

Incline Village Board of Trustees v. Edler, --- S.W.3d ---- (2018)

2018 WL 3028993

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Missouri Court of Appeals, Eastern District,
DIVISION FOUR.

INCLINE VILLAGE BOARD
OF TRUSTEES, Respondent,

v.

Matthew F. EDLER and Andrea Edler, Appellants.

No. ED 105494

Filed: June 19, 2018

Appeal from the Circuit Court of St. Charles County,
Cause No. 1211-CC00407, Honorable Daniel G. Pelikan,
Judge

Attorneys and Law Firms

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OPINION

Colleen Dolan, P.J.

*1 Matthew F. Edler and Andrea Edler (“Appellants”) appeal the trial court’s judgment concluding that they did not have **riparian** rights to the artificial lake owned by the Incline Village Board of Trustees (“Respondent”) that abutted Appellants’ property. Appellants offer two points on appeal. In their first point, Appellants argue the trial court erred in concluding that they did not have **riparian** rights to the artificial lake. Specifically, Appellants assert that the trial court erred in concluding that the lake was

still an artificial body of water; Appellants argue that the lake has become a natural body of water and that they have common law **riparian** rights to it. In Appellants’ second point, they contend that the trial court abused its discretion in awarding attorney’s fees to Respondent, specifically arguing that there were no equitable or special circumstances that supported the award.

We affirm the declaratory judgment, but reverse the award of attorney’s fees.

I. Factual and Procedural History

The Incline Village subdivision was developed in 1974. The developers dammed Indian Camp Creek to create a man-made lake (the “Main Lake”) that was built for the recreational enjoyment of the Incline Village lot owners. The subdivision’s Indenture of Trust and Restrictions of Incline Village (“the Indenture”) established a board of trustees and created several restrictions on the use and development of the subdivision. Article II of the Indenture states that “[a]ll common areas and parks shall be ... dedicated to the exclusive use and benefit of the lot owners [of Incline Village].” The Main Lake, which is owned by and titled to Respondent, is one such common area dedicated to the exclusive use and benefit of Incline Village lot owners. The Indenture also establishes that only lake-abutting Incline Village lot owners may construct boat docks or slips, and may only do so with written permission by Respondent. Assessments paid by Incline Village lot owners are the sole source of funding for repairs and improvements to common areas, including the Main Lake. Pursuant to the Indenture, lot owners were initially required to pay only an assessment fee “not to exceed fifty dollars” (per lot) to maintain the Main Lake.

In the years following the initial development of the Incline Village subdivision, the Main Lake began accumulating increasing amounts of silt—causing problems that could not be adequately addressed using only the assessment funds paid by the lot owners. In 1996, the Circuit Court of Warren County ordered the Incline Village lot owners to begin paying increased assessments of \$415.00 per lot annually for five years to fund a dredging operation to remove the silt. The Circuit

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Court of Warren County reasoned that the restoration of the Main Lake was “unquestionably in the best interest of each and every member of the [Incline Village subdivision], in that each will benefit from the use and enjoyment of the lake and each will benefit from the prospect of increased property values.” Additionally, the Circuit Court of Warren County ordered the lot owners to pay a separate \$100.00 per year assessment to fund a “preventative and remedial maintenance program” over the life of the Main Lake. In the following decades, the Incline Village lot owners were ordered to pay increased assessment fees to repair and maintain the Main Lake. To date, Respondent has spent approximately \$2,864,000.00 to repair and maintain the Main Lake since its creation; assessments paid by Incline Village lot owners were the sole source of the funds.

*2 Following the Circuit Court of Warren County’s 1996 order, property adjacent to the Main Lake was purchased by Peter Lensenhuber and subsequently developed into the Sumac Ridge subdivision; the general warranty deed transferring ownership to Lensenhuber specifically excepted ownership of “Incline Village Lake,” and did not refer to riparian rights to the Main Lake. Appellants, who own non-lake-abutting lots in the Incline Village subdivision (and therefore cannot build a dock or slip on the Main Lake pursuant to the Indenture), purchased a lake-abutting lot in the Sumac Ridge subdivision (the “Sumac Ridge Lot”) in 2009. The deed transferring ownership of the Sumac Ridge Lot to Appellants does not mention ownership of or riparian rights to the Main Lake. Nor did the Sumac Ridge subdivision plat or Sumac Ridge indenture reference rights of Sumac Ridge lot owners to use the Main Lake. Thus, Appellants owned two relevant properties: (1) the Main Lake-abutting Sumac Ridge Lot in which no contractual rights to the lake attached to its ownership; and (2) lots in the Incline Village subdivision that provided Appellants with contractual rights to use and enjoy the Main Lake, but afforded Appellants’ no contractual rights to construct boat docks or slips on the Main Lake, as the properties did not abut the lake. Regarding whether they have a right to build a dock, Appellants rely solely on their ownership of the Sumac Ridge Lot under the theory that common law riparian rights attach to said property since the Main Lake has become a permanent, natural body of water; Appellants concede that their ownership of Incline Village property

that is not Main Lake-abutting does not afford them rights to build a dock on it.

After acquiring the Sumac Ridge Lot, Appellants sought to build a dock on the Main Lake despite not owning a lake-abutting Incline Village lot. Appellants built the dock on the Main Lake from the Sumac Ridge Lot, even though they did not have written permission by Respondent to build the dock, and were explicitly told by at least one Incline Village board member that they could not build it. Respondent filed its petition in the Circuit Court of St. Charles County on April 24, 2012, alleging that Appellants had trespassed and seeking a declaratory judgment to enjoin Appellants from continuing construction on or using the dock and to order Appellants to remove the dock and repair the Main Lake property to its previous state.

After the parties filed their initial pleadings, the trial court granted Appellants’ Motion for Summary Judgment, but subsequently granted Respondent’s Motion to Reconsider and vacated its grant of summary judgment. A bench trial was held on September 8, 2016. Prior to trial, the parties jointly stipulated to several material facts (many of which have been mentioned previously), including, specifically, that the deed transferring ownership of the Sumac Ridge Lot to Appellants did not contain any language concerning the ownership of or rights to the Main Lake and that, pursuant to the Indenture, only owners of lake-abutting Incline Village lots may construct boat docks or slips on the Main Lake conditioned upon written permission from Respondent. On December 8, 2016, the trial court issued its Findings of Fact and Conclusions of Law and Judgment ordering Appellants to remove the dock, concluding that Appellants did not have the right to construct a dock on the Main Lake because “[t]he Main Lake is an artificial, man-made body of water created for the sole and exclusive use of Incline Village lot owners,” and that “[t]he Main Lake has not taken on the characteristics of a natural waterway and therefore [Appellants] have no riparian or littoral rights to own or use Main Lake.” In addition to concluding that Appellants had violated the Indenture and committed trespass by erecting the dock without Respondent’s permission, the trial court also awarded attorney’s fees and costs in the amount of \$75,199.77 to Respondent

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pursuant to § 527.100, which allows a trial court to award costs as may seem equitable and just.¹ The trial court reasoned that an award of attorney's fees was appropriate because Appellants constructed the dock without having obtained Respondent's permission and after being told by one of Incline Village's board members that Appellants did not have the right to build the dock on Respondent's property.

This appeal follows.

II. Discussion

Point I

In Appellants' first point, they argue the trial court erred in concluding that they do not have riparian rights to the Main Lake because the Main Lake has become a permanent and natural body of water. Appellants further assert that they have common law riparian rights to the Main Lake, a natural body of water, because their Sumac Ridge Lot abuts it.

Standard of Review

*3 "A judgment in a court-tried case will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Brainchild Holdings, LLC v. Cameron*, 534 S.W.3d 243, 245 (Mo. banc 2017) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). We view the evidence and inferences therefrom in the light most favorable to the trial court's judgment, and we disregard all contrary evidence. *Kirchoff v. Hutchison*, 403 S.W.3d 109, 112 (Mo. App. E.D. 2013). However, we review issues of law *de novo*. *Cent. Parking Sys. of Missouri, LLC v. Tucker Parking Holdings, LLC*, 519 S.W.3d 485, 493 (Mo. App. E.D. 2017).

Analysis

A landowner whose property abuts a body of water may have "riparian rights" to access and use that body of water. *Bradley v. Jackson Cty.*, 347 S.W.2d 683, 688

(Mo. banc 1961); *Bohannon v. Camden Bend Drainage Dist.*, 208 S.W.2d 794, 801 (Mo. App. W.D. 1948). While riparian or littoral rights have rarely been addressed by the courts of this state, Missouri courts have suggested that common law riparian or littoral rights generally do not attach to artificial bodies of water. *Bollinger v. Henry*, 375 S.W.2d 161, 166 (Mo. banc 1964) ("As a general rule riparian rights do not ordinarily attach to artificial streams in artificial channels."). This concept is consistent with the approaches taken by courts of other states, as "[t]he commonsense rationale underlying this principle is that, unlike a natural body of water, which exists because of natural processes, an artificial body of water is the result of someone's labor," and "it would be inequitable to grant a property owner rights to an artificial body of water that has been created by someone else solely because the property abuts the water." *Alderson v. Fatlan*, 231 Ill.2d 311, 314, 325 Ill.Dec. 548, 898 N.E.2d 595, 601 (2008); *see also Holton v. Ward*, 303 Mich.App. 718, 726, 847 N.W.2d 1, 7 (2014); *Anderson v. Bell*, 433 So.2d 1202, 1205-06 (Fla. 1983) (reasoning that granting common law riparian rights to landowners whose property abuts artificial bodies of water would "dissuade Florida homeowners and investors from making improvements that not only increase property values but also aesthetically improve adjacent lands, since they would run the risk of losing some of their property rights to other people merely because the water body touches another's property"). In *Greisinger v. Klinhardt*, 321 Mo. 186, 9 S.W.2d 978, 983 (Mo. banc 1928), one of the very few Missouri cases that addresses riparian rights, the Supreme Court of Missouri created a narrow exception to the aforementioned artificial body of water rule. In *Greisinger*, the Court held that a landowner who owned half of an artificial lake had riparian rights in the lake that could not be interrupted by the owner of the other half because "that property was useless ... without the privilege of the lake" and that the lake had become natural, reasoning that "[s]ince the dam was at all times intended to be permanent, and the artificial lake a permanent body of water, the riparian rights of the plaintiff attached to it the same as if it were a natural lake." *Id.*

Appellants concede that, under Missouri law, landowners whose property abuts an artificial body of water generally do not have riparian rights. Likewise, it is undisputed that Appellants do not have an easement, grant, or prescriptive

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right to build a dock to the Main Lake from their Sumac Ridge Lot, nor do Appellants assert that they own any part of the Main Lake. Rather, Appellants contend that they have common law **riparian** rights to the Main Lake under *Greisinger* because the lake, at some point in time, became a natural body of water due to the lake's intended permanence. Appellants' contention that they have **riparian** or littoral rights in the Main Lake is thus dependent upon whether the Main Lake should now be considered a natural body of water under the "artificial-becomes-natural" theory established in *Greisinger*.²

*4 First, we note that the "artificial-becomes-natural" theory has not been applied by Missouri courts since *Greisinger*. Additionally, we observe that the underlying facts of *Greisinger*, where the plaintiff and defendant each owned half of an artificial lake and defendant threatened to "lower" plaintiff's half by removing part of a dam, are very distinct from the facts in this case. Because the facts of the present case and *Greisinger* contrast significantly, and because no other Missouri case is informative on the application of the "artificial-becomes-natural" theory, it is instructive to consider how the theory has been applied by courts of other states.

In recent years, Illinois courts have only applied the "artificial-becomes-natural" theory under very select circumstances. See *Alderson*, 325 Ill.Dec. 548, 898 N.E.2d at 601–02; *Bohne v. La Salle Nat. Bank*, 399 Ill.App.3d 485, 496–97, 339 Ill.Dec. 501, 926 N.E.2d 976, 986–87 (2010). The Supreme Court of Illinois explained in *Alderson* that "the 'artificial-becomes-natural' rule ... stems, in part, from the difficulties that can arise in trying to distinguish the man-made from the natural, particularly with the passage of significant amounts of time." *Alderson*, 325 Ill.Dec. 548, 898 N.E.2d at 602 (citing A. Evans, *Riparian Rights in Artificial Lakes and Streams*, 16 Mo. L. Rev. 93, 107 (1951)). The Court also stated that "fundamentally, ... the artificial-becomes-natural rule is justified by principles of fairness and equity" and that "in some cases, where the usage of the artificial body of water has long been settled, it may be appropriate to treat the artificial body as the legal equivalent of a natural one." *Id.* The Court therefore elaborated that, at a minimum, the party invoking the "artificial-becomes-natural" theory must demonstrate that it has relied upon

the use of the artificial body of water without dispute for a lengthy period of time. *Id.* Consistent with the approach in *Alderson*, the Court of Appeals of Minnesota noted in *Lake Mille Lacs Inv., Inc., v. Payne*, 401 N.W.2d 387, 390 (Minn. Ct. App. 1987) (quoting *U.S. v. 1,629.6 Acres of Land*, 503 F.2d 764, 768 (3rd Cir. 1974)) that "in the 'vast majority' of cases finding **riparian** rights in artificial waterways, the party claiming such rights has shown reliance." We find this reasoning to be persuasive, as it is consistent both with the outcome in *Greisinger*, where the plaintiff was granted **riparian** rights to the artificial lake that he owned half of and where he had operated a resort for the five years preceding the suit, and with the suggestion by Missouri courts that common law **riparian** rights generally do not attach to artificial bodies of water, see *Bollinger*, 375 S.W.2d at 166.

Examining the record before us, we find no evidence indicating that the trial court erred in concluding that the Main Lake was an artificial body of water or in concluding that Appellants should not have **riparian** rights to the lake. Here, the Main Lake was created in 1974, and has been used solely by Incline Village lot owners and their guests. Additionally, only Incline Village lot owners have carried the burden of paying for the improvements and maintaining of the Main Lake. Notably, Incline Village lot owners were ordered by the Circuit Court of Warren County in 1996 to pay increased sums to fund the necessary repairs and maintenance to the Main Lake, which had increasing amounts of silt at that time. It is therefore reasonable to at least question the Main Lake's permanency and whether it would still exist absent the court order, which is relevant to whether the lake has become natural under *Greisinger* and *Alderson*. But regardless of whether the Main Lake has become "permanent" under the "artificial-becomes-natural theory," Appellants have failed to present any other reason why they should be granted **riparian** rights.

*5 On the premise that the Main Lake has become natural because of its permanency, Appellants essentially contend that they should *de facto* have **riparian** rights to the Main Lake simply because their Sumac Ridge Lot abuts it. Appellants have presented no evidence that they have relied upon access to the Main Lake from their Sumac Ridge Lot for a lengthy period of time, as they only purchased the lot in 2009 and built the dock in 2012—

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only months before Respondent filed suit. *See Greisinger*, 9 S.W.2d at 983 (where the Court granted plaintiff riparian rights to an artificial lake, of which he owned half, where he had operated a lake resort on the property for five years prior to the suit and where the property would be useless without rights to the lake); *see also Alderson*, 325 Ill.Dec. 548, 898 N.E.2d at 602; *Lake Mille Lacs Inv., Inc.*, 401 N.W.2d at 390. Nor have Appellants demonstrated, as a matter of equity and fairness, why they should be granted common law riparian rights under the “artificial-becomes-natural” theory. *See Alderson*, 325 Ill.Dec. 548, 898 N.E.2d at 602. Appellants can already use the Main Lake as non-lake-abutting Incline Village lot owners, and have presented no evidence that they were led to believe that their purchase of the Sumac Ridge Lot also included rights to or ownership of the Main Lake. If anything, the principles of equity and fairness require that we deny Appellants common law riparian rights. For the past four decades, Incline Village lot owners, including Appellants, have been required (including by a court order) to foot the bill to maintain and repair the Main Lake, amounting to \$2,864,000.00. Granting riparian rights to owners of properties that abut private artificial lakes, such as Appellants, would generally allow those property owners to reap the benefits of the lakes without having to carry any of the burden.

Appellants are not entitled to riparian rights to the Main Lake under the “artificial-becomes-natural” theory because they have not relied upon access to the Main Lake from their Sumac Ridge Lot for a lengthy period of time and because they have not shown as a matter of equity and fairness why they should be granted riparian rights to the lake. Granting riparian rights to Appellants would unnecessarily intrude on the terms of the Indenture and upon Respondent’s ownership rights.

Appellants' Point I is denied.

Point II

In Appellants' second point, they argue that the trial court abused its discretion in awarding attorney’s fees and costs to Respondent. Specifically, Appellants contend that there were no special circumstances to support the award, as Appellants' construction of the dock was done in the

sincere and reasonable belief they had a legal right to do so.

Standard of Review

We review a trial court’s award of attorney’s fees under § 527.100 for abuse of discretion. *Ellis v. Hehner*, 448 S.W.3d 320, 326 (Mo. App. E.D. 2014) (citing *Smith v. City of St. Louis*, 395 S.W.3d 20, 26 (Mo. banc 2013)). We will reverse a trial court’s award of attorney’s fees only if it “is arbitrarily arrived at or is so unreasonable as to indicate indifference and lack of proper judicial consideration.” *Hazelcrest III Condo. Ass'n v. Bent*, 495 S.W.3d 200, 209 (Mo. App. E.D. 2016).

Analysis

Generally, Missouri courts follow the American Rule in awarding attorney’s fees, meaning that “absent statutory authorization or contractual agreement, with few exceptions, each litigant must bear his own attorney’s fees.” *K.C. Air Cargo Servs., Inc. v. City of Kansas City*, 523 S.W.3d 1, 12 (Mo. App. W.D. 2017). Section 527.100 states that “[i]n any proceeding under sections 527.010 to 527.130 the court may make such award of costs as may seem equitable and just.” “Costs” under § 527.100 does not automatically include attorney’s fees, but in declaratory actions, “costs” may include attorney’s fees when there are special circumstances. *Smith*, 395 S.W.3d at 26. This special circumstances exception “is narrow and must be construed strictly.” *Henry v. Farmers Ins. Co., Inc.*, 444 S.W.3d 471, 478 (Mo. App. W.D. 2014). Special circumstances justifying an award of attorney’s fees under § 527.100 do not exist where “the parties simply advocated inconsistent legal and factual positions,” as advocating inconsistent positions “is the very nature of litigation.” *Smith*, 395 S.W.3d at 26.

Here, the trial court awarded attorney’s fees in the amount of \$75,199.77 to Respondent under § 527.100, concluding that “[Appellants] trespassing onto [Respondent’s] property and the fact that [Appellants] built their dock on [Respondent’s] property without seeking permission from [Respondent] and after having

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been told by [Respondent] that [Appellants] did not have the right to build on [Respondent's] property" were special circumstances justifying the award. In support of its award, the trial court cited *Ellis*, 448 S.W.3d at 326, where this Court affirmed an award of attorney's fees under § 527.100 where the defendant spitefully blocked and prevented the plaintiff's use of the plaintiff's driveway, which forced the plaintiff to file suit and incur legal fees. The trial court also analogized the facts of the present case with those of *Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo. App. E.D. 2009), where this Court affirmed the trial court's award of attorney's fees because special circumstances existed justifying the award. In *Klinkerfuss*, a trust beneficiary petitioned to have a trustee removed—seeking to obtain her full share of the trust outright—alleging that the trustee had breached his fiduciary duty and committed waste. This Court concluded that special circumstances existed justifying the award of attorney's fees because the beneficiary's "intentional misconduct" of filing meritless claims containing baseless allegations against the trustee and appealing the trial court's judgment twice resulted in the trust incurring substantial, unnecessary attorney's fees.

*6 Upon examination of the evidence and arguments presented at trial, we find that special circumstances justifying an award of attorney's fees under § 527.100 were absent in this case. While Appellants did not prevail in this case, their belief that they had the right to construct a dock leading from their Sumac Ridge Lot is not entirely meritless, even if they were informed by an Incline Village board member that they did not have the right to do so. Appellants' deed to the Sumac Ridge Lot was silent on whether they had ownership of or rights in the Main Lake; additionally, this case is further complicated by the fact that Appellants already had the right to use the Main Lake as non-lake abutting Incline Village lot owners. Because Appellants a) owned lake-abutting property (albeit, not Incline Village lake-abutting property) and b) could already access the Main Lake as Incline Village lot owners, Appellants' belief that they could build a dock on their Sumac Ridge Lot is not unreasonable given Missouri's indeterminate stance on riparian rights regarding artificial lakes. Additionally, it is noteworthy that the trial court initially granted Appellants' Motion for Summary Judgment before granting Respondent's Motion to Reconsider and vacating its grant of summary

judgment; this supports the legitimacy of Appellants' claim and the issues in this case.

Further, while Appellants may have acted contrary to what they were told by one of the Incline Village board members, Michael Vickrey, there is no evidence to support that Mr. Vickrey was acting in his official capacity as an Incline Village board member when he communicated with Appellants. Additionally, there is no evidence in the record that Appellants acted spitefully or purposefully intended to deprive Respondent or its lot owners of use and enjoyment of the Main Lake. See *Ellis*, 448 S.W.3d at 326 (finding special circumstances existed justifying an award of attorney's fees under § 527.100 where plaintiff was forced to bring suit where the defendant spitefully deprived plaintiff the use of plaintiff's property). Rather, Appellants seemingly built the dock with the honest belief they had the right to do so as lake-abutting property owners; while incorrect, Appellants' attempt to exercise the proprietary rights they believed they possessed under the law does not constitute special circumstances to justify the award of attorney's fees under § 527.100. See *Smith*, 395 S.W.3d at 26. Respondent's assertion that Appellants' "intentional conduct" to build the dock alone constituted "special circumstances" that justified the award of attorney's fees is an overextension of the cases affirming an award of attorney's fees under § 527.100. While Respondent cites *Klinkerfuss*, 289 S.W.3d at 607 in support of its contention that intentional misconduct constitutes "special circumstances," that case was not applying § 527.100. In *Klinkerfuss*, this Court determined that "special circumstances" existed where the beneficiary of a trust filed a frivolous lawsuit against the trustee and appealed the trial court's judgment twice in an attempt to obtain her full share of the trust outright. Our Court called the beneficiary's initial claims, two appeals, and numerous attempts to relitigate the case "vexatious" and "groundless and unsuccessful litigation, which she pursued for the sole purpose of benefiting herself." *Klinkerfuss*, 289 S.W.3d at 619. Factually, *Klinkerfuss* hardly seems analogous to this case. As *Smith* made clear, advocating "inconsistent legal and factual positions" does not equate to special circumstances under § 527.100. *Smith*, 395 S.W.3d at 26. Given the amount of uncertainty surrounding the issue of riparian rights to artificial bodies of water in Missouri and the unique facts of this case, the trial court abused its discretion in awarding attorney's fees to Respondent

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because whether Appellants had the right to build a dock on their Sumac Ridge Lot was a legitimate question decided by the trial court.

Therefore, the trial court's award of attorney's fees is reversed. In all other respects, the trial court's judgment is affirmed.

Appellants' Point II is granted.

Mary K. Hoff, J., concurs.

Roy L. Richter, J., concurs.

III. Conclusion

All Citations

--- S.W.3d ----, 2018 WL 3028993

Footnotes

- 1 All statutory citations are to RSMo 2000 as updated through the most recent cumulative supplement, unless otherwise indicated.
- 2 Appellants state in their reply brief that they are not arguing they acquired common law **riparian** rights through the "artificial-becomes-natural" theory, but rather, acquired them through "the permanent becomes natural principle of law." We note that such a principle, as argued by Appellants, is in essence the same as the "artificial-becomes-natural" theory, but without any regard to the concepts of equity or fairness. We have found no decision, from the courts of this state or any other, recognizing that owners of property abutting artificial bodies of water may acquire **riparian** rights solely because of the body of water's permanence. We therefore analyze Appellants' point using the recognized "artificial-becomes-natural" theory that is at least somewhat applicable to this case.

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