

SUPREME COURT OF KENTUCKY  
CASE NO. 2005-SC-842-D  
(2004-CA-500-MR)

2005-SC-322

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SUPREME COURT

BOYD FISCAL COURT

MOVANT/  
CROSS-RESPONDENT

VS:

BOYD CIRCUIT COURT  
2001-CI-643

PHILIP STURGILL, individually and as  
Sheriff of Boyd County, and  
FIDELITY AND DEPOSIT OF MARYLAND

RESPONDENTS/  
CROSS-MOVANTS

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BRIEF FOR MOVANT/CROSS-RESPONDENT  
BOYD FISCAL COURT

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served by mailing a true copy, postage prepaid, to: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 and to Hon. Matthew J. Wixsom, P. O. Box 1790, Ashland, Kentucky 41105-1790 on this the 13<sup>th</sup> day of February, 2006. I further certify that the court record was not withdrawn from the clerk's office by the party filing this brief.

  
NELSON T. SPARKS

## INTRODUCTION

This is an appeal from a decision of the Kentucky Court of Appeals that overruled a decision by the Boyd Circuit Court that found that donations that had been made to the Boyd County Sheriff for the operation of his office were illegal and that such donations should have been included each year in calculating the excess fees to be paid to the fiscal court by the sheriff.

## STATEMENT CONCERNING ORAL ARGUMENT

Movant believes that because by complexities of both the law and the facts of this case, oral argument would be helpful to the court in deciding the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

	PAGE
STATEMENT OF THE CASE .....	3
ARGUMENT ONE: THE LAW DID NOT PERMIT DONATIONS TO THE SHERIFF'S OFFICE BEFORE JUNE 20, 2005 .....	7
KRS 61.310 .....	7, 8
<u>Commonwealth ex rel. Martin v. Tom Moore Distillery Co.</u> , 287 Ky. 125. 152 S.W.2d 962, at 967 ((1939) .....	8
<u>Funk v. Milliken</u> , 317 S.W.2d 499 .....	9
ARGUMENT TWO: DONATED FUNDS SHOULD HAVE BEEN INCLUDED IN THE CALCULATION OF THE AMOUNTS TO BE PAID BY THE SHERIFF IN HIS FINAL SETTLEMENTS TO THE FISCAL COURT .....	10
KRS 134.310 .....	10
<u>Funk v. Milliken</u> , 317 S.W.2d 499 .....	10, 11
<u>Commonwealth v. Allen</u> , 980 S.W.2d 278 (1998) .....	11
<u>Layne v. Newberg</u> , 841 S.W.2d 181 (1992) .....	11
KRS 61.310 .....	11
ARGUMENT THREE: THE CIRCUIT COURT PROPERLY DETERMINED THE AMOUNT OWED BY THE SHERIFF TO THE FISCAL COURT .....	12
<u>Funk v. Milliken</u> , 317 S.W.2d 499 .....	12,13

KRS 134.310 ..... 13

ARGUMENT FOUR: THE FISCAL COURT PROPERLY SET A  
BUDGET FOR THE SHERIFF FOR 1999 ..... 16

CONCLUSION ..... 17

## STATEMENT OF THE CASE

Philip Sturgill served as Boyd County Sheriff from 1994 until January, 2003. For a six-year-period, 1994-1999, he funneled certain receipts of his office into three private bank accounts and omitted those funds from his annual settlements with the fiscal court. These funds were not audited and were not used in calculating the excess fees that were owed to the fiscal court as part of the sheriff's annual settlements. The bulk of these funds were illegal donations to the sheriff's office but there were smaller amounts from other sources as well. For example, at times, these funds were used to purchase equipment for employees, apparently to take advantage of discounts available for official purchases, and the employees then made reimbursements to the accounts. (The accounts generated small amounts of interest as well). These accounts were designated "Special Account", "Local Block Grant Account", and "Memorial Bullet Proof Trust Fund". All three contained illegally donated money.

The block grant account properly included federal monies that were granted to the fiscal court for use by the sheriff's office and were administered on the state level through the Justice Cabinet; however funds from illegal donations were deposited into this account and commingled with the grant money. (Record, p. 305, including attachments.

It is important to note that the block grant funds were never included in calculating the amounts owed to the fiscal court. (Record, p. 305, including attachments; see specifically pages 5-6 of attachment regarding the year 1997).

Respondents admitted in their brief to the Court of Appeals that during the years 1994 through 1999, the sheriff received donations to his office from various businesses and other entities and that the donated funds were not included in the annual audits of the office, were not reported to the fiscal court, and were not used to determine the excess funds to be paid over to the fiscal court as part of the sheriff's annual settlements for those years.

Upon learning of the donated funds the fiscal court asked the state auditor to conduct an audit. The court failed to consider the funds on a year-by-year basis and instead, lumped together the funds for the entire seven-year period.

Throughout this litigation, Mr. Sturgill had attempted to create an impression that the audit found no irregularities in his actions. In fact, the audit found that the donations were not authorized by law and that there was no documentation for \$24,836 in expenditures.

The fiscal court determined that these omitted funds should have been included in calculating the amount of excess fees to be paid by the sheriff to the fiscal court each year pursuant to his annual settlement.

In June, 2001, the Boyd Fiscal Court, through special counsel, filed this lawsuit to have the sheriff's annual settlements reopened to include the omitted funds and for judgment for the amount by which the income of the sheriff's office exceeded its authorized expenditures. (Circuit Court Record, pp. 10-12). After the Boyd Circuit Judge recused himself from the case, it was assigned to Hon. Daniel R. Sparks of the 24<sup>th</sup> Judicial Circuit. (Record, p. 15). Appellant Sturgill filed an answer denying liability and asserted a counterclaim against the fiscal court for "malicious misuse of legal proceedings." (Record, pp. 20-26).

The fiscal court moved for partial summary judgment on the issue of liability. Specifically, the fiscal court sought a ruling that the donated funds should have been included as "receipts" of the sheriff's office and should have been included in calculating the excess fees to be paid to the fiscal court pursuant to the sheriff's annual settlements. (Record, pp. 87-90) On February 27, 2002, the circuit court entered an order sustaining the motion for partial summary judgment and ruling that the law did not allow donations to the sheriff's office. (Record, pp. 125-130). By a subsequent order, the court ruled that the donated funds should have been included in the sheriff's annual final settlements to determine the amounts to be paid over to the fiscal court. This order also directed counsel to file

memoranda on the issue of whether the fiscal court had the authority to set a budget for the sheriff for the 1999 fiscal year. (Record, pp. 147-149).

The fiscal court also moved for the appointment of a special commissioner to conduct an inventory of the sheriff's office to determine whether the sheriff had in fact used the disputed funds to buy equipment for the sheriff's office and to determine whether such items were still in the possession of the office. (Record, pp. 144-146). After the sheriff objected, the court overruled that motion. (Record, pp. 147-149).

The fiscal court subsequently made discovery requests that asked for the names of all the donors to the sheriff's office, the amounts and dates of the donations, the purpose of the donations, the purposes for which the donated funds were used and information as to where such funds were deposited. (Record, pp. 27-28). The fiscal court also made requests for a listing of "each and every expenditure made from funds that were donated to the sheriff's office or from any other funds that were not shown on the sheriff's settlements" (Record, p. 93).

The fiscal court also requested "any and all cancelled checks, receipts or other documents identifying each and every expenditure made from funds that were donated to the sheriff's office, or from and other funds that were not shown on the sheriff's annual settlements" and any other documents that Sheriff Sturgill intended to introduce into evidence at the trial of this case. (Record, p. 91).

The Respondent at first resisted providing the requested documents and information unless the fiscal court executed non-disclosure agreements. He also wanted the fiscal court to obtain some of the information from the state auditor, who, at the request of the fiscal court, had performed an audit of the disputed funds. (Record, pp. 36-43; pp 44-47).

The court subsequently sustained the fiscal court's motion to compel and ordered the sheriff to provide the requested information and documents within forty-five days but with a provision that information relating to the sheriff's

personal finances be kept confidential except on orders of the court. (Record, pp. 85--86).

Appellant Sturgill eventually provided the documents. (Record, pp. 115-116 and Exhibits "A" and "B" thereto). (In its final judgment entered in this case, the circuit court ordered that these documents be made a part of the record; Record, p. 357).

After receiving the information from Sheriff Sturgill showing the receipts and disbursements of the donated funds, counsel for the fiscal court organized this information into year-by-year categories showing the amounts received for each year in dispute, the amount spent and the amount that should have been included in the sheriff's settlement for that particular year. (Record, p. 305, including attachments. The fiscal court then moved for a final summary judgment on the basis of this information (Record, pp. 289-291) and included the discovery information as attachments to its memorandum in support of the motion. (Record, p. 305).

Pursuant to the fiscal court's motion, the circuit court entered summary judgment on March 1, 2004. (Record, pp. 353-357).

By an unpublished opinion rendered on April 1, 2005, the Court of Appeals affirmed the Circuit Court's dismissal of Philip Sturgill's counterclaim but reversed the remainder of the lower court's decision.

This court granted discretionary review on October 12, 2005, and granted discretionary review on the cross-motion of Philip Sturgill and Fidelity and Deposit of Maryland on December 14, 2005.

ARGUMENT ONE

THE AMENDMENTS MADE TO KRS 61.310 BY THE  
GENERAL ASSEMBLY SHOW THAT THE SHERIFF  
HAD NO RIGHT TO ACCEPT DONATIONS PRIOR TO 2005.

On June 20, 2005, an amendment to KRS 61.310 took effect that allowing a sheriff to accept donations of money or goods to be used for public purposes, provided that a public record is kept of the donations and the donations are audited along with the other funds of the sheriff's office. While this legislation does not directly affect the case at bar, it clearly shows that the circuit court correctly analyzed the applicable law in determining that the donations made to Philip Sturgill during his term as sheriff were not authorized and were illegal.

The Court of Appeals took the position that a sheriff could legally accept donations because donations are not specifically prohibited by KRS 61.310. That court went on to interpret that statute as allowing donations if they are not to be used as personal compensation to the sheriff and it rejected contrary opinions of the Attorney General. The court's thinking on this point is problematic for a number of reasons.

In its pre-2005 form, KRS 61.310(3) provided that "(p)lace officers shall receive for the performance of their services and duties only such compensation or remuneration as is regularly provided and paid out of the public funds..." That section of the statute specified that donations do not constitute public funds. These two points taken together simply mean that the sheriff may not solicit donations and treat them as public funds for the operation of his office; they do not authorize donations. An absurd example illustrates the point: Suppose the statute had stated that funds from bank robberies did not constitute public funds; applying the logic of the Court of Appeals, one could argue that the legislature intended that funds from bank robberies could be used for the

operation of the sheriff's office as long as they were not used for the sheriff's personal compensation.

The 2005 General Assembly amended KRS 61.310 to specifically allow for donations to the sheriff's office. If donations were already allowed, why was the statute changed? If donations were authorized by the earlier version of the statute, then the legislature committed a useless and redundant act by passing the new legislation. "All statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory." Commonwealth ex rel. Martin v. Tom Moore Distillery Co., 287 Ky. 125. 152 S.W.2d 962, at 967 ((1939).

One might argue that the legislature merely set out some additional conditions to a preexisting right to accept donations but this analysis carries problems of its own. First of all, in its pre-2005 form, KRS 61.310 contains no right to accept donations; it simply isn't there. Second, the new version of the statute includes numerous safeguards: a public record of donations must be kept, the funds must be used for a public purpose, and donated funds must be included in the sheriff's annual audit. To argue that donations were authorized before these safeguards were in place implies that the legislature that created the earlier version of the statute intended that a sheriff could accept donations to his office with no obligation to account for the money to anyone, or to reveal its sources, its uses or even its amounts. It is unthinkable that any legislature would have intended to create such a situation.

It is worth noting that between 1942 and 2005, KRS 61.310 was amended only once, that being in 1968. Thus, any statutory authority for the acceptance of donations has been there for at least thirty-seven years and possibly sixty-three years or longer. It seems reasonable to ask why no sheriff or attorney general or auditor ever discovered this right until this litigation arose. With all

due respect to the Court of Appeals, Movant would suggest that the right to accept donations never existed until it was created by that court in the opinion it rendered in this case.

A final point on this matter is worth noting: A sheriff's salary comes from fees that are left over after the expenses of the office are paid. Funk v. Milliken, 317 S.W.2d 499, at 506, provides that "A county officer who is compensated wholly or in part from fees is required to pay over to the county, each year, the excess of receipts over and above the amounts allowable for his personal compensation, the compensation of his legally authorized deputies and assistants, and authorized official expenses." If the fees of the office fall short, the sheriff will not receive his maximum salary. If donations are received and are used to fund the operations of the office, then fee monies are freed up to be used for other purposes, including the payment of a sheriff's personal compensation and the salaries of his deputies and this increases the likelihood that the sheriff will in fact receive his maximum salary. Money is fungible; where the sheriff's salary and his operating expenses come out of the same pool, it is impossible to say which money went for the sheriff's personal compensation and which went for the expenses of running the office. While in many places more modern techniques have been implemented to allow for the operation of fee offices, it is commonly known that many sheriffs over the years have made less than their maximum salaries because the fees of the office have been insufficient. The potential for corruption in this situation is one obvious reason why donations have not been allowed.

## ARGUMENT TWO

### DONATED FUNDS SHOULD HAVE BEEN INCLUDED IN THE CALCULATION OF THE AMOUNTS TO BE PAID BY THE SHERIFF IN HIS FINAL SETTLEMENTS TO THE FISCAL COURT

Without citing any specific authority for its conclusion, the Court of Appeals, at page 17 of its opinion, found that “funds donated to the sheriff’s office did not amount to ‘other income of his office’ to be paid over to the fiscal court as contemplated by the provisions of KRS 134.310(6)” because the donations are not given for services rendered. The court went on to find that private donations were not included as “receipts” when the former Court of Appeals stated in Funk v. Milliken that

a county officer who is compensated wholly or in part from fees is required to pay over to the county, each year, the excess of receipts over and above the amounts allowed for his personal compensation, the compensation of his legally authorized deputies and assistants, and authorized official expenses. (Emphasis added.) 399 S.W.2d 399, at 506.

The Court of Appeals went on to say that that “(p)ivate donations intended for use in public safety are simply not addressed...”. Movant respectfully disagrees. The statute does not say, “income for services rendered”; that court relied on KRS 134.310(5), which requires the filing of “a statement of all funds received by his office for official services.” This is a reporting requirement for counties with a population of less than seventy thousand. It is separate and apart from the requirement of what is to be paid over, which is addressed elsewhere in the statute.

KRS 134.310 (4) requires that when making his final settlement, “the sheriff shall pay to the county treasurer all money that remains in his hands.” (Emphasis added.)

Section (6) of the statute requires that

(a) at the time he files the statements required by subsection (5) of this section, the sheriff shall pay to the fiscal court any fees, commissions, and other income of his office, including income from investments, which exceed the sum of his maximum salary as permitted by the Constitution and other reasonable expenses, including compensation of deputies and assistants. (Emphasis added.)

Had the General Assembly chosen to address the issue of donations, it could have done so with specificity. By referring generally to “all the money that remains in his hands” and to “other income of the office”, the legislature obviously meant to include any funds that were not specified.

It is a rule of statutory construction that a statute is to be interpreted based on what it says and its interpretation should not be at variance with its stated language. Commonwealth v. Allen, 980 S.W.2d 278 (1998); Layne v. Newberg, 841 S.W.2d 181 (1992). Movants respectfully contend that “other income of his office” means other income of his office and “all the money that remains in his hands” means all the money that remains in his hands.

It is inconsistent to say that donations were specifically allowed by the pre-2005 version of KRS 61.310, as the court found in its opinion, but the other statutes and cases dealing with the management of the finances of the sheriff's office somehow failed to consider this source of funding. The high court in Funk v. Milliken went to great lengths to discuss the funding and other financial operations of the sheriff and other fee offices but the Court of Appeals took the position that donations, while allowed, were overlooked or ignored by the statutes and by the case law. Movant respectfully contents that the Court of Appeals wrongly interpreted the law on this point.

### ARGUMENT THREE

#### THE CIRCUIT COURT PROPERLY DETERMINED THE AMOUNT OWED BY THE SHERIFF TO THE FISCAL COURT

If this court should determine that donations to the sheriff's office were authorized during the relevant periods of this case, then it need look no further. But if the court determines that the donations in dispute in this case were not authorized, then it must address the question of whether the circuit court properly determined the amounts that are owed by Philip Sturgill to the fiscal court. The rule set forth in Funk v. Milliken, supra, again provides the applicable law and it is not an oversimplification to say that there were only two questions of fact to be answered to make this determination: 1. What was the amount of the omitted receipts for each of the years in question? 2. What was the amount of the sheriff's authorized expenditures that were made from those funds for each of those years? The difference between these two amounts gives the amount owed to the fiscal court for each of the six years. This information was provided in the sheriff's answers to the fiscal court's discovery requests.

The method used to calculate liability was simple: for each of the six years in dispute, the court compiled the receipts and subtracted the documented expenditures. The difference was the amount owed for that year. The total for the six years was the amount of the judgment.

It is important to note that the sheriff himself provided the information upon which the judgment was based and it is equally important to note that the sheriff was given the benefit of every doubt in the calculations. An examination of the record will show that each and every documented expenditure was allowed; the fiscal court did not dispute a single expenditure for which any documentation was provided. There is no evidence that could have changed the

application of the rule in Funk v. Milliken to the facts of this case and summary judgment was proper.

It should also be noted that the sheriff does not and has not alleged that he has any documents beyond what he provided by way of discovery that would show expenditures that were not properly credited in the judgment.

The omitted donations that are in dispute in this case cover a six-year period, 1994-1999. In their brief, Respondents argue that in calculating the sheriff's liability, this entire period should be treated as a single unit and they call the failure to do so an accounting "sleight-of-hand". The law, however, requires the calculations to be made one year at a time. Funk v. Milliken requires the sheriff to pay over his excess fees to the county "each year". 317 S.W.2d at 506. KRS 134.310 contains the same requirement: the sheriff must annually settle his accounts with the county.

The Respondents' argument that the judgment does not correspond to the documentary evidence is simply wrong. They base this argument on the audit report that is attached to their Court of Appeals brief as "Appendix D". This audit was commissioned by the fiscal court and is addressed to the county judge and to the sheriff. (The money in dispute was not included in the annual audit of the sheriff's office and was not audited at all until the fiscal court made a request to the state auditor to do so.) In his report, the auditor established two important facts: the sheriff received donations illegally and he did not properly document his expenditures. However the report also contains a glaring error by the auditor: it ignores the requirements of Funk v. Milliken and KRS 134.310 and lumps the entire six-year period into a single unit. Nowhere in the report is there any determination of the amount the sheriff owed to the fiscal court at the end of each of the six years in question. The requirement of an annual accounting is

treated as if it does not exist. The Respondents in their Court of Appeals brief and throughout his litigation have been guilty of the same omission.

Movant would respectfully challenge Respondents to show this court a single case or statute that allows a sheriff to withhold funds that are supposed to be paid over to the fiscal court at the end of a particular year and to use those funds for his office in the following year.

The respondents have made various arguments that the circuit court miscalculated the amounts owed. The memorandum, with its attachments, that was filed in support of the motion for summary judgment at page 305 of the record speaks for itself but the movant offers the following in response to the specific complaints previously made by the respondents:

1. Grants to the sheriff's office were not included in calculating liability. Pages 5-6 of the memorandum show the calculations for the year 1997. For that year, \$67,413.06 was deposited into the Local Block Grant Account; \$24,000 of this money was excluded by the fiscal court from its calculations of the amount owed for that year because it was simply a transfer of money that had been received in a previous year from one account to another; an additional \$17,642 was grant money that was not payable to the fiscal court as excess fees. The deduction of these funds leaves \$25,771.06, which was an illegal donation of \$25,000 from Kings Daughters Medical Center and \$771.06 in interest. Documented disbursements of \$963.35 were deducted, leaving \$24,807.71 owed from this particular account to the fiscal court. (An additional \$4,639.18 was owed for 1997 from the "Special Account", making a total of \$29,446.89 owed to the fiscal court for 1997.)

Respondents Sturgill's argument that he spent \$49,000 from this fund for cruiser lights and radios in 1998 is fallacious for two reasons. First, it includes \$24,000 that had accumulated in the Special Account from previous years but

was transferred to the Local Block Grant Account in 1997; the sheriff should have transferred this money to the fiscal court in the years it was received and he should not have had it in his possession in 1997. Second, the other \$25,000 is from an illegal donation from Kings Daughters that should have been paid to the fiscal court in 1997 and, once again, should not have been in the sheriff's possession in 1998.

The argument on page 17 of Respondents' Court of Appeals brief that transferring funds into the Local Block Grant Account was the equivalent of transferring those funds to the fiscal court is, to say the least, unsound. The sheriff opened this account and controlled it and the fiscal court had nothing to do with it. This argument seems to be that after opening a bank account to receive grant money, the sheriff can avoid paying his excess fees to the fiscal court by placing additional funds into that grant account and claiming that is the equivalent of a payment to the fiscal court. Respondents make the curious argument that this somehow makes the money go "off the Sheriff's books". Movant contends that the proper method for getting money off the sheriff's books is by following the procedures prescribed by the law in Kentucky.

2. Funds commingled with grant money in the Local Block Grant Account were not excluded from the fiscal court's calculation of excess fees. Respondents make the argument on page 16 of their Court of Appeals brief that the sheriff should be allowed to put donated money into a grant money account and exclude the donated funds as if they were themselves grant money. There is no law that allows the sheriff to change the character of the receipts of his office on the basis of the account into which he chooses to deposit the money.

ARGUMENT FOUR  
THE FISCAL COURT PROPERLY SET A  
BUDGET FOR THE SHERIFF FOR 1999

The Court of Appeals ruled that the fiscal court did not set a budget for the sheriff for 1999. The record refutes this argument

The record shows the following sequence of events:

On January 12, 1999, the fiscal court set a salary cap for the sheriff's deputies at \$609,362 with a provision that the salary cap would be raised when funding became available for two more deputies. (Record, p. 164)

On January 19, 1999, the fiscal court accepted the line item budget proposed by the sheriff, setting the sheriff's budget at \$1,172,413.96. (Record, p. 163)

On December 11, 1999, the fiscal court raised the salary cap for the sheriff's deputies to allow him to spend an additional \$36,653.62 for deputies' salaries. (Record, p. 165). It is important that this was not an amendment of the overall sheriff's budget but simply an amendment of a single line item within the budget.

On August 15, 2000, the fiscal court accepted the sheriff's settlement (Record, p. 169) that showed expenditures of \$1,162,327 (Record, pp. 166-168), leaving \$10,086.96 of his budget unspent. (Apparently through an oversight, it went unnoticed that the expenditure did not include the sheriff's own salary.) This \$10,086.96 was credited against the sheriff's expenditures in calculating the additional amount owed to the fiscal court for 1999 on the basis of unreported donations.

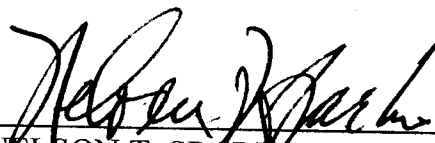
Although this figure of \$10,086.96 was based on the fiscal court's own calculations, a closer examination of the records shows it be a credit to which the sheriff was not entitled. The audit of the sheriffs reported receipts and

disbursements for 1999 ignores the fact that the sheriff was on a budget that year. (Record, pp. 166-168). If we accept, arguendo, the sheriff's contention that the increase in the salary cap was an increase in the sheriff's budget, the sheriff would be authorized to spend \$1,209,067.58, as he has contended. However his audit report shows expenditures of \$1,162,327 plus the sheriff's statutory maximum salary of \$70,143, for a total of \$1,232,470, or \$23,402.20 over the budget as allegedly amended. (Record, pp. 166-168). If the budget was determined to be \$1,172,413.96 as the fiscal court contends, the sheriff was over his budget by \$60,056.04. In either event, the circuit court gave the sheriff a credit of \$10,086.96 for 1999 to which he was not entitled and he has no basis to complain.

#### CONCLUSION

The opinion of the Court of Appeals should be reversed and the opinion of the Boyd Circuit Court should be reinstated.

Respectfully submitted,



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