

ORIGINAL

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE FIFTH DISTRICT COURT OF APPEALS

JACQUIN CLIFFORD, et al.,

:

Plaintiffs-Appellants,

:

Case No. 10-0807

-vs-

:

Court of Appeals

Case No. 09 CA 0082

LICKING BAPTIST CHURCH, et al.,

:

Defendants-Appellees.

:

MEMORANDUM OF DEFENDANT-APPELLEE LONNY ALESHIRE, SR.
IN OPPOSITION TO JURISDICTION

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A
CASE OF PUBLIC OR GREAT GENERAL INTEREST.....1.

STATEMENT OF THE CASE AND FACTS.....2.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....6.

Proposition of Law No. 1: Religious Institutions Have No
Affirmative Duty To Put A Policy In Place Whereby No
Adult Can Be Alone With A Child.....6.

CONCLUSION.....13.

CERTIFICATE OF SERVICE.....14.

**EXPLANATION OF WHY THIS CASE IS NOT A
CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This is not a case of public or great general interest. Appellee certainly agrees with Appellants that it is of the utmost importance to take reasonable measures to protect children from abuse. Where Appellants' position diverges from that of Appellee—and from the holdings of courts in Ohio—is in the means that Appellants believe should be utilized in order to protect children from abuse.

The Appellants in this case do more than simply argue that churches have a moral responsibility to prevent child abuse. In fact, Appellants do even more than ask that churches implement a policy aimed at preventing child abuse. It is Appellants' position that a church should be obligated by law to implement a very specific policy whereby no adult would ever be allowed to be alone with a child. The practical implications of such a policy would be that a church or other institution would be required to provide two adults who would be present around children at all times.

One cannot fathom the social upheaval that would occur if this Court held that all churches or other institutions where children are present are required to provide a team of two adults to supervise the children. Appellants themselves recognize that many religious institutions have daycare and school programs affiliated with the institution. This duty would therefore be placed upon all parochial schools and daycare centers. Moreover, this duty would extend to public schools and private secular youth organizations, as sexual abuse of children is just as likely to occur in public schools as it is in parochial schools.

Thus, by creating such a duty in Ohio, each and every school or daycare center would be required to provide two teachers for every classroom. *Schools and daycare centers would be obligated to double the amount of teachers that are currently on staff.* Placing a duty upon these

schools to hire twice the amount of teachers that are currently on staff would have disastrous consequences.

It is common knowledge that some schools in Ohio are currently struggling to remain open as it is. The policy that is advocated by Appellants would force all of the under-funded schools to close, as such schools would be financially incapable of hiring dozens of new teachers. This policy would cause many more schools in Ohio to experience financial hardship. The Ohio school system, both private and public, simply could not sustain a two-teacher-to-every-classroom policy. This Court should not accept this case for review because the policy that Appellants demand is simply not a reasonable solution to preventing child abuse. A two-teacher-to-every-classroom policy cannot be the law of the land. It must be rejected.

Moreover, this is not a case of great interest for this Court because this is not a situation in which there are inconsistent holdings among the appellate courts in Ohio. As far as Appellee Aleshire Sr. is aware, Appellants are the only individuals who have ever argued in an Ohio court that the law should place an affirmative duty on a church or other institution to execute a policy whereby two adults would be required to be with a child at all times. There is no conflicting case law in the appellate courts on the issue of whether a religious institution has such a duty. This is the only case in Ohio on this issue. Only Appellants have set forth this novel argument. Thus, this is not a case in which review by the highest court in the land is proper.

STATEMENT OF THE CASE AND FACTS

At all relevant times, Appellee Lonny Sr. was the pastor of Appellee Licking Baptist Church, where his role as pastor was to preach, teach, and counsel his congregation. Lonny Sr. did not have any employees or personnel, and so he was not responsible for supervising anyone at Licking Baptist Church.

At all relevant times, Lonny Jr. was a parishioner at Licking Baptist Church. He also acted as a volunteer choir director in the church. Lonny Jr. never received compensation for his volunteer work at Licking Baptist Church.

From February of 1994 until May of 2004, Appellants Thomas Cottrell and Joanna Cottrell, who are husband and wife, and their two daughters, Appellants Jacquin Clifford¹ and Sandra Cottrell,² were parishioners at Licking Baptist Church.

Throughout the entire time that they were members of Licking Baptist Church, none of the Appellants ever told Lonny Sr. that they were concerned that Lonny Jr. was having improper relations with Sandra. Similarly, none of the Appellants ever expressed to Lonny Sr. that they had any concern about impropriety that occurred or may occur between Lonny Jr. and Jacquin. Because Lonny Sr. never saw or heard anything that would give him reason to be concerned, Lonny Sr. never suspected that there was anything improper occurring between Lonny Jr. and Sandra or between Lonny Jr. and Jacquin.

Like Lonny Sr., Mr. and Mrs. Cottrell did not suspect that Lonny Jr. was having an abusive relationship with either Sandra or Jacquin or that he could not be trusted around children. Both Mr. and Mrs. Cottrell testified that they trusted Lonny Jr., as they had never heard anything in the community that would make them feel otherwise. Because of this trust, Mrs. Cottrell admitted that she never told Sandra that she was not allowed to be alone with Lonny Jr.

Appellee Reverend Robert M. Cassady, who acted as a “pastor to pastors” at Licking Baptist Church, did call Lonny Sr. on the telephone and inform him about a single conversation that he had with Mrs. Cottrell sometime between May and October of 2004. Mrs. Cottrell had met with Cassady in order to discuss some concerns she had regarding Licking Baptist Church.

¹ Jacquin reached the age of majority on January 2, 2006.

² Sandra reached the age of majority on August 3, 2007.

As she was getting ready to leave, Mrs. Cottrell mentioned in passing that she was concerned that there was some unaccounted for time during which Lonny Jr. and Sandra were together.

After speaking with Cassady, Lonny Sr. immediately arranged a meeting between himself, Lonny Jr., and Cassady. Lonny Sr. questioned Lonny Jr. about any possible impropriety between him and Sandra. Lonny Jr. told his father that he had dropped off and picked up Sandra from babysitting on several occasions, but he denied having an inappropriate relationship with her. Lonny Sr. warned Lonny Jr. that not only would he not tolerate impropriety, but he would also not tolerate the appearance of impropriety. At no time, in this conversation or otherwise, was Lonny Sr. made aware that Lonny Jr. spent time alone with Sandra at Licking Baptist Church.

Appellants allege that from early 2003 until late 2004, Lonny Jr. engaged in numerous consensual sexual acts with Sandra Cottrell, some of which allegedly occurred on the premises of Appellee Licking Baptist Church. Appellants also allege that in June of 2004, Lonny Jr. raped Jacquin Clifford on the premises of Appellee Licking Baptist Church.

In early 2005, Lonny Jr. was arrested and charged with various crimes as a result of the allegations of Jacquin and Sandra. After Lonny Jr. was arrested, the executive board of Licking Baptist Church felt that it would be a good idea for Lonny Jr. to address the church via phone from the Licking County Jail. Lonny Sr. had no role in this decision. Lonny Jr.'s speech to the congregation concerned the power of forgiveness and love. He did not discuss or address in any way his pending criminal case. Also in early 2005, the Licking Baptist Church held a candlelight vigil. However, this vigil was not held on Lonny Jr.'s behalf. They prayed for the officers, each inmate, and the ministry. At no time did Lonny Sr. ratify the acts of Lonny Jr. nor could he

ratify any improper acts, because Lonny Sr. has always believed that his son was innocent of the charges against him.

On April 17, 2007, Plaintiffs-Appellants filed a lawsuit against Lonny Aleshire, Jr., Lonny Aleshire, Sr., Licking Baptist Church, Reverend Dr. Lawrence O. Swain, Reverend Robert Cassady, American Baptist Churches of Ohio, American Baptist Churches of U.S.A., Columbus Baptist Association, and several John/Jane Does, which arose from the alleged rape of Jacquin Clifford (formerly Cottrell) by Lonny Jr. and the alleged sexual relationship between Lonny Jr. and Sandra Cottrell. Appellants subsequently amended their Complaint to add additional causes of action. The causes of action that Appellants asserted against Lonny Sr. are: 1) *respondeat superior*; 2) intentional infliction of emotional distress; 3) defamation; 4) civil conspiracy; 5) negligent supervision and retention; and 6) violation of the Ohio Pattern of Corrupt Activities Act.

On August 4, 2008, Appellee Lonny Sr. filed a Motion for Summary Judgment, which requested the dismissal of all claims asserted against him. Defendants Licking Baptist Church, Reverend Swain, Reverend Cassady, American Baptist Churches of Ohio, American Baptist Churches of U.S.A., and Columbus Baptist Association also filed motions for summary judgment.

On September 17, 2008, the trial court granted summary judgment in favor of Appellee Lonny Sr. The trial court also granted summary judgment in favor of the other above-named Appellees on varying dates. On June 11, 2009, Appellants voluntarily dismissed Lonny Jr. from the action.

On June 15, 2009, Appellants filed their Notice of Appeal of the trial court's decision. As to Lonny Sr., Appellants appealed the trial court's dismissal of the *respondeat superior* and

negligent supervision and retention claims. They did not appeal the trial court's dismissal of the defamation, civil conspiracy, intentional infliction of emotional distress, and violation of the Ohio Pattern of Corrupt Activities Act claims. On March 26, 2010, the Fifth District Court of Appeals affirmed the decision of the trial court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Religious Institutions Have No Affirmative Duty To Put A Policy In Place Whereby No Adult Can Be Alone With A Child.

The elements of a claim for negligent hiring, supervision, and retention are: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's knowledge of the employee's incompetence, (4) the employee's act or omission causing the plaintiff's injuries, and (5) a causal link between the employer's negligence in hiring, supervising, and retaining and the plaintiff's injuries.³ *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, 872 N.E.2d 295, at ¶ 42, citing *Harmon v. GZK, Inc.* (Feb. 8, 2002), 2d Dist. No. 18672, at *41-42; *Doe v. Archdiocese of Cincinnati*, 167 Ohio App. 3d 488 2006-Ohio-2221, 855 N.E.2d 894, at ¶ 27. A plaintiff must also show that the employee's act was reasonably foreseeable. *Id.*, citing *Steppe v. Kmart Stores* (1999), 136 Ohio App.3d 454, 465, 737 N.E.2d 58. An act is reasonably foreseeable if the employer knew or should have known of the employee's "propensity to engage in similar criminal, tortious, or dangerous

³ Appellants engage in a discussion of the elements of a common law negligence claim. Appellants' Memo. in Support of Jurisdiction at 9. A cursory glance at Appellants' Amended Complaint will reveal that they did not plead a claim for common law negligence against Lonny Sr.; their claim is actually one of negligent supervision and retention.

However, regardless of whether Appellants' claim is one of negligence or negligent supervision and retention, both claims require the employee's act to be reasonably foreseeable in order for the employer to be liable. See *Doe v. Archdiocese of Cincinnati*, 167 Ohio App. 3d 488, 2006-Ohio-2221, 855 N.E.2d 894, at ¶ 27, quoting *Wagoner v. United Dairy Farmers, Inc.* (Nov. 17, 2000), 1st Dist. No. C-990767, at *4; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614.

conduct." *Id.*, citing *Wagoner v. United Dairy Farmers, Inc.* (Nov. 17, 2000), 1st Dist. No. C-990767, at *4. Similarly, in a common law negligence claim, the existence of a duty depends on foreseeability of harm. *Wallace v. Halder*, 8th Dist. No. 92046, 2009-Ohio-3738, at ¶ 30, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.*, quoting *Menifee*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707. Foreseeability of harm usually depends on a defendant's knowledge. *Id.*, citing *Menifee*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

Both the trial court as well as the Fifth District Court of Common Pleas reviewed the applicable case law and concluded that there is no affirmative duty placed upon a church or religious institution to implement a policy whereby no adult is permitted to be alone with a child. Appellants have failed to identify any case in which a court held that it is reasonably foreseeable that any adult would sexually abuse a child if that adult was left alone with that child. Appellants have failed to identify any case in which a court held that an employer/principal has a duty to prevent all adults from being un-chaperoned with children. Appellants have failed to identify any case in which a court held that an employer/principal who permits an adult to be unsupervised with a child is automatically liable if that adult sexually abuses that child.

No court in Ohio has held that churches are required to implement such a rigid, hard-to-enforce policy. Appellants' suggestion that this Court should find that such a duty does exist is a request that this Court create new law.

Not only is Appellants' position not supported by Ohio law, but it directly contradicts the currently case law regarding negligent supervision and common law negligence claims. As demonstrated above, there can be no recovery in a negligent supervision claim unless the

employee's act was reasonably foreseeable. Similarly, a legal duty in the context of a common law negligence claim depends on whether the particular harm that had manifested was foreseeable.

It is Appellants' position that the sexual wrongdoing of Lonny Jr. was foreseeable because there is a number of reported cases of sexual abuse that occurred in a religious institution. In other words, Plaintiffs are arguing that the foreseeability of sexual abuse in this case is based solely on the fact that there have been a number of sex abuse scandals in the news involving priests and religious leaders. Thus, they reason, it is reasonably foreseeable that any adult who is left alone with a child would sexually abuse that child, and as such, there should be a duty to put a policy in place which prohibits adults from being alone with children.

The position that all adults are potential child-molesters is extreme and was directly rejected by the lower courts. The trial court found Appellants' position that it is reasonably foreseeable that any adult who is left alone with a child would sexually abuse that child to be "unsupported and unreasonable":

As to plaintiffs' contention that Aleshire, Sr. is at fault for not establishing a church policy concerning supervision of children, they cite no authority that such a duty exists. A reasonably prudent person does not anticipate the sexual assault of a child any time a child is left alone with an adult. Plaintiffs' contention that sexual assault is reasonably foreseeable any time a child is left alone with an adult member of the congregation is unsupported and unreasonable.

September 17, 2008 Opinion in *Clifford v. Licking Baptist Church*, Licking Cty. Case No. 2007 CV 00589, at 5. The appellate court concurred with the trial court that a reasonably prudent person would not anticipate that a child would be sexually assaulted whenever left alone with an adult. Appellants' Memo in Support of Jurisdiction, Exhibit A at 12.

In arguing that the sexual abuse perpetrated by Lonny Jr. was foreseeable simply on account of the recent sex scandals in churches, Appellants misapply the term "foreseeability" as

it is used in a legal context. In Ohio, the issue of whether an event is foreseeable such that a legal duty arises is not based on statistical data of how often similar events have occurred in society. Rather, foreseeability is based on whether it is foreseeable that the event would occur *based on the facts and circumstances of that particular case*. See *Doe v. Archdiocese of Cincinnati*, 167 Ohio App. 3d 488, 2006-Ohio-2221, 855 N.E.2d 894, at ¶ 27 (“An act is reasonably foreseeable if the employer knew or should have known of the employee's ‘propensity to engage in similar criminal, tortious, or dangerous conduct.’”).

Thus, a court will find that sexual assault by an individual was foreseeable only when *that particular individual* had a history of sexual improprieties. See *Prewitt v. Alexson Servs., Inc.*, 12th Dist. No. 2007-09-218, 2008-Ohio-4306, at ¶¶ 31-35 (where the court held that an employee's rape by a co-worker was not foreseeable because there was no evidence that the co-worker committed other crimes during his employment and no evidence that he had a propensity to commit a sexual assault); *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, 786 N.E.2d 94, at ¶¶ 63-65 (where the court held that it was not foreseeable that an Ohio Highway State Patrol instructor would have sexual relations with a student where all of his previous sexual affairs occurred outside the scope of employment); *Doe v. Beach House Dev. Co.* (2000), 136 Ohio App.3d 573, 581-82, 737 N.E.2d 141 (where the court held that it was not foreseeable that a thirteen-year-old boy would sexually molest an eight-year-old boy living in the same apartment complex where the thirteen-year-old had no history of sexual misbehavior prior to that incident); *see also Wallace v. Halder*, 8th Dist. No. 92046, 2009-Ohio-3738, at ¶¶ 33-41 (where the court held that it was not foreseeable that a graduate student would break into a school building using a sledgehammer and proceed to shoot and kill another graduate student because that particular student had no criminal record and no history of violent behavior);

Campbell v. Sharpe, 1st Dist. No. C-070564, 2008-Ohio-3163, at ¶¶ 7-8 (where the court held that it was not reasonably foreseeable that a six-year-old would lose control of his bicycle and run into the plaintiff because that particular six-year-old did not have a propensity to fall off his bike and had never crashed into anyone).

Thus, accepting Plaintiffs' argument that such a duty exists would create a shift in the way courts in Ohio analyze whether an event is considered to be "foreseeable" under the law. An act or event would be considered to be foreseeable any time similar events were reported to have occurred in other situations. The lack of a criminal record, history of violence, sexual misconduct, or other wrongdoing on the part of an individual who harmed a plaintiff would be irrelevant. Such a shift in the law would open the floodgates and create an abundance of new cases in Ohio. More and more employers and principals would be hauled into court where they had no reason to suspect that their employee/agent would cause harm to another. Recognizing the danger, this Court should preserve the current law in Ohio regarding foreseeability whereby foreseeability is based on whether the particular individual in the case previously manifested a propensity to engage in the alleged behavior.

Applying the currently law regarding foreseeability, the evidence in the record established that Lonny Sr. did not know and had no reason to know that there was an inappropriate relationship going on between Lonny Jr. and Sandra or that Lonny Jr. could not be trusted around minors. Neither Appellants nor anyone else gave Lonny Sr. reason to know of Lonny Jr.'s impropriety. Lonny Jr. never admitted to Lonny Sr. that he was having a sexual relationship with Sandra or with any other minor. Moreover, Mr. and Mrs. Cottrell themselves testified that they trusted Lonny Jr. and had no reason to believe that he would sexually abuse their daughters. It was simply not reasonably foreseeable that Lonny Jr. would have a sexual

relationship with Sandra or rape Jacquin because no one—not Lonny Sr., Mr. Cottrell, or Mrs. Cottrell— had any evidence that would make them believe that Lonny Jr. should not be trusted around Sandra, Jacquin, or any other minor.

Appellants make reference to pornography that was allegedly found on Lonny Jr.'s laptop work computer. While Lonny Jr. worked at the Department of Youth Services, a co-worker was going over files on a laptop computer and he claims to have discovered pornography on it. Lonny Jr. did not have the laptop at the time.

This investigation in no way supports Appellants' contention that it was reasonably foreseeable that Lonny Jr. would sexually abuse a child for several reasons. First, an investigation was conducted and Lonny Jr. was exonerated by his employer. As such, the suspicion regarding the workplace computer amounted to nothing more than unsubstantiated accusations from which he was later exonerated. Moreover, *assuming arguendo* that Lonny Jr. did possess pornography of *adults* on his work computer, this in no way makes it reasonably foreseeable that he would sexually abuse a *child*.

Most importantly, Mrs. and Mr. Cottrell repeatedly testified that they trusted Lonny Jr., that they allowed him to be alone with Sandra, and that they had no reason to suspect that he would abuse children. Although Mrs. and Mr. Cottrell were aware of the investigation by Lonny Jr.'s employer, they obviously did not feel that it was foreseeable that Lonny Jr. would sexually abuse their children. If the work investigation did not put Sandra and Jacquin's own parents on notice that Lonny Jr. may harm them, then certainly Lonny Sr. cannot be liable for failing to be on notice. As such, the fact that Lonny Jr. was investigated and exonerated does not make it reasonably foreseeable that he would engage in sexual misconduct with Sandra or Jacquin.

Appellants also refer to a single instance in which Mrs. Cottrell mentioned to Robert Cassady that there was unaccounted for time during which Lonny Jr. and Sandra were together. However, none of the Appellants ever approached Lonny Sr. and gave him any reason to suspect that Lonny Jr. was engaging in appropriate behavior with Sandra. Moreover, when Cassady mentioned the unaccounted for time to Lonny Sr., he immediately conducted an investigation, whereby Lonny Jr. told Lonny Sr. that nothing inappropriate was happening between him and Sandra. Therefore, although Lonny Sr. knew that Lonny Jr. and Sandra were spending time together, he had absolutely no reason to suspect that their relationship was a sexual one. Moreover, no one—not Appellants, nor Cassady, nor anyone else—gave Lonny Sr. a reason to suspect that anything improper would happen between Lonny Jr. and Jacquin.

Appellants take issue with the fact that Lonny Sr. did not “follow up” with Mrs. Cottrell after the meeting with Cassady. Mrs. Cottrell herself admitted that she only mentioned her concern to Cassady once. When Cassady informed him, Lonny Sr. immediately reacted to Mrs. Cottrell’s concern by approaching Lonny Jr. and questioning him. Lonny Sr. did not “follow up” or take any other action because Lonny Sr. had no reason to believe that Mrs. Cottrell’s concerns had not been put to rest. Without having any indication from Appellants that the situation did not resolve itself after his meeting with Lonny Jr., Lonny Sr. cannot be deemed liable for failing to take further steps.

Finally, Appellants argue that there is evidence that those at Licking Baptist Church knew or had reason to know that leaving an adult alone with a child would lead to abuse because they considered putting such a policy in place. According to Appellants, this is evidence that a policy should have been required because it is the standard of care as set forth in the community.

Such an argument is without merit. No one in the record testified that he or she believed that they were *required by law* to put such a policy in place. The pastors of Licking Baptist Church may have wished to take precaution by prohibiting unsupervised adult-minor interaction. They were certainly allowed to take *more* precaution than was required by law. This does not mean that a failure to take extra precaution made them liable under Ohio law. Moreover, the Fifth District Court of Appeals concluded that Appellants have not provided any authority demonstrating that it is a common practice among churches to have such a policy. Appellants' Memo. in Support of Jurisdiction, Exhibit A at 11. There is no evidence demonstrating the percentage of churches that have such a policy. There is no evidence that the churches that have implemented such a policy are not the exception rather than the rule.

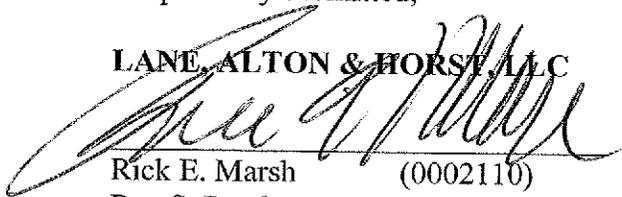
It is one thing to argue that a church should be encouraged to voluntarily adopt a particular policy that is geared towards preventing child abuse. It is another thing to hold that a church has an *affirmative duty* under law to do so such that the church could be held legally responsible for failure to do so, even in cases in which it was not foreseeable that a particular individual would abuse a child. There is no evidence that *any court throughout the United States* has found the existence of such a duty. This Court should reject Appellants' position and should thus decline to accept jurisdiction.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Lonny Aleshire Sr. respectfully requests that this Court decline jurisdiction in this case and dismiss the appeal filed by Plaintiffs-Appellants.

Respectfully submitted,

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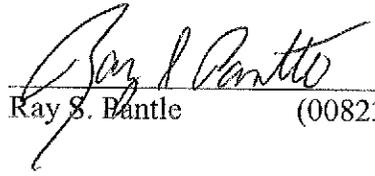
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following, by ordinary, U.S. Mail, postage prepaid, this 17th day of May, 2009.

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