IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,181

ALLIED-SIGNAL INC., formerly known as GARRET AIRESEARCH MANUFACTURING COMPANY OF CALIFORNIA, Appellant, vs. KEVIN FOX, Appellee.	**ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT** Florida Bar No. 333761

REPLY BRIEF OF APPELLANT, ALLIED-SIGNAL, INC.

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ISSUE

WHETHER, IN DETERMINING A PARTY'S "PERCENTAGE OF FAULT" PURSUANT TO SECTION 768.81(3), FLORIDA STATUTES, IT IS NECESSARY TO CONSIDER THE FAULT OF ALL PARTIES INVOLVED IN AN ACCIDENT, NOT JUST THOSE PARTIES NAMED AS DEFENDANTS IN A LAWSUIT.

ARGUMENT

IN DETERMINING A PARTY'S "PERCENTAGE OF FAULT" PURSUANT TO SECTION 768.81(3), FLORIDA STATUTES, IT IS NECESSARY TO CONSIDER THE FAULT OF ALL PARTIES INVOLVED IN AN ACCIDENT, NOT JUST THOSE PARTIES NAMED AS DEFENDANTS IN A LAWSUIT.

Appellee, Fox, has argued in his answer brief that Section 768.81(3), Florida Statutes, is ambiguous and then appellee has proceeded to catalog a number of supposed conflicts with existing Florida Statutes that would result if Section 768.81(3) is applied to permit consideration of the fault of a non-party in apportioning damages. Appellant, Allied Signal, will show the court that none of appellee's arguments in regard to the statute's alleged ambiguity have any merit and that the asserted conflicts with existing statutes are imaginary rather than real.

Fox has also argued that the apportionment issue was not preserved in the trial court and that there was no factual basis for finding negligence on the part of Fox's non-party employer, Eastern. Appellant, Allied, will show the court that these arguments are without merit and were specifically rejected by the Eleventh Circuit Court of Appeals.

A. The Statute is Not Ambiguous.

Section 768.81(3), Florida Statutes, clearly and unambiguously provides for the complete abrogation of joint and several liability for non-economic damages. The statute specifically provides that "the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability".

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With regard to economic damages, joint and several liability is only partially abrogated because joint and several liability for economic damages is retained "with respect to any party whose percentage of fault equals or exceeds that of a particular claimant". The legislature focused on a party's "percentage of fault", and clearly that percentage can only be determined by consideration of the fault of all parties to an accident. The statute is clear and unambiguous and its words should be given their plain and simple meaning. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

Appellee's first argument in regard to the statute's alleged ambiguity is that in the case at bar the Eleventh Circuit Court of Appeals certified the apportionment issue to this Court because the Eleventh Circuit concluded the apportionment statute was ambiguous. That is clearly not the case. At no point in its certification opinion did the Eleventh Circuit ever state that the statute was ambiguous. *Fox v. Allied-Signal, Inc.*, 966 F.2d 626 (11th Cir. 1992). As set forth in the opinion, the certification was based on the conflict between the decision of the Fifth District Court of Appeal in *Messmer v. Teachers Insurance Co.*, 588 So. 2d 610 (Fla. 5th DCA 1991), *rev. denied*, 598 So. 2d 77 (Fla. 1992) and the decision of the Third District Court of Appeal in *Fabre v. Marin*, 597 So. 2d 883 (Fla. 3d DCA 1992). The certification was, therefore, appropriate because "two cases conflict directly on [a] question of law dispositive of the instant matter . . ." 966 F.2d at 627.

Appellee next points out that a couple of states have adopted a version of the Uniform Comparative Fault Act which limits apportionment to "claimants, named defendants, persons who have been released from the action, and third-party defendants". (Brief of Appellee, p. 13) That observation does not aid appellee's argument at all because the Florida legislature did

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not adopt the language of the Uniform Act or any similar limiting language. Because the Florida legislature in no way limited application of the apportionment statute to defendants involved in a lawsuit, apportionment must necessarily include consideration of the fault of all parties involved in an accident.

Appellee next argues that the Florida legislature could have adopted a statute similar to Indiana's which specifically refers to the fault of a non-party. Ind. Code §34-4-33-5(a)(1) (1984). While the Florida legislature could have chosen to refer to non-parties, it was unnecessary to do so. By referring to a party's "percentage of fault" it is obvious that the legislature intended that a jury should consider all fault that contributed to an accident, not just the fault of the named defendants. In addition, the reference to the fault of a non-party in the Indiana statute was necessary because that statute specifically provided that the claimant's employer was not to be considered a "non-party". Ind. Code §34-4-33-2(a) (1984). The reference to a non-party had to be made in order to preclude consideration of the fault of the claimant's employer. The Florida legislature, on the other hand, did not choose to exclude the claimant's employer from consideration in apportioning damages, so it was unnecessary to refer to non-parties or to specify which non-parties could be considered in apportioning damages.

Appellee further argues that its position is supported by decisions from other jurisdictions but that is clearly not the case. Most of the cases cited by appellee are from jurisdictions that still adhered to the doctrine of joint and several liability at the time the decisions were filed. Since those jurisdictions did not have a statute similar to Florida's apportionment statute, those cases are totally inapplicable and of no value whatsoever. *See*

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Mills v. Brown, 303 Or. 223, 735 P.2d 603 (Or. 1987) (Oregon later partially abolished joint and several liability, *see* Or. Stat. §18.485 (1987)); *National Farmers Union Property and Cas. Co. v. Frackleton*, 662 P.2d 1056, 1060 (Colo. 1983) (Colorado later partially abolished joint and several liability, *see* Colo. Rev. Stat. §13-21-111.5 (1986)); *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033, 1037 (Mass. 1983); *Heckendorn v. Consolidated Rail Corp.*, 502 Pa. 101, 465 A.2d 609, 612 (Pa. 1983); *Sugue v. F.L. Smithe Machine Co.*, 56 Haw. 598, 546 P.2d 527, 528 (Haw. 1976) (Hawaii later partially abolished joint and several liability, *see* Haw. Rev. Stat. §663.10.9 (1986)).

In *Lake v. Construction Machinery, Inc.*, 787 P.2d 1027 (Alaska 1990), cited by appellee, the Supreme Court of Alaska considered whether the fault of a claimant's employer could be considered in apportioning damages. The court ruled that the employer's fault could not be considered because Alaska's comparative fault statute only allowed the jury to allocate fault to "each claimant, defendant, third-party defendant, and person who has been released from liability . . ." 787 P.2d at 1030. The court concluded that "an employer does not fit easily within any of these categories" because of the exclusive liability provisions of Alaska's worker's compensation statute. *Id.* The *Lake* case is inapplicable to the case at bar because the Florida legislature did not adopt any language limiting apportionment to specific parties to a lawsuit.

Similarly, in *Jarrett v. Duncan Thecker Associates*, 175 N.J. Super 109, 417 A.2d 1064 (N.J. Super. 1980), the court ruled that an employer's fault could not be considered in apportioning damages because New Jersey's comparative fault statute only permitted the jury to determine the "percentages of negligence of all the parties to a suit . . . " 417 A.2d at

1065. While recognizing that courts in other jurisdictions permitted apportionment of fault to non-parties, *see*, e.g. *Connar v. West Shore Equipment of Milwaukee*, 68 Wis.2d 42, 227 N.W.2d 660 (1975), the court stated:

> The statute clearly limits the jury's deliberations to parties to the suit, rather than parties to the transaction. I am constrained to be guided by this legislative mandate although the holding in *Connar* provides a more rational basis for the triers of the facts to resolve the issue of comparing negligence.

417 A.2d at 1065. Because Florida's statute does not limit apportionment to parties to the suit, the *Jarrett* case is also inapplicable.

In short, not a single argument raised by appellee to support the contention that Section 768.81(3) is ambiguous has any merit whatsoever. Tellingly, appellee (and the amicus) ignored the numerous cases from other jurisdictions which have held that apportionment cannot be achieved unless consideration is given to the fault of all parties involved in an accident, not just the parties to a lawsuit. *See, e.g. Prince v. Leesona Corp., Inc.*, 720 F.2d 1166, 1168-69 (10th Cir. 1983) (applying Kansas law); *Johnson v. Niagara Machine & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981) (applying Minnesota law); *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238, 243-45, 828 P.2d 140 (Cal. 1992); *Bode v. Clark Equipment Co.*, 719 P.2d 824, 827 (Okla. 1986); *Bowman v. Barnes*, 168 W. Va. III, 282 S.E. 2d 613, 621 (W. Va. 1981); *Pocatello Industrial Park Co. v. Steel West, Inc.*, 101 Idaho 783, 621 P.2d 399, 402-03 (Idaho 1980); *Paul v. N.L. Industries, Inc.*, 624 P.2d 68, 70 (Okla. 1980); *Lines v. Ryan*, 272 N.W. 2d 896, 902 (Minn. 1978); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867, 875-76 (Kan. 1978); *Connar v. West Shore Equipment of Milwaukee, Inc.*, 68 Wis. 2d 42, 227 N.W. 2d 660, 662 (Wis. 1975); *Payne v. Bilco Co.*, 54 Wis. 2d 424, 195 N.W. 2d 641, 645-46 (Wis. 1972).

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The amicus makes no reference whatsoever to the California Supreme Court's unanimous decision in *DaFonte v. Up-Right, Inc.*, *supra*, and appellee refers to it only in passing. That case is factually and legally indistinguishable from the case at bar, and there the California Supreme Court held that a statute strikingly similar to Section 768.81(3) was clear, plain and unambiguous and that the statute required consideration of the fault of non-parties, including an employer, in apportioning damages. Appellee concedes that in *DaFonte* the California Supreme Court "did conclude that a statute similar in wording to Florida's [Section 768.81(3)] required consideration by the jury of an immune, non-party employer's comparative negligence in the employee's third-party tort suit." (Brief of Appellee, p. 24) Appellee tries to distinguish *DaFonte* by asserting, incorrectly, that California's worker's compensation act is dramatically different than Florida's. That argument completely overlooks the fact that the California Supreme Court did not base its decision on the California worker's compensation act. Instead, the court focused on the language of the apportionment statute and held that it clearly and unambiguously required consideration of the fault of all parties involved in an accident. 828 P.2d at 145. The court also correctly pointed out that the statute [like Florida's statute] neither stated nor implied an exception for damages attributable to the fault of persons who are immune from liability or who were not joint tortfeasors. *Id.*

Because the Florida statute, like the California statute, is clear and unambiguous, there is no need to resort to rules of statutory interpretation. The statute must be given its plain and obvious meaning. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984); *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960); *Engelwood Water District v. Tate*, 334 So. 2d 626 (Fla. 2d DCA 1976). In *Tropical Coach Line, Inc.*, this court stated:

> In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.

121 So. 2d at 182.

In, *DaFonte, supra*, the California Supreme Court concluded that Section 1431.2 of the California Civil Code unambiguously provided for consideration of the fault of non-parties by providing that: "Each defendant shall be liable only for the amount of damages allocated to the defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." The court also stated that:

> [S]ection 1431.2 itself contains no ambiguity which would permit resort to . . . extrinsic constructional aids. The statute plainly attacks the issue of joint liability for noneconomic tort damages root and branch. In every case, it limits the joint liability of every "defendant" to economic damages, and it shields every "defendant" from any share of noneconomic damages beyond that attributable to his or her own comparative fault. The statute contains no hint that a "defendant" escapes joint liability only for noneconomic damages attributable to fellow "defendants" while remaining jointly liable for noneconomic damage caused by others.

828 P.2d at 145.

Because the Florida statute, like the California statute, clearly shields any "party" from any share of noneconomic damages beyond that attributable to his or her own "percentage of fault", appellant respectfully submits that this court should hold, as the unanimous California Supreme Court held, that the statute is unambiguous and does not permit resort to extrinsic rules of construction. The statute plainly says that a court "shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine

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of joint and several liability." If the fault of a non-party is not taken into consideration, then the result would be joint and several liability, which the statute clearly precludes.

In *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990), this court held that joint and several liability has been abrogated in this state except for the three limited situations set forth in Section 768.81, which are (1) as to economic damages, "with respect to any party whose percentage of fault equals or exceeds that of a particular claimant"; (2) in cases involving claims for economic damages arising from pollution, intentional torts and actions where joint and several liability is provided for by specific statutes; and (3) as "to all actions in which the total amount of damages does not exceed $25,000." This court then stated that "[i]n light of this express legislative pronouncement" application of joint and several liability in other circumstances "would be contrary to the policy of this state." *Conley*, 570 So. 2d at 285. Unless a case falls within one of the three exceptions specifically listed in Section 768.81, a defendant's liability is several, and not joint and several. A consideration of all fault involved in an incident is the only way to insure that a party is found liable for its "percentage of fault".

B. Rules of Statutory Construction are Inapplicable and Would Not Preclude Consideration of the Fault of a Non-Party in Apportioning Damages.

After devoting only three pages of a thirty-three page brief to the weak and unpersuasive argument that Section 768.81(3), Florida Statutes, is ambiguous, appellee then proceeds to list various rules of statutory construction which purportedly would lead to the conclusion that the apportionment statute does not require consideration of the fault of non-parties. All of the asserted arguments are without merit. *See State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973) (rules of construction are useful only in case of doubt and should never be used to create doubt).

Appellee first quotes extensively from the Legislative Staff Analysis of Chapter 86-160, but to no avail. The Staff Analysis simply summarizes the doctrine of joint and several liability and then summarizes the provisions of Section 768.81. There is no language anywhere in the Analysis which states that in apportioning damages a jury may only consider the fault of named defendants in a lawsuit.

Appellee also recites the general rule that statutes in derogation of the common law are to be strictly construed. That rule is not in any way contrary to appellants position that joint and several liability has been abrogated in Florida except in the three limited circumstances specified in Section 768.81.

Appellee next argues that repeals by implication are not favored and then conjures up imaginary conflicts between the abrogation of joint and several liability under Section 768.81 and existing Florida statutes. Appellee places primary reliance on the preposterous argument that Section 768.81 (the apportionment statute) "conflicts" with Section 768.31 (the contribution statute). Appellee then argues that Section 768.81 should have no force or effect whatsoever, stating that "because the contribution statute still exists, it must be utilized to obtain apportionment of damages among joint tortfeasors, irrespective of what §768.81(3) may say." (Brief of Appellee, p. 21) In other words, appellee would have this court believe that because the contribution statute predated the apportionment statute, there can be no apportionment, even among joint tortfeasors who are named defendants in a lawsuit.

Appellee's argument in regard to the contribution statute is totally lacking in merit. The contribution statute is of no practical value whatsoever in a case such as *Walt Disney World v. Wood*, 515 So.2d 198 (Fla. 1987), where a defendant with a deep pocket who was only one

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percent at fault was held liable for eighty-six percent of the plaintiff's damages because the joint tortfeasor co-defendant was apparently judgment proof. Section 768.81 was enacted precisely to cure this inequity and to insure that a defendant could only be held liable for its percentage of fault. If appellee is correct in asserting that there is a conflict between Section 768.81 and Sections 768.31, and the earlier enacted statute must prevail, then there could be no apportionment in any case, including a case involving the facts present in *Wood*. There is no conflict whatsoever between Section 768.81 and Section 768.31. Contribution is only effective where all responsible parties are solvent, and that is the very reason the Florida legislature abolished joint and several liability except in three limited circumstances.

Appellee's secondary argument in regard to statutory conflicts is that Section 768.81 somehow conflicts with various statutes permitting setoffs. This argument is also lacking in merit because any practical application of those statutes would apply the set off to the full amount of damages assessed by the jury, not the lesser amount a partially at fault defendant was required to pay.

Appellee also argues that application of Section 768.81(3) to a non-party employer would conflict with Florida's worker's compensation act. First, the compensation act only permits recovery of very specific economic damages. There can, therefore, be no conflict between the act and the portion of Section 768.81(3) which completely abolishes joint and several liability for noneconomic damages. As to economic damages, joint and several liability still applies to any party whose percentage of fault equals or exceeds that of a particular claimant. In addition, the compensation act specifically provides for a reduction in the amount of any lien where the employee does not recover the full value of damages sustained because

of comparative negligence or because of limits of insurance coverage and collectibility. There is, therefore, no conflict between the apportionment statute and the worker's compensation act.

Appellee's argument in regard to Florida Standard Jury Instruction 6.1b does not support the assertion that Section 768.81 precludes consideration of the fault of a non-party. The instruction simply deals with the "standard" situation where all culpable parties are named as defendants. The instruction does not address at all the "non-standard" situation where culpable parties are not named as defendants in a lawsuit.

There is also no support for appellee's position in the report of the Academic Task Force. To the contrary, that report supports appellant's position. The report specifically states at page 53 that: "Florida's 1986 Act adopts several (proportionate) liability, except for intentional torts, designated statutory torts, negligence judgments not exceeding $25,000.00, and for economic damages as against a defendant who is not less negligent than plaintiff." The Task Force also correctly pointed out at pages 53-54 that, "[t]he basic argument in favor of abolishing joint and several liability is that, once the comparative fault principle is accepted as governing liability, no defendant should have to pay more than the share of damages that corresponds to his share of fault." That is precisely Allied's position. Allied should not be forced to pay more than the share of damages that corresponds to its fault and that share can only be determined by considering the fault of all parties who contributed to the accident in question.

C. Appellants Preserved the Apportionment Issue in the Trial Court and There Were Facts in the Record Demonstrating Negligence on the Part of the Non-Party Employer.

Appellee has also argued that this court's decision will not be "determinative of the cause" unless this court also decides whether Allied adequately preserved its apportionment argument in the trial of this case before the Southern District of Florida and whether the record showed negligence on the part of the non-party employer. First of all, those procedural issues were not certified by the Eleventh Circuit. Second of all, the Eleventh Circuit Court of Appeals was furnished with briefs dealing with those issues, the court had the record available to it and heard oral argument in this case. The court's certification of the apportionment issue obviously means that the court considered and rejected appellee's arguments in regard to those issues.

As pointed out in greater length in the briefs filed with the Eleventh Circuit, the apportionment issue was preserved in the trial court because Allied submitted a proposed jury verdict form which would have allowed the jury to apportion fault to the non-party employer, Eastern. (R1-28-16-17, Allied's proposed and rejected jury verdict form permitting apportionment). The form was self-explanatory, but rejected by the trial court because the court ruled that there could be no apportionment of fault to a non-party. In addition, Allied raised the apportionment issue in post-trial motions, and Fox responded, without arguing that the apportionment issue was not preserved. (R1-35-12). Fox has, therefore, waived any arguments in regard to preservation. In its certification opinion, the Eleventh Circuit recognized that Allied raised the apportionment issue in the trial court, stating: "The trial court denied Allied's request to allow the jury to consider and assess non-party Eastern's percentage of fault, if any, under Florida's Tort Reform Act, Fla. Stat. §768.81 (1989). The court interpreted the statute to allow apportionment of fault only among the parties to the suit." 966 F.2d at 627.

Appellee has also argued that there was no factual basis for submitting the issue of Eastern's fault to the jury. That assertion was also rejected by the Eleventh Circuit. In stating the facts of this case in its certification opinion, the Eleventh Circuit noted that when Fox was injured while repairing a fan, the fan did not have a safety screen on it. In discussing Eastern's acts of negligence, the court stated:

> Eastern Airlines and its employee, Kevin Fox, failed to place a guard or screen over the fan. Eastern Airlines was nonetheless aware of the OSHA requirement that guarding be placed over rotating machines to protect operators from hazards, 29 C.F.R. §1910.212 (1991). Further, Eastern had established a system for using safety screens, it had instructed its employees on the use of such screens, and it had regularly scheduled maintenance programs to educate its employees on these procedures. Apparently, this accident occurred during a strike against Eastern, and Mr. Fox, as well as other employees, had only been engaged in this type of work for a short period of time. As "new hires," these individuals were given some training but there is a serious question about its adequacy and what was in fact covered.

966 F.2d at 626-27.

At trial, the court gave a specific instruction, without objection from Fox, which set forth the applicable OSHA regulation requiring a guard, and also provided that:

> You are instructed that a violation of this Statute is negligence. The Defendant alleges that Eastern Airlines and Kevin Fox both violated this Statute. If you find that either Kevin Fox or Eastern Airlines violated this Statute, then either or both were negligent.

(R1-20-11; 3SR-44-45). In addition, Fox's own expert at trial testified that Fox and his employer, Eastern, were negligent in failing to comply with the OSHA regulation. (2SR-29-34)

There was obviously a more than adequate factual basis for the jury to find negligence on the part of the non-party employer, Eastern. As already found by the Eleventh Circuit, "Eastern . . . failed to place a guard or screen over the fan" despite Eastern's awareness of the

OSHA requirement that a guard was necessary." 966 F.2d at 626. In addition, the record raised "a serious question" about the adequacy of Fox's training by Eastern. 966 F.2d at 627. Appellees arguments in regard to preservation and the factual basis in the record for Eastern's negligence have no merit and have already been rejected by the Eleventh Circuit.

CONCLUSION

Based on the foregoing authorities, this court should answer the certified question from the United States Court of Appeals for the Eleventh Circuit in the affirmative and hold that Section 768.81(3), Florida Statutes, requires consideration by the jury of a non-party's percentage of fault in order to properly determine what portion of a plaintiff's damages is attributable to a party defendant.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was duly furnished by mail to DONALD T. NORTON, ESQUIRE, Cohen & Cohen, P.A., Co-Counsel for Appellee, 2525 North State Road 7 (441), Hollywood, Florida 33021; G. WILLIAM BISSETT, ESQUIRE, Preddy, Kutner, Hardy, Rubinoff, Thompson, Bissett & Bush, Co-Counsel for Plaintiff, Co-Counsel for Appellee, 501 Northeast First Avenue, Miami, Florida 33132; MARGUERITE H. DAVIS, ESQUIRE, Katz, Jutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., Attorneys for Amicus Curiae, American Insurance Association, Highpoint Center, Suite 1200, 106, East College Avenue, Tallahassee, Florida 32301; SHARON LEE STEDMAN, ESQUIRE, De Ciccio & Associates, P.A., Attorneys for Amicus Curiae Florida Defense Lawyers Association, 20 North Orange Avenue, Suite 807, Orlando, Florida 32801; and to JOEL D. EATON, ESQUIRE, Podhurst, Orseck, Josefsberg, Eaton,

Meadow, Olin & Perwin, P.A., Attorneys for Academy of Florida Trial Lawyers, 25 West Flagler Street, Suite 800, Miami, Florida 33130, on this 18th day of December, 1992.

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