***** NOT FOR PUBLICATION *****

NO. 24249

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

CONCERNED CITIZENS OF PĀLOLO, a Hawai'i non-profit corporation, LEWIS H. MOORE; MASARU ISHIDERA; BARBARA KEATING; GLADYS J. PARK; BARBARA A. SUZUKI; ROBERT K. NAKAMURA; GLENN WONG; THOMAS KAWABATA; CHARLES E. HELSLEY; PATRICIA M. BAKER; SHOTEI YAMAUCHI; COLIN P. CHUNG; TOSHIMASA ARAI; AND LIFE OF THE LAND, INC., a Hawai'i non-profit corporation,
Plaintiffs-Appellants,

AND

JOHN DOES 1-5; AND JANE DOES 1-5,
Plaintiffs,

vs.

THE KOREAN BUDDHIST DAE WON SA TEMPLE OF HAWAI'I; ABBOT DAE WON KI; CHAE YANG KO; ARMAN KITAPCI; ENDRE TOTH; THE CITY AND COUNTY OF HONOLULU; AND ZONING BOARD OF APPEALS OF THE CITY AND COUNTY OF HONOLULU,
Defendants-Appellees,

AND

CHARLES P. SUNG; JOHN DOES 1-5; JANE DOES 1-5; AND DOE ENTITIES 1-5,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 88-2217-07)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and Circuit Judge Ibarra, in place of Acoba, J., recused)

The plaintiffs-appellants Concerned Citizens of Pālolo [hereinafter, "Concerned Citizens"], a Hawai'i non-profit corporation, Lewis H. Moore, Masaru Ishidera, Barbara Keating, Gladys J. Park, Barbara A. Suzuki, Robert K. Nakamura, Glenn Wong, Thomas Kawabata, Charles E. Helsley, Patricia M. Baker,

Shotei Yamauchi, Colin P. Chung, Toshimasa Arai, and Life of the Land, Inc. [hereinafter, "LOL"], a Hawai'i non-profit corporation [collectively hereinafter, "the Appellants"], appeal from the April 6, 2001 judgment of the circuit court of the first circuit, the Honorable Marie N. Milks presiding, alleging as follows: (1) that the circuit court erred in entering (a) the May 3, 1999 decision and order granting the motion of the defendants-appellees City and County of Honolulu [hereinafter, "the City"] and Zoning Board of Appeals of the City and County of Honolulu [hereinafter, "the ZBA"] [collectively hereinafter, "the City"] for summary judgment [collectively hereinafter, "the City's MSJ"] and (b) the June 25, 1999 order granting in part and denying in part the Temple's joinder in the City's MSJ and the Temple's motion for summary judgment [hereinafter, "the Temple's MSJ and joinder in the City's MSJ"] of defendants-appellants Korean Buddhist Dae Won Sa Temple of Hawai'i [hereinafter, "the Temple"] and Abbot Dae Won Ki [collectively hereinafter, "the Temple"]; (2) that the circuit court "erred and abused its discretion in allowing evidence . . . which was obtained in violation of the discovery rules, not timely produced, prejudicial . . . and/or irrelevant"; and (3) that the circuit court "erred and abused its discretion in [entering the November 8, 2000 written order] denying [the Appellants'] motion for attorney's fees under [Hawai'i Revised Statutes (HRS)] Section 607-25 [(Supp. 2000).]"

On appeal, the Appellants argue: (1) that the circuit court "erred in granting summary judgment on the basis of res judicata and collateral estoppel," insofar as, notwithstanding

"the many and tedious prior agency proceedings, the only 'issue' technically before the agencies was the excess height of the main temple hall, and there has been no decisions on the zoning violations brought in this lawsuit; therefore, genuine and material issues of disputed fact remain to be decided"; (2) that the circuit court "erred and abused its discretion where, during trial on the nuisance claims, it allowed into evidence the Temple's exhibits," inasmuch as the exhibits (a) "had never been seen by the [Appellants] (despite 10 years of discovery requests)," (b) "were irrelevant," (c) "had been obtained in violation of the 'notice' requirements of [Hawai'i Rules of Civil Procedure (HRCP)] Rule 34 [(1999)]," and (d) "were prejudicial"; and (3) the circuit court "erred and abused its discretion in refusing to grant [the Appellants' motion for] attorney's fees and costs."

The Temple responds: (1) that the circuit court "did not err in granting various summary judgment motions brought by [the Temple]"; (2) that the circuit court "neither erred nor abused its discretion in receiving [the Temple's exhibits] into evidence at trial"; and (3) that the circuit court "neither erred nor abused its discretion in refusing to grant [the Appellants'] motion for attorney's fees and costs as the 'prevailing' party."

The City counters: (1) that the circuit court "did not err in granting summary judgment on the basis of res judicata and collateral estoppel"; and (2) that the circuit court "had [a] separate and independent basis for granting summary judgment in favor of the City."

The defendant-appellee Arman Kitapci asserts: (1) that, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 30 (2001), the Appellants' "appeal should be dismissed because they have failed to comply with [HRAP] Rule 28(b) [(2001)]," specifically by (a) "fail[ing] to comply with HRAP Rule 28(b)(3)'s requirement of a concise statement of the case," (b) "fail[ing] to comply with HRAP 28(b)(4)'s requirement of a concise statement of the points of error," and (c) "fail[ing] to comply with HRAP Rule 28(b)(7)'s requirement of an argument containing the contentions of [the] Appellants['] points [of error] and reasons therefor"; (2) that "the order granting summary judgment in favor of Kitapci should be affirmed even if the court decides to consider the [Appellants'] appeal on the merits" because (a) "the 'law of the case' does not bar Kitapci's December 28, 2001 motion for summary judgment" and (b) the Appellants have "failed to present any evidence to support [their] conspiracy claim"; and (3) that this court should "award Kitapci his attorneys' fees and costs incurred as a result of the [Appellants'] appeal."

The Appellants reply: (1) that "the arguments of the City and the Temple do not have legal or factual support," and the circuit court "erred and abused its discretion in granting the City's and [the] Temple's [motions for] summary judgment where there were material issues of fact remaining to be resolved," insofar as (a) "neither the City nor the Temple can show how the [issues raised by the Appellants] were 'essential' to the sole issue before the Director" of the Honolulu Department

of Land Utilization (DLU) [hereinafter, "the Director"], namely, "the 'variance' for the main temple hall," (b) "neither the City nor the Temple can point to any point in the record wherein the Director, the ZBA or any court made any ruling regarding ordinance No. 86-94, the Bridge Ordinance," and (c) "the City's 'standing' defense did not apply to the private temple, which as a private 'developer' built in violation of various zoning ordinances"; (2) that "the trial court abused its discretion in permitting numerous photographs, first produced only 10 days before trial . . . and which were irrelevant or violated the discovery rules"; and (3) that "the Temple's argument that the [circuit] court properly denied [the Appellants'] request for attorney's fees and costs in unavailing, because the express purpose of [HRS] Section 607-25 is to encourage private parties to act in place of the City or State."

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold: (1) that Kitapci is a nominal appellee and was not required to file an answering brief, such that we deny, with prejudice, his patently frivolous request for attorney's fees on appeal; (2) that the circuit court did not err in entering (a) the May 3, 1999 decision and order granting the City's MSJ and (b) the June 25, 1999 order granting in part and denying in part the Temple's joinder and MSJ; (3) that the Temple's informal request for attorney's fees is denied without prejudice to any future request meeting the requirements of HRAP Rule 39 (2001); (4) that the

circuit court did not prejudice the substantial rights of the Appellants in admitting the contested photographs into evidence, such that any alleged error was harmless; and (5) that, insofar as the Appellants were not a prevailing party, they may not avail themselves of the provisions of HRS § 607-25, and the circuit court therefore did not err in entering the November 8, 2000 order denying the Appellants' May 10, 2000 motion for attorney's fees and costs.

The Appellants do not allege any points of error pertaining to Kitapci. HRAP Rule 28(c) (2001) provides in relevant part that "[a] nominal appellee need not file an answering brief." By definition, Kitapci is a nominal appellee, insofar as his involvement at the appellate level does not extend beyond the Appellants' mention of his name as a party below. Kitapci himself admits that the Appellants only refer to him once in their opening brief, confirming that he has no stake in the present appeal.

Simply put, Kitapci argues that any appellant who challenges rulings that concern only certain appellees, but not others, has filed a sanctionable opening brief. This proposition, on its face, is utterly without merit. It is also noteworthy that Kitapci's request for fees and costs does not meet the requirements of HRAP Rule 39(d) ("A party who desires an award of attorney's fees or costs shall request them by submitting an itemized and verified bill of fees or costs, together with a statement of authority for each category of items[.]"). We therefore disregard Kitapci's irrelevant

arguments and deny his request for attorney's fees and costs with prejudice to any future request.

The Appellants do not advance any response to the City's argument that, notwithstanding its res judicata rationale, "the trial court . . . granted summary judgment based on other separate and independent bases." The Appellants therefore do not address the following rationale, set forth in the May 3, 1999 decision and order granting the City's MSJ: (1) as to Count I, (a) "[t]he alleged violations of the [Comprehensive Zoning Code (CZC)] and the [Land Use Ordinance (LUO)] in Count One have nothing to do with the City," (b) "[t]he record is clear that there is agreement between the [ZBA] and the reviewing courts on the issue of the applicable height limits on the Cultural Center under the LUO and CZC," (c) the Appellants failed to exhaust administrative remedies, and (d) although "[the] issues [raised in Count I] are without merit," "an overall finding regarding the safety of the Cultural Center is best undertaken after all zoning and building code violations have been corrected"; (2) as to Count II, (a) "[t]here was no intentional violation of the building codes or condonation of a violation of the building codes by the City," and "the City did not 'construct' the Cultural Center," (b) "there is no evidence that the City inspectors were negligent," and "under the 'public duty' doctrine . . . the City is not liable for the acts or omissions of its inspectors," and (c) "ROH section 18-5.7 grants the City immunity from claims arising from the performance of any inspection by the City," "UBC section 202(f) . . . bars claims against the City for

damages allegedly resulting from negligent building inspections," and "approval after a City inspection does not result in the City becoming a guarantor against all subsequent construction defects on the premises"; (3) as to Count III, (a) "[s]everal of the claims fail as they are within the purview of other government entities which have the duties of regulation and enforcement," the "public nuisance theories . . . fail because there is no showing that the injury to any [Appellant] resulting from the alleged nuisance is any different in kind from that of the public in general," and the "attractive nuisance theory fails because there has been no showing that the temple is unsafe and the theory is inapplicable to the facts of the case," and (b) "[t]he City neither created nor did it have any control over the nuisances alleged in Count Three," such that the Appellants' "nuisance claims relate solely to the actions of the Temple"; (4) as to Count IV, "[t]he allegations in the complaint fail to state a claim for conspiracy because there has been no showing of an illegal act committed by the City," insofar as (a) "[t]here is no illegal act in the record upon which the [Appellants] may base a claim of conspiracy" and (b) "there has been no showing of an alleged agreement between the parties to participate or aid in the commission of an illegal act"; (5) as to Count V, "[t]he only bad faith alleged in the Complaint is that of the Temple in the submission of its building permit applications," "[t]he Temple's actions had nothing to do with the City," and "[a]llegations of illegal campaign contributions are irrelevant as to the City," (b) the Appellants have "not pled the specific circumstances

constituting the alleged fraud[, such that] this count is defective on its face," but "[e]ven if the claim was pled with particularity, the City was the defrauded party, not the [Appellants]," and (c) "'bad faith' is not a cause of action"; and (6) as to Count VI, "[t]he issues raised . . . are moot, insofar as "the record reflects that the ZBA already assumed proper jurisdiction over the [T]emple's variance petition and that [the Appellants] participated in the administrative hearing."

Based on the foregoing uncontroverted reasoning, we hold that the circuit court's May 3, 1999 decision and order granting the City's MSJ is "appropriate." Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004) (internal citations and quotation signals omitted).

With regard to the Temple, as noted supra as to Kitapci's request for fees and costs, any party seeking fees or costs must "request them by submitting an itemized and verified bill of fees or costs, together with a statement of authority for each category of items[.]" HRAP Rule 39(d). Thus, we hold that the Temple's request for attorney's fees is denied without prejudice to any future request meeting the standards of HRAP Rule 39.

Turning to the Temple's MSJ, it is noteworthy that the circuit court did not explain its rationale in granting summary judgment in favor of the Temple, but rather merely noted that it was granting summary judgment as to Counts I, II, IV, V and VI, and as to Count III, with the exception of the Appellants'

"claims of noise, damaged retaining wall, and obstruction of view plane (for portions of structures built over the legal height limit only)." Nevertheless, the circuit court's rationale in granting the City's MSJ is equally applicable to its June 25, 1999 order granting in part and denying in part the Temple's MSJ and joinder in the City's MSJ. Indeed, even in light of the Appellants' contention in their opening brief that res judicata did not bar their claims, the following alternative grounds "show that there [is] no genuine issue as to any material fact and that the [Temple is] entitled to judgment as a matter of law," Durette, 105 Hawai'i at 501, 100 P.3d at 71 (internal citations and quotation signals omitted): (1) as to Count I, (a) "[t]he record is clear that there is agreement between the [ZBA] and the reviewing courts on the issue of the applicable height limits on the Cultural Center under the LUO and CZC," (b) the Appellants failed to exhaust administrative remedies, and (c) although "[the] issues [raised in Count I] are without merit," "an overall finding regarding the safety of the Cultural Center is best undertaken after all zoning and building code violations have been corrected"; (2) as to Count III, (a) "[s]everal of the claims fail as they are within the purview of other government entities which have the duties of regulation and enforcement," (b) "[the Appellants'] other public nuisance theories likewise fail because there is no showing that the injury to any [Appellant] resulting from the alleged nuisance is any different in kind from that of the public in general," and (c) "[the Appellants'] attractive nuisance theory fails because there has

been no showing that the temple is unsafe and the theory is inapplicable to the facts of the case"; (3) as to Count IV, (a) "[t]here is no illegal act in the record upon which the [Appellants] may base a claim of conspiracy" and (b) "there has been no showing of an alleged agreement between the parties to participate or aid in the commission of an illegal act"; (4) as to Count V, (a) the Appellants have "not pled the specific circumstances constituting the alleged fraud[, such that] this count is defective on its face," but "[e]ven if the claim was pled with particularity, the City was the defrauded party, not the [Appellants]," and (b) "'bad faith' is not a cause of action"; and (5) as to Count VI, "[t]he issues raised . . . are moot, insofar as "the record reflects that the ZBA already assumed proper jurisdiction over the [T]emple's variance petition and that [the Appellants] participated in the administrative hearing."

It is noteworthy that, notwithstanding its res judicata rationale, the circuit court did not set forth any sound reasoning in support of its disposition of Count II in the May 3, 1999 decision and order granting the City's MSJ that is applicable to the Temple. With regard to res judicata, the circuit court granted summary judgment against the Appellants and in favor of the City on Count II because, inter alia, "all adjudicative bodies involved in this case have agreed that the building permit in question is to remain open so any present violations can be corrected," such that the "issue is settled" and the circuit court could not "declare that the construction

was "'illegal, null and void.'" The foregoing reasoning supports the circuit court's grant of summary judgment in favor of the Temple as to Count II.

In Exotics Hawai'i-Kona, Inc. v. E.I. Dupont De Nemours & Co., 104 Hawai'i 358, 90 P.3d 250 (2004), this court observed as follows:

> It is well-settled in our jurisdiction that
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> > [r]es judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy. Claim preclusion and issue preclusion are, however, separate doctrines that involve distinct questions of law.
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> Bremer v. Weeks, 104 Hawai'i 43, 53, 85 P.3d 150, 160 (2004) (internal quotation marks, citations, brackets, and footnote omitted). . . .

104 Hawai'i at 364-65, 90 P.3d at 256-57 (emphases in original) (footnote omitted). With regard to claim preclusion, this court has stated that

> [c]laim preclusion, . . . "prohibits a party from relitigating a previously adjudicated cause of action." [Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999)]. Moreover,
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> > [t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all *grounds of claim* and defense which might have been *properly* litigated in the first action but were not litigated or decided.
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> Foytik v. Chandler, 88 Hawai'i 307, 314, 966 P.2d 619, 626 (1998) (quoting Morneau v. Stark Enters., Ltd., 56 Haw. 420, 422-23, 539 P.2d 472, 474-75 (1975)) (emphases added). The party asserting claim preclusion has the burden of establishing that (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question.

Bremer, 104 Hawai'i at 53-54, 85 P.3d at 160-61 (some emphases added and some in original).

> The policies underlying issue preclusion and claim preclusion are well-defined:
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> > The public interest staunchly permits every litigant to have an opportunity to try his case on the merits; but it also requires that he be limited to one such opportunity. Furthermore, public reliance upon judicial pronouncements requires that what has been finally determined by competent tribunals shall be accepted as undeniable legal truth. Its legal efficacy is not to be undermined. Also, these doctrines tend to eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent results.
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> Ellis v. Crockett, 51 Haw. 45, 56, 451 P.2d 814, 822 (1969) (citation and internal quotation marks omitted, reh'g denied, 51 Haw. 86, 451 P.2d 814 (1969)). Stated differently, issue preclusion and claim preclusion "share the common goals of preventing inconsistent results, preventing a multiplicity of suits, and promoting finality and judicial economy." Dorrance v. Lee, 90 Hawai'i 143, 148-49, 976 P.2d 904, 909-10 (1999).

Exotics Hawai'i-Kona, 104 Hawai'i at 365, 90 P.3d at 257.

The Appellants claim in Count II of their complaint that "in constructing the cultural center," the Temple "violated the provisions of the Honolulu Building Code." Count II is barred by claim preclusion. The three Bremer requirements are met: (1) Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan, 87 Hawai'i 217, 221, 953 P.2d 1315, 1318 (1998) (Korean Buddhist Temple II), which affirmed the circuit court's order affirming the ZBA's October 20, 1994 FOFs, COLs, and decision and order, "was a final judgment on the merits"; (2) the City, the Temple, and the Appellants were all parties to Korean Buddhist Temple II; and (3) "the claim decided [in Korean Buddhist Temple II] . . . is identical with the one presented in the [present matter]." See Bremer, 104 Hawai'i at 54, 85 P.3d at 161. With

regard to the third of the Bremer requirements, the ZBA's October 20, 1994 COLs specifically adjudicated the Appellants' claim that the construction of the cultural center "violated the provisions of the Honolulu Building Code," inasmuch as the ZBA concluded that "all of the building defects have been cured, will be cured or can be cured," such that the Temple no longer violated the provisions of the Building Code. (Emphasis added.)

Based on the foregoing, we hold that the circuit court did not err in entering the June 25, 1999 order granting in part and denying in part the Temple's joinder and MSJ, inasmuch as summary judgment in favor of the Temple was appropriate as to Count II based on claim preclusion and as to all other counts based upon the alternative rationale set forth in the May 3, 1999 decision and order granting the City's MSJ.

The Appellants' arguments as to the admission of the photographs are unavailing. HRE Rule 103(a) (1993) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" See also State v. Cordeiro, 99 Hawai'i 390, 421, 56 P.3d 692, 723 (2002) (quoting HRE Rule 103); In re Estate of Herbert, 90 Hawai'i 443, 462-63, 979 P.2d 39, 59 (1999) ("[T]he trial court's error in admitting the [lay opinion testimony] into evidence 'is not a basis for reversal absent substantial resulting prejudice to the rights of a party.'" Lau v. Allied Wholesale, Inc., 82 Hawai'i 428, 438, 922 P.2d 1041, 1051 (1996) (citing Commentary to HRE Rule 103 (quoting Trask v. Kam, 44 Haw. 10, 22, 352 P.2d 320, 326 (1959))) (internal quotation marks

omitted) (brackets added)). In the present matter, the Appellants have presented no argument as to how the circuit court's admission of the photographs prejudiced their substantial rights, aside from their general accusation that they were "'sandbagged.'" The Appellants were free to voir dire the Temple's witness, Griffith, as to the authenticity and accuracy of the photographs and had ample opportunity (i.e., from June 21, 1999 to July 2, 1999) to take their own photographs to rebut the exhibits introduced by the Temple. Moreover, Stender v. Vincent, 92 Hawai'i 355, 992 P.2d 50 (2000), is inapposite to the present matter because that case involved the defendant's production of more than 10,000 documents and 20 videotapes in two banker's boxes on two separate occasions after discovery deadline and on the eve of trial, even though documents were available months or years earlier. Id. at 366-69, 992 P.2d at 61-64. This court noted that the defendant's late production "impair[ed the] plaintiffs' ability to respond [and] therefore . . . prejudiced plaintiffs' rights both to timely discovery and to a fair trial," such that the error was not harmless. Id. at 369, 992 P.2d at 64. As we have said, such a grave degree of prejudice is not evident in the present matter. It is further noteworthy that the Appellants cite no relevant testimony in support of their claim that the Temple violated HRCP Rule 34, and the Temple in fact asserted at trial that the photographs were taken from public places.

Based on the foregoing, we hold that the circuit court did not prejudice the substantial rights of the Appellants in

admitting the relevant exhibits into evidence, such that any alleged error was harmless.

The Appellants fail to meet the requirements for an award of attorney's fees pursuant to HRS § 607-25. Notwithstanding the plethora of extrajurisdictional authority the Appellants urge to persuade us to stretch the definition of a prevailing party beyond all meaningful bounds, the Appellants cannot identify a single ruling with respect to which they have prevailed in the present matter. The Appellants cannot tout any successes in Korean Buddhist Temple II as evidence of their victory in the case now before this court, inasmuch as Korean Buddhist Temple II arose out of an entirely distinct procedural background, albeit the identical subject matter. Moreover, although the Appellants assert that they prevailed in their February 10, 1989 motion for a preliminary injunction, the record plainly reflects that on October 6, 2000, the circuit court entered a written order denying the Appellants' February 10, 1989 motion for preliminary injunction. The Appellants have also failed to identify precisely in the record where the circuit court in the present matter ruled "that the Temple had proceeded to build in violation of the zoning codes 'in deceit and bad faith.'" In any case, as is evidenced from the entire procedural history of the present matter, the Appellants have not obtained any written order indicating that they have prevailed in any way.

That being the case, we hold that the Appellants may not avail themselves of the provisions of HRS § 607-25, and that the circuit court did not err in entering the November 8, 2000

order denying the Appellants' May 10, 2000 motion for attorney's fees and costs. Therefore,

IT IS HEREBY ORDERED that the circuit court's (1) April 6, 2001 judgment, (2) May 3, 1999 decision and order granting the City's MSJ, (3) June 25, 1999 order granting in part and denying in part the Temple's joinder and MSJ, and (4) November 8, 2000 written order denying the Appellants' motion for attorney's fees and costs are hereby affirmed.

DATED: Honolulu, Hawai'i, May 31, 2005.

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