, that one must read Section 562.50, a 1945 statute, along with Section 768.125 to create a cause of action for service to a habitual drunkard.

The Petitioner's also discussed the Fifth District's decision in Sabo v. Shamrock Communications, Inc. Notably, Sabo does not directly address any of the issues before the Court in this appeal, although a favorable ruling for

Respondents in the instant case would effectively eradicate the plaintiff's claim in Sabo.

In Sabo, the Fifth District held, on the facts as presented in the trial court, that a liquor liability plaintiff for service of alcohol to an habitual drunkard could prove actual knowledge of the addiction through circumstantial evidence. Therefore, apparently, a tacit issue in the Sabo case is whether or not actual knowledge of the standard versus written notice. To affirm Sabo this Court would have to directly deviate from its own language that Section 768.1254 does not create a cause of action itself, but rather limits pre-existing liability. In other words, this Court would have to now hold that 768.125 does create an independent cause of action.

Lastly, there is a tangential issue which this Court must address - that is, whether, assuming Section 768.125 creates a cause of action, there exists a first party cause of action for an alcohol addict who consumes alcoholic beverages, voluntarily takes to the road and as a result of their intoxication injures themselves. In other words, is there a cause of action for "I got myself drunk and hurt myself, and now I'm going to sue you!"? The answer is "no" for two reasons.

The first reason is because it is the actual consumption of the alcohol, not the service, which is the proximate cause of the intoxication and injury. See, Reed v. Black Caesar's

Forge Gourmet Restaurant, Inc., 165 So.2d 787 (Fla. 3d DCA 1964). In Reed the plaintiff's estate brought a complaint that alleged that the defendants, as operators of a liquor-dispensing establishment, wrongfully caused the death of the decedent. It was alleged that the decedent became intoxicated at the establishment and thereafter defendants' servant gave to the decedent the ignition keys and the possession of his car which he then operated in such a manner as to cause his own death. The complaint was dismissed by the trial court, upon defense motion, for failure to state a cause of action.

The rationale of the Reed court was that "the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing the liquor, or delivering the ignition keys and possession of the automobile." 165 So.2d at 788. A similar result was reached in Clyde Bar, Inc. v. McClamma, 10 So.2d 916 (Fla. 1942), where an intoxicated plaintiff was denied recovery because of her own intoxication and drunkenness which were determined to be the proximate cause of her injuries versus the actual service of the alcohol.

The Reed rationale of lack of proximate causation was adopted into the decision of Goodell v. Nemeth, 501 So.2d 36 (Fla. 2d DCA 1986). In Goodell the Second District analyzed a scenario where the plaintiff sued for negligent entrustment

of a loaded firearm. The basis for the negligent entrustment was his own intoxication. In other words, the plaintiff brought a lawsuit alleging that the defendant should not have entrusted him with a gun because of the plaintiff's own intoxication. In denying recovery to the plaintiff, the court held:

> We can conclude as a matter of law the injury was shown to be the proximate causation of the Plaintiff's own negligence and that the Plaintiff cannot shield himself from his own negligence by his voluntary intoxication. See, Reed v. Black Caesar's Forge Gourmet Restaurant, inc., 165 So.2d 787, 788 (Fla. 3d DCA 1964), cert. den., 172 So.2d 597 (Fla. 1965) ... See also, Personal Representative of the Estate of Starling v. Fisherman's Pier, Inc., 401 So.2d 1136 (Fla. 4th DCA 1981), pet. rev. den., 411 So.2d 381 (Fla. 1981), which departed from Black Caesar's Forge only on the basis that the intoxicated person in Fisherman's was owed a duty by the defendant's commercial establishment on whose premises he was seen in eminent danger prior to losing his life from the danger which was easily avoidable by the defendant. See also, Barnes v. B.K. Credit Service, Inc., 461 So.2d 219 (Fla. 1st DCA 1984), pet. rev. den., 467 So.2d 999 (Fla. 1985).

501 So.2d at 37.

A similar result has been achieved in reviewing other similar statutes, such as Section 371.54(1) of the Florida Statutes, and Section 790.17 of the Florida Statutes.

In Strickland v. Roberts, 382 So.2d 1338 (Fla. 5th DCA 1980), the plaintiff was skiing behind a boat which did not have a water ski watcher in violation of Section 371.54(1) of

the Florida Statutes. As such, violation of this Statute was negligence per se. However, according to the Strickland facts, on one lap the plaintiff swung out to the side of the boat to cause a "spray", collided with a piling on the dock, and was seriously injured. In arguing for recovery, the plaintiff asserted that a violation of Section 371.54 was negligence per se. He was, however, denied recovery.

In denying the plaintiff recovery in Strickland, the court held that it was the plaintiff's voluntary actions and the manner in which he was skiing that was the proximate cause of the accident and, therefore, recovery was denied. 382 So.2d 1339. See also, Landers v. Milton, 370 So.2d 368 (Fla. 1979).

Similarly, in Green v. Evans, 232 So.2d 424 (Fla. 1st DCA 1970), the First District construed Section 790.17 of the Florida Statutes involving the sale of weapons "to any person of unsound mind... ." In reviewing certain facts where the complaining plaintiff who shot himself claimed to be a "person of unsound mind", the Green court held that the statute was not designed or intended to protect the purchaser of the weapon from injuries to himself, but rather was designed to protect innocent third parties.

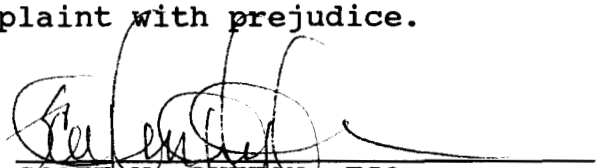
And, finally, most recently the Third District had the opportunity to decide the case of Bennett v. Godfather's Pizza, Inc., ____ So.2d ____, 15 FLW D2778 (3d DCA Nov. 13, 1990). The Bennett case involved the issue of liquor

liability and also Section 768.125 as it related to an employee of the defendant who allegedly drank alcoholic beverages and was involved in an accident injuring the plaintiff. In denying recovery to the plaintiff, the Bennett decision turned upon the rationale that civil liability cannot be attached against a drinking establishment for injuries or harm to the individual who actually consumed the alcoholic beverages as opposed to innocent third parties. The Appellate Court noted "the rationale for not holding the establishment liable is that the voluntary drinking of the alcohol, not the furnishing of the alcohol, is the proximate cause of the injury."

In sum, the proximate cause of Ellis' claim to injuries is the consumption of the alcohol, not the service. Moreover, to hold the bar liable in a "I got myself drunk and hurt myself" case would essentially make the liquor vendor the insurer of the addict's safety. Rather, it is better to let addict's take care of themselves.

CONCLUSION

This Court should approve the decision of the District Court of Appeal, Second District, affirming the Trial Court's dismissal of Petitioner's complaint with prejudice.



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Certificate of Service

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