KASHI LAW LETTER
A Synopsis of Florida Case Law

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TORTS: NEGLIGENCE: PREMISES LIABILITY: SLIP AND FALL: SECTION 768.0755, FLORIDA STATUTES, WHICH REQUIRES EVIDENCE OF ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF A TRANSITORY FOREIGN SUBSTANCE, DOES NOT APPLY RETROACTIVELY TO ACCIDENTS THAT OCCURRED BEFORE JULY 1, 2010: EVIDENCE THAT DEFENDANT HAD EXCLUSIVE CONTROL OF PREMISES FROM WHICH PUDDLE OF WATER FLOWED CREATED AN INFERENCE OF NEGLIGENT MAINTENANCE OR MODE OF OPERATION; CIVIL PROCEDURE: SUMMARY JUDGMENT REVERSED: APPEALS: CONFLICT CERTIFIED

Glaze v. Worley, ___ So. 3d ___, 40 Fla. L. Weekly D555
(Fla. 1st DCA March 3, 2015)

While walking with his sister in a mall, a boy slipped and fell in a puddle of water that originated from the defendant's business establishment. The trial court entered summary judgment for the defendant based upon its lack of actual or constructive knowledge of the presence of the puddle. The appellate court reversed because Section 768.0755, Florida Statutes, which imposes an actual or constructive knowledge requirement in transitory foreign substance cases, may not be applied retroactively before its effective date of July 1, 2010. The First District agreed with the Fourth District that Section 768.0755 created a substantive change in the law because the statute it replaced, Section 768.0710, Florida Statutes, did not require evidence of actual or constructive notice of transitory foreign substances. The First District disagreed, and certified conflict, with the Third District, which held that Section 768.0755 merely created a procedural change in the burden of proof. "[U]nder section 768.0710, Florida Statutes, a plaintiff could succeed in a slip and fall case where he or she could show negligence on the part of the business 'by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises.'" "Allegations of such active negligence exist[ed] in this case. Because there [was] no evidence that anyone other than [defendant's] employees [were] allowed on the [side of the door from which the puddle originated], it [could] reasonably be inferred that there was a lack of reasonable care (negligence) on the part of [the defendant] in either the maintenance of the premises or in the mode of operation of the business which allowed the water to flow into the common area. Under such circumstances, summary judgment is inappropriate." Judge Benton concurred in Judge Wolf's majority opinion, and Judge Makar concurred and specially concurred in a written opinion.

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GUARDIANSHIP: INCAPACITATED PERSONS: AN ALLEGED INCAPACITATED PERSON IS NOT REQUIRED TO PAY THE FEES AND COSTS ASSOCIATED WITH A PETITION TO DETERMINE INCAPACITY BROUGHT IN GOOD FAITH BUT IN WHICH INCAPACITY WAS NOT FOUND: COURT URGES LEGISLATURE TO CLARIFY WHO IS RESPONSIBLE FOR PAYING COURT APPOINTED ATTORNEY'S FEES IN THIS SITUATION

Steiner v. Steiner, ___ So. 3d ___, 40 Fla. L. Weekly D559 (Fla. 2d DCA March 4, 2015)

The son and daughter filed petitions to determine that their parents were incapacitated. Although the petitions were brought in good faith, the court appointed examining committee found that the parents were not incapacitated. As a result, the trial court dismissed the petitions and ordered the parents to pay fees to their court appointed attorneys. The appellate court reversed based upon a prior decision in which it "determined that chapter 744 [Florida Statutes] does not require the alleged incapacitated person to pay fees and costs where the petition to determine guardianship and incapacity is brought in good faith but incapacity is not found and guardianship is not established." The court lamented that its holding left court appointed attorneys "with a right without a remedy;" Although court appointed attorneys are entitled to fees, under the court's holding, no one is responsible to pay them. The court "urge[d] the legislature to address the statutory gap by clarifying which party is responsible for paying the attorney's fees in this situation."

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REAL ESTATE: WHEN ONE JOINT TENANT DIED, THE PROPERTY PASSED TO THE OTHER JOINT TENANTS BECAUSE THE DEED CREATED A JOINT TENANCY WITH RIGHT OF SURVIVORSHIP: ABSENCE OF UNITIES OF POSSESSION, INTEREST, TITLE, AND TIME WAS IRRELEVANT BECAUSE RIGHT OF SURVIVORSHIP WAS BASED UPON THE LANGUAGE OF THE DEED RATHER THAN THE NATURE OF THE TENANCY

Simon v. Koplin, ___ So. 3d ___, 40 Fla. L. Weekly D561 (Fla. 2d DCA March 4, 2015)

The deed conveyed a 2/3 interest in real property to A, a single man, and a 1/3 interest, to B & C, a married couple, as joint tenants with full rights of survivorship. When A died, the trial court ruled that the property passed to B & C, and the appellate court affirmed. "Section 689.15, [Florida Statutes], abolishes the right of survivorship in real and personal property held by joint tenants except in cases of estates by the entireties or in tenancies in common

where the instrument creating the estate shall expressly provide for the right of survivorship." Although "the unities of possession, interest, title, and time are required to create a true joint tenancy. . . . [t]he right of survivorship [in this case did] not depend on the nature of the tenancy but on the express provision in the deed."

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REAL ESTATE: MORTGAGE FORECLOSURE: NOTICE OF DEFAULT: FORBEARANCE AGREEMENT WAIVED NOTICE OF DEFAULT ONLY DURING THE FORBEARANCE PERIOD; CIVIL PROCEDURE: SUMMARY JUDGMENT FOR LENDER REVERSED

Hatadis v. Achieva Credit Union, ___ So. 3d ___, 40 Fla. L. Weekly D562 (Fla. 2d DCA March 4, 2015)

The borrowers contended that the lender was not entitled to foreclose because paragraph 22 of their mortgage entitled them to cure within thirty days after notice of default, but the lender's notice stated that it had already accelerated and required immediate cure. The trial court ruled that the borrowers waived compliance with paragraph 22 by entering into a forbearance agreement, which required interest only payments for a six month period and waived the borrowers' right to notice of default. The appellate court reversed because the borrowers fully performed their obligations under the forbearance agreement almost two years before notice of acceleration was provided, and the waiver applied only to the period while the forbearance agreement was in effect.

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TORTS: MEDICAL MALPRACTICE: PRESUIT SCREEN REQUIREMENTS: ALTHOUGH CORROBORATING MEDICAL AFFIDAVIT LACKED DETAIL, TRIAL COURT DID NOT DEPART FROM ESSENTIAL REQUIREMENTS OF LAW BY DENYING DEFENDANT'S MOTION TO DISMISS THE COUNTS OF COMPLAINT THAT THE AFFIDAVIT ADDRESSED, BUT TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW BY NOT DISMISSING COUNT AFFIDAVIT FAILED TO ADDRESS; APPEALS: CERTIORARI

University of South Florida Board of Trustees v. Mann, ___ So. 3d ___, 40 Fla. L. Weekly D563 (Fla. 2d DCA March 4, 2015)

Although it found that the plaintiff's corroborating medical affidavit in a medical malpractice case "could [have been] more detailed, [the appellate court could not] conclude that the trial court departed from the essential requirements of law by denying the [defendant's] motion to dismiss" the counts of the complaint that the affidavit addressed. On the other hand, the trial

court did depart from the essential requirements of law by failing to dismiss a count based upon the negligence of the defendant's nursing staff and supervisor because the affidavit did not deal with this issue.

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FAMILY LAW: CHILD SUPPORT: CIVIL PROCEDURE: RELIEF FROM JUDGMENT: CLERICAL MISTAKES: IMPUTATION OF MEDIAN INCOME, RATHER THAN MINIMUM INCOME, WAS A SUBSTANTIVE, RATHER THAN A CLERICAL, ERROR THAT SHOULD HAVE BEEN ADDRESSED BY MOTION FOR REHEARING OR APPEAL RATHER THAN MOTION FOR RELIEF FROM JUDGMENT UNDER FLA. R. CIV. P. 1.540(a): MISTAKE ARISING FROM DELIBERATE CHOICE IS NOT CLERICAL ERROR

Department of Revenue v. Annis, ___ So. 3d ___, 40 Fla. L. Weekly D565 (Fla. 2d DCA March 4, 2015)

The Department of Revenue (DOR) filed a petition for support against the father. The trial court's amended final judgment imputed income at the median income level, but a successor judge relied upon *Fla. R. Civ. P.* 1.540(a) to enter a second amended final judgment that reduced the imputation of income to the minimum wage level. The appellate court reversed. Rule 1.540(a) may be used to correct clerical, but not substantive, errors. "The successor judge's findings . . . indicate[d] that she believed that the median wage level imputation of income was the result of a mistaken view of the facts or law and that there had been a due process violation at the hearing on DOR's motion to vacate. But those types of errors are judicial errors that must be addressed by appeal and not by rule 1.540(a). Consequently, because the trial court lacked jurisdiction under rule 1.540(a) to reduce the imputation of income on these facts, it committed fundamental error when it vacated the amended final judgment of support and entered the second amended final judgment of modification to correct error." A clerical error does not occur when the mistake is the product of a deliberate choice.

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REAL ESTATE: MORTGAGE FORECLOSURE: LONG TERM LEASE: QUIET TITLE; CIVIL PROCEDURE: SUMMARY JUDGMENT: ERROR TO GRANT SUMMARY JUDGMENT ON GROUND NOT RAISED BY MOTION FOR SUMMARY JUDGMENT: ISSUES OF FACT EXISTED

WHETHER LEASE PAYMENTS WERE SUBJECT TO ABATEMENT DURING FORECLOSURE PROCESS

HSBC Mortgage Corporation (USA) v. Mullan, ___ So. 3d ___, 40 Fla. L. Weekly D567 (Fla. 2d DCA March 4, 2015)

The lender included the lessor as a defendant in an action to foreclose on the 99 year lease on a condominium unit. The lessor filed a counterclaim to quiet title to the unit based on the premise that the mortgage attached only to the borrower's leasehold estate, which had terminated because of his failure to pay rent. The lender opposed the lessor's motion for summary judgment based upon insufficiency of notice to the lender of unpaid rent. The trial court granted summary judgment for the lessor because the lease entitled only institutional mortgagees to notice of default, and the mortgage identified MERS as the mortgagee. The appellate court reversed because the lessor never argued in the trial court that the lender was not entitled to notice but only that notice was sufficient. "[T]he trial court committed reversible error in granting summary judgment on an issue not raised by [the moving party]." In addition, material issues of fact existed whether the lease payments were subject to abatement during the foreclosure process.

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FAMILY LAW: REAL ESTATE: RIGHT OF FIRST REFUSAL: FORMER HUSBAND'S EMAIL STATING THAT HE WAS EXERCISING HIS RIGHT OF FIRST REFUSAL TO PURCHASE THE MARITAL HOME IMPLICITLY ADOPTED ALL THE TERMS OF THE THIRD PARTY CONTRACT AND PERFECTED HIS RIGHT OF FIRST REFUSAL: FORMER WIFE'S REPLY EMAIL, WHICH INTRODUCED NEW TERMS NOT FOUND IN THE LISTING ORDER, CONSTITUTED A BREACH

Castelli v. Castelli, ___ So. 3d ___, 40 Fla. L. Weekly D570 (Fla. 4th DCA March 4, 2015)

The trial court entered a Listing Order requiring the parties to sell the marital home but providing the former husband with a right of first refusal. When a third party made an offer to purchase the home, the former husband's lawyer sent an email to the former wife's lawyer exercising the right of first refusal. The former wife's lawyer replied within thirty eight minutes, giving the former husband the option of (1) within one hour and thirty nine minutes, preparing, signing, and delivering a matching contract and proof of ability to pay or, (2) within five hours and thirty nine minutes, signing the third party contract. When the former husband did neither, the trial court granted the former wife's motion to hold him in contempt for failing to execute the offer. The appellate court reversed. "[Because] a right of first refusal inherently requires the holder of the right to accept the same terms and conditions as the third party offer, [the court] h[e]ld that [the former husband's] email stating that he was exercising his right of first refusal implicitly adopted all the terms of the third party contract. . . . Therefore, [the former husband's] email contained sufficient language [properly to] exercise his right of first refusal under the Listing Order." "[The former wife's] introduction of new terms, not found in the Listing Order, in her reply email was a rejection of [the former husband's] right of first refusal and, as such, constituted a breach of the newly formed contract. In the face of such a breach, [the former husband could not] be blamed for failing to draft and sign a contract, complete with proof of ability to pay, within an hour and a half."

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CIVIL PROCEDURE: SANCTIONS: ATTORNEY'S FEES: TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEY'S FEES AGAINST DEFENDANTS AND THEIR LAWYER FOR FILING A MOTION TO DISMISS AND MAKING ARGUMENTS IN SUPPORT OF THE MOTION THAT THEY SHOULD HAVE KNOWN WERE UNSUPPORTED BY THE FACTS AND THE LAW AND BY OBSTRUCTING THE DISCOVERY THAT REVEALED THEIR POSITION WAS FRIVOLOUS: TRIAL COURT ERRED BY AWARDING COSTS BECAUSE SECTION 57.105 DOES NOT PROVIDE A MECHANISM FOR RECOVERING COSTS

Pronman v. Styles, ___ So. 3d ___, 40 Fla. L. Weekly D572 (Fla. 4th DCA March 4, 2015)

The appellate court affirmed the imposition of sanctions under Section 57.105, Florida Statutes, because of the existence of competent substantial evidence that the defendants and their lawyer knew or should have known that their motion to dismiss based upon lack of personal jurisdiction and improper venue "were unsupported by the facts and the law" and thwarted discovery dealing with the issues raised by their motion. "In their motion, the [defendants] represented that they had no ties to Broward County and they and their corporate entity did business only in Canada," but the discovery that the defendants "vociferously" opposed ultimately provided "overwhelming evidence . . . that the [defendants] and their corporate entity conducted their business in Broward County, Florida." The trial court erred, however, by awarding costs because "section 57.105 does not provide a mechanism for recovering costs."

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INSURANCE: BAD FAITH: PREMATURE BAD FAITH ACTION; CIVIL PROCEDURE: DISCOVERY: CLAIMS FILE: BUSINESS POLICIES OR PRACTICES; APPEALS: CERTIORARI: CERTIORARI GRANTED AS TO PREMATURE BAD FAITH DISCOVERY: CERTIORARI DENIED AS TO DENIAL OF MOTION TO DISMISS PREMATURE BAD FAITH ACTION WITHOUT PREJUDICE TO FILING MOTION TO ABATE IN TRIAL COURT

United Automobile Insurance Company v. Riverside Medical Associates, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D574 (Fla. 4th DCA March 4, 2015)

The appellate court granted the insurer's petition for certiorari as to an order granting premature bad faith discovery. "[U]ntil the obligation to provide coverage and damages has been determined, a party is not entitled to discovery related to the claims file[] or to the insurer's business policies or practices regarding handling of claims." The appellate court denied the insurer's petition for certiorari as to the denial of its motion to dismiss the premature bad faith claim but did so without prejudice to filing a motion to abate in the trial court.

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REAL ESTATE: MORTGAGE FORECLOSURE: CONDITION PRECEDENT: FINAL JUDGMENT OF MORTGAGE FORECLOSURE REVERSED AND REMANDED FOR DISMISSAL OF ACTION BECAUSE OF LENDER'S FAILURE TO COMPLY WITH NOTICE OF DEFAULT PROVISION OF MORTGAGE

Blum v. Deutsche Bank Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D574 (Fla. 4th DCA March 4, 2015)

The appellate court reversed final judgment of mortgage foreclosure and remanded for dismissal of the action because the lender failed to comply with paragraph 20 of the mortgage, which required notice of breach and a reasonable opportunity to take corrective action.

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ARBITRATION: AN AGREEMENT TO ARBITRATE FUTURE DISPUTES IN ANOTHER JURISDICTION IS VOIDABLE UNDER THE FLORIDA ARBITRATION CODE (FAC) BUT NOT UNDER THE FEDERAL ARBITRATION ACT (FAA): AN EMPLOYMENT AGREEMENT BETWEEN A FLORIDA RESIDENT AND A NONRESIDENT CORPORATION IMPLICATES INTERSTATE COMMERCE AND IS GOVERNED BY THE FAA: ARBITRATION OF A WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM DOES NOT VIOLATE THE PUBLIC POLICY: EMPLOYER DID NOT WAIVE ITS RIGHT TO ARBITRATE WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM BY FAILING TO DEMAND ARBITRATION OF WORKER'S COMPENSATION CLAIM: THREAT TO FIRE PLAINTIFF

IF HE DID NOT SIGN EMPLOYMENT CONTRACT WAS INSUFFICIENT TO CONSTITUTE DURESS: AGREEMENT TO ARBITRATE WORKER'S COMPENSATION RETALIATORY DISCHARGE CLAIM WAS NOT SUBSTANTIVELY UNCONSCIONABLE: AS A RESULT, IT WAS UNNECESSARY TO CONSIDER ISSUE OF PROCEDURAL UNCONSCIONABILITY

AMS Staff Leasing, Inc. v. Taylor, ___ So. 3d ___, 40 Fla. L. Weekly D575 (Fla. 4th DCA March 4, 2015)

On January 7, 2015, the court issued its original opinion, which was summarized in this blog. On March 4, 2015, the court issued a revised opinion, but the court's holding and reasoning remained the same. As a result, readers are referred to the summary of the original opinion.

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COMMERCIAL TRANSACTIONS: ACTION ON GUARANTY; PROFESSIONAL RESPONSIBILITY: REPRESENTATIONS OF COUNSEL; CIVIL PROCEDURE: NEW TRIAL: NEW TRIAL REQUIRED BECAUSE TRIAL COURT OVERRULED OBJECTION TO, AND RELIED UPON, UNSUBSTANTIATED REPRESENTATIONS OF COUNSEL DURING INTRODUCTORY STATEMENT AND DEPRIVED THE OPPOSING PARTY OF THE OPPORTUNITY TO PRESENT CONTRARY EVIDENCE

Taverna v. Bank of America, ___ So. 3d ___, 40 Fla. L. Weekly D579 (Fla. 3d DCA March 4, 2015)

The lender sued the corporate borrower and two guarantors for the balance due under a line of credit. One guarantor claimed that her signature was a forgery. The bank obtained judgment against the debtor and the guarantor whose signature was not in dispute. The guarantor against whom judgment had been entered subsequently proceeded to nonjury trial on its cross claim against the other guarantor. During an introductory statement, counsel for the cross defendant represented that the bank decided not to pursue its claim against her after receiving handwriting exemplars. Counsel for the cross plaintiff objected but was interrupted by the trial court while attempting to explain that the bank's action against the cross defendant was pending. The appellate court reversed judgment for the cross defendant because the trial court overruled the cross plaintiff's objections to the representations of counsel, accepted them as true despite the absence of corroborating evidence, and deprived cross plaintiff of the opportunity to present rebuttal evidence. The appellate court concluded that "[the cross plaintiff] was unduly prejudiced by the unsubstantiated representation regarding the ultimate fact in issue and, consequently, was not afforded a fair trial."

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WORKER'S COMPENSATION: APPEALS: NONFINAL ORDERS: ORDER DECLINING TO RULE ON JURISDICTIONAL QUESTION BASED ON LACK OF EVIDENCE WAS NOT APPEALABLE UNDER FLA. R. APP. P. 9.180(b)(1)(A) PROVIDING FOR APPELLATE REVIEW OF NONFINAL ORDERS ADJUDICATING JURISDICTION

Bonafide Masonry v. Saxton, ___ So. 3d ___, 40 Fla. L. Weekly D586 (Fla. 1st DCA March 5, 2015)

An order of the Judge of Compensation claims, declining to rule on a jurisdictional question based on lack of evidence, was not appealable under *Fla. R. App. P.* 9.180(b)(1)(A), which provides for appellate review of nonfinal orders adjudicating jurisdiction. Instead of following the judge's instructions to file an evidentiary motion, the appellant filed a premature appeal.

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ARBITRATION: MANDATORY NONBINDING ARBITRATION: MANDATORY NONBINDING ARBITRATION WAS NOT INVALID BECAUSE ORDER OF REFERRAL WAS NOT SUBSTANTIALLY SIMILAR TO MANDATORY FORM ORDER ADOPTED IN CIRCUIT; JUDGMENT: RELIEF FROM JUDGMENT: LAWYER'S IGNORANCE OF DEADLINE FOR REQUESTING TRIAL DE NOVO DID NOT CONSTITUTE EXCUSABLE NEGLECT; APPEALS: INVITED ERROR: PLAINTIFF INVITED ERROR BY FAILING TO OBJECT TO AGREED ORDER SCHEDULING NONBINDING ARBITRATION

Alexander v. Quail Pointe II Condominium, ___ So. 3d ___, 40 Fla. L. Weekly D600 (Fla. 5th DCA March 6, 2015)

A plaintiff, who failed to make a timely request for trial de novo after mandatory nonbinding arbitration, was bound by the result even though the order of referral to arbitration was not substantially similar to the form order required in the circuit. The plaintiff was not entitled to relief from judgment because his lawyer's ignorance of the deadline for requesting trial de novo did not constitute excusable neglect. In addition, the plaintiff invited any error by failing to object to the agreed order scheduling nonbinding arbitration.

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TORTS: MOTOR VEHICLE NEGLIGENCE: OWNER OF FREIGHT WAS NOT LIABLE FOR NEGLIGENCE OF TRUCK DRIVER IN INTERSTATE COMMERCE

Peninsula Logistics, Inc. v. Erb, ___ So. 3d ___, 40 Fla. L. Weekly D601 (Fla. 5th DCA March 6, 2015)

The owner of freight was not liable for the negligence of the truck driver, who was hauling it in interstate commerce, because the freight owner was neither the owner, the driver, nor the lessor of the truck, and it did not assign the driver to operate it.

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TORTS: MOTOR VEHICLE NEGLIGENCE: PROPOSAL FOR SETTLEMENT: PROPOSAL FOR SETTLEMENT WAS UNENFORCEABLE BECAUSE IT PROPOSED TO RESOLVE CONTRACTUAL AND STATUTORY CLAIMS AND WAS, THEREFORE, AMBIGUOUS AS TO WHETHER IT WOULD PRECLUDE POTENTIAL UNINSURED MOTORIST AND HEALTH INSURANCE CLAIMS

Vogan v. Cruz, ___ So. 3d ___, 40 Fla. L. Weekly D603 (Fla. 5th DCA March 6, 2015)

A proposal for settlement from the defendant in a motor vehicle negligence case was unenforceable because it "propose[d] to resolve contractual and statutory claims" and was, therefore, "ambiguous as to whether it would preclude [the plaintiff's] potential uninsured motorist and health insurance claims."

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