SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
PHILLIP LEWIS PALEY
JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

March 26, 2019

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RE: Joao Silva v. Conti Enterprises, Inc. et al.
MID-L-7167-15

Dear Counsel:

On December 10, 2013, Joao Silva was injured during his employment with Conti Enterprises, Inc. At that time Mr. Silva was working on a road construction site in Secaucus. He was then struck by the rear end of a 2007 Ford F-350 pick-up truck, driven by his co-worker Manuel Barbosa, as it was backing-up. Mr. Barbosa claims that he did not see Mr. Silva; he stopped only after feeling a "thud" and hearing Mr. Silva scream. Mr. Barbosa claims that his view was unobstructed; however, other witnesses testified that tools obstructed the view of the rear window and the lighting was poor. No "spotter" – someone guiding the driver as he backed

up - was used; the pick-up truck was not equipped with a backup alarm. Mr. Silva has sued several parties, seeking compensation for injuries suffered in the collision.

Ford Motor Company manufactured the F-350 pick-up truck. Fred Beans Ford, Inc. ["FBF"] was the dealer which sold the vehicle to Conti. Conti purchased the pick-up truck for the sole purpose of construction. After the purchase, the pick-up truck was retrofitted [presumably with features appropriate for construction-related work] by Reading Equipment & Distribution ["Reading"]. Mr. Silva has asserted a product liability claim against Ford, FBF, and Reading. He claims that the pick-up truck was designed defectively, in that it had no backing-up alarm. The 2007 models were not equipped with a backing-up alarm; no such alarm was available by opinion. In 2011, this feature became an option for the newer models; however, such alarms can be retrofitted on older models relatively easily.

Conti and Jacobs Engineering Group Inc. were hired by the New Jersey Turnpike Authority ["NJTA"] to undertake this construction project. The scope of the relationship between Conti and Jacobs is contested. Certain contractual provisions suggest that Conti is the primary contractor and that Jacobs, a consultant, lacked control over Conti's work. Other provisions and discovery - depositions and a hierarchy chart - suggest that Jacobs directly supervised and controlled Conti.

On September 28, 2018, Vincent Gallagher, Mr. Silva's expert, issued a report contending that both Jacobs and Conti are negligent for not ensuring that a backing-up alarm was used. Mr. Gallagher is an expert in the field of occupational safety and health, worker injury, policies, and procedures, and OSHA standards. He notes that OSHA explicitly requires the use of a backing-up alarm, especially when the vehicle has an "obstructed view." Jacobs argues that no OSHA regulation requires such an alarm; Jacobs asserts that Mr. Gallagher seeks to impose a higher standard than that required by law.

On January 31, 2019, Don Philips, Mr. Silva's products liability expert, was deposed. Thereafter, he prepared a supplemental report, concluding that the pick-up truck should have been equipped with a backing-up alarm, as required by OSHA regulations, Federal Motor Vehicle Safety Standards, and the National Safety Council, Motor Fleet Safety Manual, 5th Edition.

Motion: Defendants seek summary judgment on the following grounds:

Conti and Mr. Barbosa claim that the: New Jersey's Worker's Compensation Act, N.J.S.A. 34:15-1 et seq. bars this suit against the employer.

Jacobs claims that it owed no duty to Mr. Silva, because Conti was solely responsible for construction site safety. Jacobs claims that it only a consultant, with no authority to control the construction project. Further, it argues that Mr. Gallagher's opinions are net, because OSHA does not require a backing-up alarm installed in the pick-up.

Ford, Reading, and FBF assert that there is no proof of defect. They argue that the expert reports are net, in that they cite no sources suggesting that the design of the Conti pick-up truck was defective.

Opposition: Mr. Silva does not oppose Conti's, Mr. Barbosa's, and FBF's summary judgment motions.

Mr. Silva contends that Jacobs, the primary contractor, had a duty to manage safety which was non-delegable. Further, Jacobs had a duty to provide for safety controls, as asserted in Carvalho v. Toll Brothers, 143 N.J. 565 (1996). Mr. Gallagher's report is not net. He considered photographs, incident reports, and deposition testimony in reaching his conclusion that the truck had an "obstructed view" as defined by OSHA. Similarly, Mr. Gallagher, Mr. Silva's expert, used Jacob's contractual documents and other industry standards when he concluded that the pick-up truck should have been equipped with a backup alarm. Mr. Silva cross-moves for summary judgment, alleging that Jacobs breached their duty of care.

Mr. Silva opposes Ford's motion for summary judgment because the pick-up truck's use was foreseeable and it was both feasible and practical for Ford to install a backup alarm on the F-350 model. This case is distinguishable from Boyle v. Ford Motor Company, 399 N.J. Super. 18 (App. Div. 2008), where the court held that the manufacturer was not responsible for installing a rear bumper safety device; here, it is reasonable to require Ford to retrofit older models with a back-up alarm.

Mr. Silva asserts that Reading strictly liable for a design defect. Notably, Mr. Phillips cites manuals that state that backing-up alarms must be considered when retrofitting older models.

Analysis: The purpose of a summary judgment procedure is to provide an efficient and inexpensive means of disposing of a litigated matter. Pursuant to R. 4:46-2, if it appears that no genuine issue of material fact is presented, it is for the court to determine the motion on the applicable law. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). The Court has held that, when deciding whether a genuine issue of material fact exists, the trial court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). A judge is to decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533, (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). After the passage of "adequate time to complete the discovery, summary judgment should be granted 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Brill at 533.

A jury should not be permitted to speculate without the aid of expert testimony in areas where laypersons could not be expected to have sufficient knowledge or experience. Kelly v. Berlin, 300 N.J. Super. 256, 268 (App Div. 1997). The test of the need for expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable. Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982). Except for malpractice cases, no general rule or policy is requiring expert testimony as to the standard of care in negligence actions. Id.; see also, Taylor v. DeLosso, 319 N.J. Super. 174, 179-180 (App. Div.1999) ("[I]n a professional negligence case, the standard of care must normally be established by expert testimony"). An expert witness is almost always required to prove a design defect claim. See Johansen v. Makita USA, 128 N.J. 86, 101 (1992).

The net opinion doctrine excludes expert testimony that "is based merely on unfounded speculation and unqualified possibilities." Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289, 300 (App. Div. 1990). An expert must give the "why and wherefore of his or her opinion, rather than a mere conclusion." Polzo v. County of Essex, 196 N.J. 569, 583 (2008). An expert opinion must have a proper factual foundation and "may be termed a 'net opinion' when the data on which it is based is perceived as insufficient, unreliable or contrary to the proponent's theory of the case." Biunno, Current New Jersey Rules of Evidence, comment 3 on N.J.R.E. 703 (citing Gore v. Otis Elevator Co., 335 N.J. Super. 296, 303-304 (App. Div. 2000)).

Consistent with the policy of admitting all relevant evidence, a decision to reject an expert's testimony should be used sparingly and only with great caution. N.J.R.E. 402; Reinhart v. E.I. DuPont De Nemours, 147 N.J. 156, 164 (1996). It is the jury's function to weigh alleged deficiencies in the testimony or qualifications of a proffered expert. Rubanick v. Witco Chemical Corp., 242 N.J. Super. 36, 48 (App.

Div. 1990). Any alleged weakness in an expert's qualifications or testimony is the subject of cross-examination, not grounds to bar the expert's opinion outright. See, e.g., State v. Jenewicz, 193 N.J. 440, 455 (2008).

Jacobs argues that Mr. Gallagher's conclusion that Mr. Barbosa had an obstructed view constitutes a net opinion because it discounts portions of Mr. Barbosa's testimony stating he did not have an obstructed view. Further, Mr. Gallagher did not perform a "line of sight calculation." However, Mr. Gallagher bases his conclusion on testimony explicitly stating that Mr. Barbosa had at least partial obstruction of view, as well as industry standards such as OSHA's definition of an obstructed view. Here, there is some debate as whether tools obstructed the rear view mirror and whether the lighting was adequate - under OSHA, lighting qualifies as an obstruction. While discounting Mr. Barbosa's testimony and not performing a "line of sight calculation" may weigh against the report when presented to a jury, it serves no basis for rendering the report inadmissible.

Jacobs asserts that Mr. Gallagher relies on personal opinion only to conclude that the pick-up truck should have been equipped with a backing-up alarm. He bases his conclusion on an OSHA standard: a vehicle with an obstructed view must be equipped with a backup alarm when no spotter is used. While a jury may not find Mr. Gallagher's conclusions on whether there was an obstructed view credible, there is sufficient basis presented to allow him to testify that a pick-up truck, with an obstructed view, should have been equipped with a backup alarm.

Reading asserts that Mr. Phillips' report is net because it cites no identifiable standards for using a backing-up alarm. The report does not specifically cite a Federal Motor Vehicle Safety Standard that supports his conclusion, and the OSHA regulation he relies on is directed to employers, not manufacturers. However, Mr. Phillips specifically cites the National Safety Council, Motor Fleet Safety Manual,

5th edition, which states that backing-up alarms must be considered when retrofitting older models. This is not only his personal opinion; his report is not net.

In New Jersey, a Products Liability claim is viable. See the Products Liability Act ("PLA"), N.J.S.A. 2A:58C-1, et. seq. To plead a prima facie cause of action under the PLA, a plaintiff must show that (1) the defendant manufactured the product, (2) that a reasonably foreseeable user was injured, (3) that the product was defective, (4) that the defect existed when it left the defendant's control, and (5) that the defect was the actual and proximate cause of the plaintiff's injury. Worrell v. Elliott & Frantz, 799 F. Supp. 2d 343, 350 (D.N.J. 2011). A products liability claim must be based on one (or more) of the following theories: (a) deviation from the design specifications, formulae, or performance standards of the manufacturer or otherwise identical units manufactured to the same manufacturing specifications or formulae; or (b) failure to contain adequate warnings or instructions; or (c) defective design. N.J.S.A. 2A:58C-2. Mr. Silva claims that the pick-up truck had a design defect.

Under New Jersey law, a "manufacturer" means:

> (1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product; or (4) a United States domestic sales subsidiary of a foreign manufacturer if the foreign manufacturer has a controlling interest in the domestic sales subsidiary. N.J.S.A. 2A:58C-8.

A manufacturer or distributor, of a component product is liable for the harm caused by the absencs of a safety device in a finished product, when a plaintiff

proves, by preponderance of the evidence, that it was feasible and practical for such safety device to have been installed at the time the component product was within the control of the manufacturer or distributor. Zaza v. Marquess & Neil, Inc., 144 N.J. 34 (1996). Alternatively, a manufacturer or distributor of a component product is liable for the harm caused by a defective finished product when: (1) such defect was caused by the integration of a defective component product into the finished product; or (2) the manufacturer or distributor of the component product substantially participates in integration of the component product into the ultimate design of the finished product; and (i) the integration of the component causes the product to be defective; and (ii) the resulting defective product is a proximate cause of the harm. Restatement (Third) of Torts: Products Liability §5 (1998).

To prevail on a defective product claim, a plaintiff must prove, by a preponderance of evidence, that a defendant is liable for the injuries sustained because the defendant's product was not reasonably fit, suitable or safe for its intended purpose because it was designed in a defective manner. N.J.S.A. § 2A:58C-2. "Generally, the fact-finder is required to perform a risk-utility analysis to determine whether a product is defective in its design. In performing a risk-utility analysis, an expert opinion is ordinarily relied upon to establish a reasonable alternative design." Rocco v. New Jersey Transit Rail Operations, Inc., 330 N.J. Super. 320, 341 (App. Div. 2000).

Here, Ford relies heavily on Boyle. There, the Court reversed the trial court's decision that Ford had a duty to install safety devices "whenever feasible." The Court held that with the vehicle having numerous unforeseen end uses, "it was neither practical, feasible, nor reasonable to require Ford to install a rear guard device." Id. at 36. Ford argues that the F-350 pick-up is used for various tasks; Ford had no knowledge of the end use of the pick-up truck in question. Further, Ford asserts that it is impractical to install the backup alarm on the entire series because the alarm

would only satisfy one of many end uses. Often, customers do not want the alarm because of its noise and distraction.

Mr. Silva distinguishes Boyle by looking at the cost difference between installing a backup alarm and a rearguard bumper. The installation of a backing-up alarm cost relatively little – not exceeding $100. Providing the backup alarm is both practical and feasible, as per Boyle. Alternatively, Mr. Silva asserts Ford should at least have offered F-350 owners the option of installing a backup alarm.

Notwithstanding, the use of the vehicle for construction purposes is merely one of many possible end uses, and the backing-up alarm is appropriate for that one use only. Consistent with Boyle, it is unreasonable to require Ford to install backup alarms on every vehicle because "depending on the vehicle's end use, such a device could have been ineffective, inadequate, or unnecessary." Id. "Despite its vast financial and automotive technical resources, Ford is not in the best position to determine the safety device … because the type of safety device needed will always depend upon the nature of the completed truck's use." Id. at 37-38. Since the backing-up alarm is a specific application safety feature, it would be unreasonable to require Ford to apply this feature without prior knowledge of the pick-up trucks end use. Ford's motion for summary judgment is granted.

While Boyle found Ford was not in the best position to determine the safety device needed, the Court found "the final stage manufacturer … is by far, in the best position to ascertain the safety needs [of the end user]." Boyle, 399 N.J. Super. 38. "Once the safety concerns were identified, [the final stage manufacturer], could have either designed and manufactured the particular device required or purchase a suitable, commercially available, prefabricated device." Id. The same rationale that allowed the court to grant summary judgment for Ford is not available for Reading. Reading was the "final stage manufacturer," and they were aware of the pick-up truck's end purpose - they were specifically hired to retrofit the vehicle for

construction purposes. While Mr. Silva must prove by the preponderance of the evidence that a design defect existed and caused harm, Mr. Phillips' report could allow a jury to find a design defect. Therefore, Reading's summary judgment motion is denied.

The Worker's Compensation Act, N.J.S.A. 34:15-1 et seq., represents the bargain struck between employers and employees concerning workplace injuries, whereby employers shoulder the expense of workers' injuries arising out of the performance of work duties. Ricciardi v. Damar Products Co., 45 N.J. 54, 60 (1965). The Act:

> [I]nvolved a historic trade-off whereby employees relinquished their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffered injuries by accident arising out of and in the course of employment. Thus, the quid pro quo anticipated by the Act was that employees would receive assurance of relatively swift and certain compensation payments, but would relinquish their rights to pursue a potentially larger recovery in a common law action.

Lindquist v. City of Jersey City Fire Department, 175 N.J. 244, 257 (2003). In accepting the benefits of the Act, an employer assumes an absolute liability in exchange for immunity from common lawsuit even though the employer may be negligent. Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479, 489 (1960). The Act's remedies are exclusive; there is no direct cause of action available to an injured employee against the employer. Cortes v. Interboro Mutual Indemnity Ins. Co., 232 N.J. Super. 519, 523-24 (App. Div. 1988), aff'd 115 N.J. 190 (1989).

There are two ways in which an injured employee may maintain an action against his employer despite recovering a workers' compensation award. One involves the employers' committing an intentional wrong. N.J.S.A. 34:15-8. An "intentional wrong" abrogating the immunity provided under the Act will only be found where there is "deliberate intent to harm" the injured employee, or

equivalently egregious conduct. See Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 170 (1985). An employer whose behavior is negligent, grossly negligent or even reckless concerning a possible risk of harm to its employees will not meet the "substantial certainty" standard for an intentional wrong. Id. at 183. A defendant employer may also be stripped of the protections of the Workers' Compensation Act if the employer's actions are "plainly beyond" what the Legislature intended to immunize. Laidlow v. Hariton Machinery, 170 N.J. 602 (2002).

Nothing suggests the Conti acted intentionally in harming Mr. Silva. Mere negligence is not enough to bring a claim against an employer. Therefore, summary judgment is appropriate for Conti.

The exclusivity provision within the Act applies to a co-worker for injuries arising out and in the course of employment, except those caused by intentional wrong. See N.J.S.A. 34:15-8. Therefore, summary judgment for Mr. Barbosa is granted.

"Before recovery may be had, a duty must exist in law, and a failure in that duty must be proved as a fact." Mergel v. Colgate-Palmolive-Peet Co., 41 N.J. Super. 372, 379 (App. Div. 1956). There could be no recovery in a negligence action if the actor violated no duty owed to the injured party. Karuth v. Geller, 54 N.J. Super. 442, 453 (App. Div. 1959). The question of whether a duty exists as a matter of law is appropriately decided by the court. See Carvalho v. Toll Bros. & Developers, 143 N.J. 565 (1996). A duty of reasonable care is generally imposed upon a defendant when it has sufficient control over the environment and the opportunity and ability to avoid a risk of injury. J.S. v. R.T.H., 155 N.J. 330, 339 (1998).

Foreseeability requires the court to look at the "totality of the circumstances," and deals with the knowledge, either actual or imparted, on the part of the defendants of the risk of injury to the plaintiff. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 507 (1997). Other factors for the court to identify are the relationships

between and among the parties, the defendant's responsibility for creating the risk of harm, and whether the defendant had sufficient ability to have avoided the risk of harm. J.S. v. R.T.H., 155 N.J. at 339. Foreseeability is the "ability to foresee injury to a potential plaintiff, and is crucial to determining whether imposition of a duty on an alleged tortfeasor should be imposed." Carvalho v. Toll Bros. and Developers, 143 N.J. 565, 572 (1996).

The duty which was owned by a defendant to a plaintiff in connection with the furnishing of a safe place to work is merely to "warn him of dangers of which the defendant was aware." Mergel v. Colgate-Palmolive-Peet Co., 41 N.J. Super. 372, 379 (App. Div. 1956). "This type of duty does not extend to such dangers which are as obvious to others as to the person in control." Id. That is if the danger is "open and visible" and discoverable by "ordinary observation," the person in control has a right to assume such observation will be made to discover it. Id.

As a matter of public policy and federal law, the prime contractor is the single repository of responsibility for the safety of all employees on the job. As such,it bears responsibility for all OSHA violations on a project. Meder v. Resorts International, 240 N.J. Super. 470, 473-77 (App. Div. 1989); Kane v. Hartz Mountain, 278 N.J. Super. 129, 142-43; Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 320-21 (App. Div. 1996). Prime contractors/construction managers have a non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." Alloway v. Bradlees Inc., 157 N.J. 221, 237-38 (1999) (citing Kane v. Hartz Mountain, 278 N.J. Super. 142-143).

Jacobs argues that it did not owe Mr. Silva a duty of care for general construction safety. In opposition, Mr. Silva asserts that Jacobs was the primary contractor of the NJTA; however, the agreement between Jacobs and the NJTA

suggests otherwise. Pursuant to the contract, Jacobs was deemed a consultant, and the NJTA construction manual was incorporated into the contract. The manual states: "[a]ll services provided by the consultant is required to be in strict compliance with the NJTA Standard Quality as found in the NJTA Construction Manual along with the Manual for Traffic Control and the 2004 NJTA's Standards and Specification." Further, "job safety is the sole responsibility of the Contractor." While the consultant "should remind the Contractor whenever it appears that safety has been overlooked. However, it is not intended to shift the responsibility… at any time."

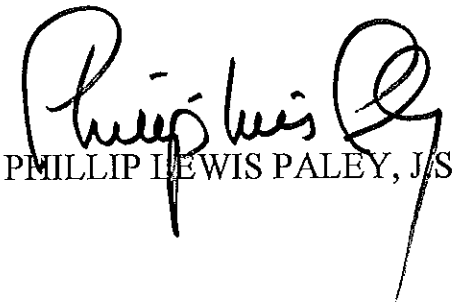
Here, Conti was solely responsible for workplace safety. Jacobs provided engineering consulting work for the NJTA, and the language of its contract in no way suggests that Jacobs was a contractor, let alone a primary one. In Carvalho v. Toll Brothers, the Court imposed a duty on an engineering consultant who had actual knowledge that the operations were being carried out in the violation of safety standards and had authority to stop the work. Jacob here lacked authority or control to stop Conti.

Nonetheless, Mr. Silva argues that Jacobs had control over Conti, because Jacobs was listed directly above Conti on the Job Organization and Hierarchy Charts. In this court's view, Jacobs had more control than it asserts. Further, the deposition of Patrick Hogan - a former employee of Conti - suggests that Jacobs was in complete control of the project. Therefore, it is unclear what, if any, level of duty Jacobs owed Mr. Silva.

Jacobs and Mr. Silva argue that Mr. Gallagher's report is net: if so, Mr. Silva cannot prove a breach of duty. The court ruled that the opinions of Mr. Gallagher were not net. The court has also ruled that there are disputed factual issues regarding the obstructed view. Under these circumstances, there being material facts in dispute

regarding both duty and breach, Jacobs' and Mr. Silva's summary judgment motions are denied.

Very Truly Yours,



PHILLIP LEWIS PALEY, J.S.C.

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JOAO ABILIO SILVA; MARIA SILVA (his wife),

Plaintiffs,

v.

CONTI ENTERPRISES, INC.; THE CONTI GROUP; CONTICO CORP.; CONTICO CORPORATION; MANUEL "MANNY" BARBOSA; FORD MOTOR COMPANY; JACOBS ENGINEERING GROUP INC.; READING EQUIPMENT & DISTRIBUTION, LLC; FRED BEANS FORD, INC.; NAIK CONSULTING GROUP, PC; JIM CAFFREY; PAUL DECASAS; BILL MOSER; JEFF BOWSER; CHARLIE ANDERSON; JOHN WALDORF, JOHN DOES 1-20; ABC CORPORATIONS 1-20,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO.: MID-L-7167-15

Civil Action

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT FRED BEANS FORD, INC.

THIS MATTER having been brought before the Court upon motion by Gaul, Baratta & Rosello, LLC, attorneys for the defendant, FRED BEANS FORD, INC., for an Order granting Summary Judgment, and the Court having considered the matter and for good cause shown;

IT IS, on this 26th day of March 2019,

ORDERED, that the defendant, FRED BEANS FORD, INC.'s Motion for Summary Judgment is hereby granted; and it is further

GAUL, BARATTA
&
ROSELLO, LLC
ATTORNEYS AT LAW
100 HANOVER AVENUE
CEDAR KNOLLS, NJ 07927

ORDERED that a copy of this Order shall be deemed served upon upload to eCourts.

J.S.C.

HON. PHILLIP LEWIS PALEY, J.S.C.

( ) Opposed.

(X) Unopposed.

GAUL, BARATTA
&
ROSELLO, LLC
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