In the District Court of Appeal
Third District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] and [redacted]

Appellants,

v.

SPACE COAST CREDIT UNION, et al.,

Appellees.

ON APPEAL FROM THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

I. Introduction

[redacted] and [redacted] ("the Homeowners") appeal the trial court's non-final order denying their motion to quash the service of process instituted by Space Coast Credit Union ("the Bank").

II. Appellants' Statement of the Facts

When serving process upon the Homeowners, the Bank's process server failed to write the process server's initials on the summonses as required by Florida Statute § 48.031(5).[1] The Homeowners moved to quash service of process based upon the process server's non-compliance.[2]

The Bank did not dispute that the required information was missing from the summonses. Rather, without notifying the Homeowners' counsel, the Bank obtained "alias" summonses from the clerk of the court and attempted to "re-serve" the Homeowners.[3] The Homeowners moved to quash this second attempt at service because the Bank did not obtain an order from the trial court directing the

[1] Copy of Summonses attached as Exhibit A to Defendants' Motion to Quash Service of Process, August 23, 2010. (App. 7).

[2] Defendants' Motion to Quash Service of Process, August 23, 2010. (App. 4).

[3] Alias Summons dated February 28, 2012 (App. 9).

clerk to issue the alias summons.[4] The trial court denied the Homeowners' motion to quash the alias summons "without prejudice" and ordered the parties to set the Homeowners' original motion to quash for an evidentiary hearing.[5]

At the hearing, the Bank initially argued that the original motion to quash was "moot" since service was "perfected" by the alias summons.[6] And the Bank also argued that the Homeowners "waived" service of process by propounding discovery and filing a notice of email designation and two notices of unavailability:

> MR NOLAN [the Bank's lawyer]:…And [the Bank] argues that this case falls within the first exception, defendant party can voluntarily serve responsive pleadings, motions, or papers. In this case they have – [the Homeowners have] filed a response to our Request for Admissions, response to our Request for Production, and response to interrogatories. Those are responsive pleadings.
>
> In addition, papers. [The Homeowners have] filed notice of email designation, and designation of attorney, and two notices of unavailability....[7]

[4] Defendants' Motion to Quash Alias Summons, June 12, 2012 (App. 44).

[5] Order On Defendants, [redacted] and [redacted] Motion to Quash Alias Summons, July 30, 2014 (App. 54).

[6] Transcript of Hearing Before Judge Migna Sanchez-Llorens, January 26, 2015 (App. 56; "T. 1"), at 6.

[7] T. 7.

The Homeowners responded that they challenged jurisdiction at the onset and therefore had not voluntarily submitted themselves to the trial court's jurisdiction.[8]

Nevertheless, the trial court found that the Homeowners waived the issue and therefore denied the motion:

> THE COURT: Okay. Having reviewed the file, and, again, I did see that [the Homeowners] did file interrogatories, and I believe they waived the issue, I would agree with [the Bank's] counsel that at this point in time your motion will have to be denied.[9]

The Homeowners timely appeal this non-final order.[10]

[8] T. 8.

[9] T. 9; Order on Defendants' Motion to Quash, January 26, 2015 (App. 67).

[10] Notice of Appeal of Non-Final Order, February 5, 2015 (App. 68).

SUMMARY OF THE ARGUMENT

The Bank's burden in the trial court was to show it effectuated valid service of process by strictly complying with the service of process statute. The Bank did not carry its burden, or even argue that the actual service of process was proper. And the Bank clearly failed to strictly comply with the statute governing service because the process server failed to write the process server's initials on the summonses.

Nor did the Homeowners waive the jurisdictional defect by defending the case on the merits. It is black letter law that, once a party has raised the jurisdictional objection, it may then defend the case and even participate at trial. Permission to defend, however, is meaningless if the defending party cannot propound and respond to discovery or file a simple notice designating a primary email address.

Additionally, the issue was not mooted when the Bank had alias summonses issued and delivered since these summonses were not proper or authorized under the Rules until the original summonses had been quashed.

The lower court's denial of the Homeowners' motion to quash service of process should be reversed.

STANDARD OF REVIEW

This Court has jurisdiction to review the non-final order denying the motion to quash under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i), which permits review of non-final orders that determine the jurisdiction of a person. *See Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470 (Fla. 5th DCA 2007) (citing *Fisher v. Int'l Longshoremen's Ass'n*, 827 So. 2d 1096, 1097 (Fla. 1st DCA 2002)); *see also Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n*, 546 So. 2d 764, 765 (Fla. 5th DCA 1989). The standard of review is *de novo*. *Mecca Multimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007); *Anthony v. Gary J. Rotella & Associates*, 906 So. 2d 1205 (Fla. 4th DCA 2005); *Re-Employment Servs.*, 969 So. 2d at 470. As such, absolutely no deference is to be accorded the decision of the lower court. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). The Plaintiff bears the burden of demonstrating "[s]trict compliance with the statutes governing service of process…" *Schupak v. Sutton Hill Assocs.*, 710 So. 2d 707, 708 (Fla. 4th DCA 1998).

ARGUMENT

I. The Bank's process server failed to strictly comply with statutes governing service of process.

A. The process served failed to strictly comply with Fla. Stat. §48.031(5).

The Bank's process server failed to comply with the statutory law of Florida governing service of process. Specifically, the process server did not place the server's initials on the summonses on the Homeowners' summonses. Florida Statute § 48.031(5) provides:

> **Service of process generally; service of witness subpoenas.**-- (5) A person serving process shall place, on the copy served, the date and time of service and his or her identification number and initials for all service of process.

(emphasis added). This requirement is underscored in Florida Statute § 48.29(6) which adopts § 48.031(5) as the standard for certified process servers.

The Bank did not deny that the summonses were missing this required information or that the process server failed to perform the fundamental task which the server was sworn to perform. And the absence of a factual or legal basis for advocating (much less, holding) that service had been properly performed is fatal to the Bank's cause. "The burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court…" *Carlini v. State Dep't. of Legal Affairs*, 521 So. 2d 254, 255 (Fla. 4th DCA 1988).

B. Strict compliance with the statute is required.

It is black letter law that strict compliance with the statutes governing service of process is required. *Vidal v. SunTrust Bank,* 41 So. 3d 401, 402 (Fla. 4th DCA 2010) (reversal required where process servicer failed to note the time of service on the process served); *Herskowitz v. Schwarz & Schiffrin*, 411 So. 2d 1359 (Fla. 3d DCA 1982) (statutes governing substituted service of process must be strictly complied with and strictly construed). *See also Re-Employment Services, Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d at 471 ("The courts require strict construction of, and compliance with, the provisions of statutes governing service of process."); *Sierra Holding, Inc. v. Inn Keepers Supply Co.*, 464 So. 2d 652, 655 (Fla. 4th DCA 1985) ("Since…the statute requiring that alternative service be made on an 'employee' must be strictly construed, mere 'connections' with the corporation are insufficient"). The Bank, therefore, had the burden of showing strict compliance with the statute mandating that the process server's initials be written on the summonses delivered to the Homeowners.

C. Excusing the non-compliance with one of the provisions of the service statute would completely vitiate the statute and violate the constitutional separation of powers requirement.

The Bank may argue that the failure to include the process server's initials on the summonses was a mere trifle that can be ignored with impunity by the process server. However, the Florida Supreme Court has held that "the Legislature

does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (citing *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002)).

The Florida Supreme Court has instructed that "[i]n construing statutes, we must, to the extent possible, give effect to all parts of a statute." *Kepner v. State*, 577 So. 2d 576, 578 (Fla. 1991); *see also State ex rel. City of Casselberry v. Mager*, 356 So. 2d 267, n.5 (Fla. 1978) ("[a] statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts."). Accordingly, no portion of the statute may be arbitrarily deemed too unimportant to enforce.

Excusing a failure to comply with a portion of the statute is to leap with great abandon upon the slippery slope. There is no discernible difference between excusing the process server's failure to place his or her initials on the summonses and a failure to note any of the other required information, such as the time, the date, or the process server's identification number. The refusal to enforce a part of the statute would provide future violators an excuse for ignoring all of the statute.

Additionally, a trial court's refusal to enforce such a provision effectively legislates the statute out of existence—a direct violation of the separation of

powers doctrine. Under this doctrine, the courts of Florida are compelled to respect the will of the legislature as codified in the Florida Statutes. Florida Constitution in Article II, Section 3; *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953) (once the legislature makes a decision on a matter within its purview, "it becomes incumbent upon the Judicial branch to enforce it"). *See also Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) ("courts may not reweigh the competing policy concerns underlying a legislative enactment"); *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976) ("The propriety and wisdom of legislation are exclusively matters for legislative determination."), *quoting In re Apportionment Law, Senate Joint Resolution No. 1305*, 263 So. 2d 797 (Fla. 1972); *Kahn v. Shevin*, 416 U.S. 351 (1974), (courts do not substitute their beliefs for the judgment of legislative bodies which are elected to pass the laws).

D. Failure to strictly comply with Fla. Stat. §48.031(5) mandates reversal.

Because it is undisputed that the process server failed to strictly comply with §48.031(5), the order must be reversed. *Vidal*; *see also Brown v. U.S. Bank Nat. Ass'n*, 117 So. 3d 823 (Fla. 4th DCA 2013); *Kwong v. Countrywide Home Loans Servicing, L.P.*, 54 So. 3d 1033, 1034 (Fla. 4th DCA 2011).

II. The Homeowners did not waive the sufficiency of process issue.

During the hearing, the Bank argued, and the trial court agreed, that the Homeowners waived the sufficiency of process issue by responding to discovery and filing certain "papers" in the trial court.[11] But the argument that defending a case on the merits waives a previously filed motion to quash service of process is not merely incorrect, but is frivolous to the point of being sanctionable.

A. Responding to, and propounding, discovery does not waive an objection to personal jurisdiction.

Florida law is abundantly clear that, if a party timely raises an objection to personal jurisdiction or service of process, then that party may plead to the merits and actively defend the lawsuit without waiving the objection:

> A defendant who timely asserts a challenge to the court's jurisdiction over the person of the defendant is not prejudiced by participation in the trial of the suit and defending the matter thereafter on the merits. His challenge is preserved and he may obtain a review of the question of personal jurisdiction upon appeal should he suffer an adverse final judgment in the cause. *State ex rel. Eli Lilly and Co. v. Shields*, 83 So.2d 271 (Fla.1955)....

Babcock v. Whatmore, 707 So. 2d 702, 704 (Fla. 1998).

Here, the Bank argued that the Homeowners had voluntarily submitted themselves to the court's jurisdiction by serving responses to the Bank's discovery,

[11] T. 6.

which it incorrectly called "responsive pleadings."[12] The Bank was referring to the case of *Anthony v. Gary J. Rotella & Associates, P.A.*, 906 So. 2d 1205 (Fla. 4th DCA 2005)—which held that there was no waiver of the jurisdictional objection—and specifically, its statement (citing to *Trawick, Fla. Prac. & Proc.* § 8-2 (2005 ed.)) that service of process can be waived if the defending party serves responsive pleadings, motions or papers. *Id*. at 1208. This waiver only occurs, however, if the defendant files such pleadings, motions or papers before an objection to jurisdiction is made. In other words, the Bank confused a waiver of service of process with a waiver of an already made objection to the service of process.

Once the defendant raises the objection, responding to discovery does not waive it. *Snider v. Metcalfe*, 157 So. 3d 422, 425 (Fla. 4th DCA 2015) (filing responses to discovery and notice of intent to use trust funds to pay for attorneys' fees was not a request for affirmative relief that would amount to a waiver of the objection to jurisdiction).

Although unmentioned by the Bank, the Homeowners also propounded their own discovery after objecting to service.[13] This, too, did not result in a waiver.

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[12] (T. 7). Fla. R. Civ. P. 1.100(a) defines the types of filings which are considered pleadings and mandates that "[n]o other pleadings shall be allowed."

[13] *See*, Docket (App. 1), indicating Notice of Interrogatory (December 7, 2010); Notice of Interrogatory and two Requests for Production (June 24, 2013).

Brown, 117 So. 3d at 824 (making discovery requests—and even moving for sanctions for failure to comply with an order compelling discovery—are purely defensive activities and were not requests for affirmative relief, because they could not form the basis of an independent action). *See also Florida Department of Children and Families v. Sun-Sentinel, Inc.*, 865 So. 2d 1278 (Fla. 2004) (Florida Supreme Court held that motion for change of venue was not a plea for affirmative relief that would waive a jurisdictional challenge.); *Hollowell v. Tamburro*, 991 So. 2d 1022 (Fla. 4th DCA 2008) (Defendants requesting and participating in mediation, as well as filing a motion for protective order did not waive right to contest jurisdiction.); *Arch Aluminum & Glass Co., Inc. v. Haney*, 964 So. 2d 228, 235 (Fla. 4th DCA 2007) ("A compulsory counterclaim does not waive a personal jurisdiction defense.").

Here, the Homeowners challenged the efficacy of the service of process, and therefore challenged the trial court's jurisdiction. Serving and responding discovery is not only part of that defense, but a necessary part. If merely serving and responding to discovery waives a jurisdictional defense, then the Florida Supreme Court's pronouncement that a defendant may actively defend a case without such a waiver is meaningless.

B. Filing a notice of email designation and notices of unavailability did not waive an objection to personal jurisdiction.

Just as clearly, filing the notice of email designation[14] did not waive the Homeowners objection because the "the filing of a 'notice of appearance' by [defendant's] counsel did not waive [defendant's] right to claim lack of jurisdiction over [his] person." *Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026, 1027 (Fla.1982). This is because such a piece of paper: 1) indicates no acknowledgment of the court's authority; 2) contains no request for the assistance of its process; and 3) reflects no submission to the court's jurisdiction. *Id*.

Like a "notice of appearance," the Homeowners' notice of email designation did not acknowledge the trial court's authority, contained no request for assistance of its process, and, most importantly, reflected no submission to the court's jurisdiction. In fact, the notice explicitly provides that it was made pursuant to the newly minted "email designation" provision of Fla. R. Jud. Admin. 2.516 [(b)(1)(A)] (requiring an attorney to designate a primary email address upon appearing in a case).[15]

[14] Notice of Designation of Email Addresses, September 1, 2012 (App. 48).

[15] *Id*. at p. 1 (App. 48).

Furthermore, the Homeowners' notice of unavailability[16] cannot be considered affirmative relief which waives a jurisdictional challenge. "Affirmative relief" is the redress, assistance, or protection which the Defendant could have sued upon independently:

> *affirmative relief.* The relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiff's action.[17]

See also, *Brown*, 117 So. 3d at 824 (motions to compel and for sanctions were not "affirmative relief" because "they could not be maintained 'independently of plaintiff's claim…'"); Merriam-Webster's Dictionary of Law ("Affirmative relief (n): relief requested by the defendant to a lawsuit for injury which he or she claims to have suffered during the same factual situation the plaintiff claims to have been injured in and for which he or she could also bring a lawsuit." (emphasis added)); *B E & K, Inc. v. Seminole Kraft Corp*., 583 So. 2d 361 (Fla. 1st DCA 1991) ("Affirmative relief" is that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it.).

* * *

[16] Notice of Unavailability, September 7, 2013 (App. 51).

[17] Black's Law Dictionary (2004) (emphasis added).

In summary, the court erred when it found that the Homeowners waived the issue of jurisdiction. Their discovery requests and responses, along with the other court filings referenced by the Bank during the hearing, were not logically inconsistent with their initial defense of lack of jurisdiction. *Babcock v. Whatmore*, 707 So. 2d at 704. None of these filings could have been maintained independently of the Bank's claim since the Homeowners could not sue the Banks for discovery or because their attorney had an email to report. And for this reason alone the order should be reversed.

III. The alias summonses did not moot the issue.

A. The alias summonses were improperly issued without a court order.

Finally, the alias summonses did not render the Homeowners' initial motion to quash moot since the clerk of the court was not authorized to issue the alias summons until the original was quashed as "not executed" or "improperly executed." Fla. R. Civ. P. 1.070(b); *Vidal*, 41 So. 3d at 404 (determining that appeal was not mooted by alias summons served during its pendency because issues remain as to whether the second service was "proper and authorized" under Rule 1.070(b)). The Bank was required to file a motion with the trial court to obtain an order authorizing the issuance of the alias summonses—a motion alleging the reason an alias summons is needed:

> Trawick's Florida Practice and Procedure, Section 8.3 (1975), correctly points out that when the original summons is not returned, an alias summons can be authorized by the court. The proper procedure is to file a motion to obtain such authorization, alleging the need for alias summons and the reason the original summons has not been returned.

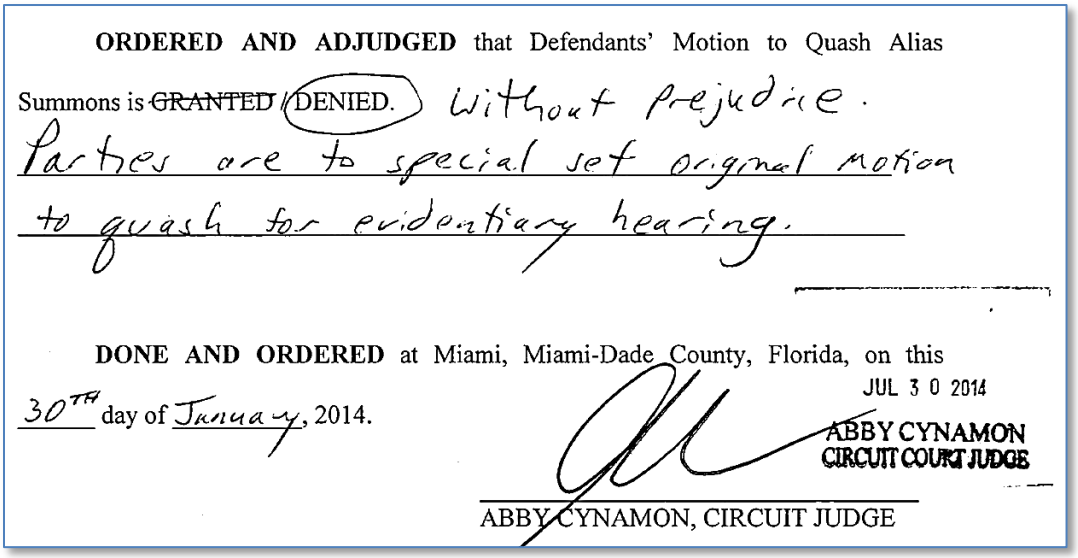
Hotel and Restaurant Employees and Bartenders Inter. Union v. Lake Buena Vista Communities, Inc., 349 So. 2d 1217, 1218 (Fla. 4th DCA 1977), *disapproved on other grounds of by Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026 (Fla. 1982).[18]

The Bank did not file a motion alleging the need for alias summonses or obtain an order from the court. Instead, it apparently obtained them from the clerk *ex parte*, even though the Homeowners had made a special appearance in the case for contesting jurisdiction. Because it did not make such a motion, it never articulated a need for an alias summons—which presumably would have been that it had not been properly executed.

[18] In *Hotel and Restaurant*, the Fourth District held that a plaintiff's failure to comply with this procedure was "harmless," in part, because the defendant waived jurisdiction by filing a notice of appearance. *Id*. at 1218. The Florida Supreme Court disapproved of the holding that a notice of appearance waives jurisdiction. It did not disapprove of the conclusion that the original summons must be quashed or surrendered before an alias summons may be issued.

B. The validity of the alias summonses is not ripe for review.

Although the trial court nominally denied the Homeowners' motion to quash the service of the alias summonses, in doing so, it did not rule that this second attempt mooted the initial motion to quash the original summonses. Just the opposite, the trial court specifically indicated that the ruling was "without prejudice" and ordered that a hearing be set on the original motion to quash:[19]



ORDERED AND ADJUDGED that Defendants' Motion to Quash Alias Summons is ~~GRANTED~~ (DENIED.) without prejudice. Parties are to special set original motion to quash for evidentiary hearing.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, on this 30TH day of January, 2014.

JUL 3 0 2014

ABBY CYNAMON
CIRCUIT COURT JUDGE

ABBY CYNAMON, CIRCUIT JUDGE

Had the court intended to rule that the issuance of the alias summonses was proper such that the Homeowners were now validly served, it would simply have denied the motion to quash and ordered the Homeowners to answer the complaint. Instead, it left the door open for the Homeowners to raise the issue again should the court decide that the original service was ineffective. Thus the trial court never

[19] Order On Defendants, [redacted] and [redacted] Motion to Quash Alias Summons, July 30, 2014 (App. 54).

ruled upon the merits of whether the issuance of the alias summonses was valid and the issue is not ripe for review. *Vidal*, at 404. Nor has either party asked for review of that order.

Indeed, the court in *Vidal* goes so far as to say that the trial court cannot rule upon a motion to quash an alias summons until it had decided whether the first attempt at service was valid:

> Because issues remain as to whether the second service was proper and authorized, we conclude that the second service does not render this appeal moot. The validity of the original service must first be determined before the trial court can rule on the pending motion [to quash the second service].

Id.[20]

Accordingly, if this Court finds that the first service of process was improper (and that the impropriety has not been waived), it should reverse the order below. At that time, in accordance with the trial court's expressly stated permission, the Homeowners can challenge the issuance of the alias summonses and obtain a ruling upon the merits. That pending decision is not before this court for review. *See Cousino v. State*, 473 So. 2d 777, 778 (Fla. 3d DCA 1985) (petition for writ of certiorari premature where court did not deny petitioners' motion for a protective

[20] Obviously, this view contemplates that a prematurely issued alias summons could be validated retroactively by a determination that the original service of process was defective—a view that the Homeowners do not espouse, but which may have been the view of the trial court here.

order, but ordered that the deposition be discontinued until further order of the court); *Balzer v. State*, 100 So. 3d 173, 175 (Fla. 2d DCA 2012) (order denying motion "without prejudice" coupled with language that contemplated further judicial labor on the issue was not final for purposes of review).

CONCLUSION

The lower court's denial of the Homeowners' motion to quash service of process should be reversed.

Dated: April 27, 2015

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this April 27, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this April 27, 2015.

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