No. 89348-9

SUPREME COURT OF THE STATE OF WASHINGTON

KERRY A. CLARK , ET AL.,

Petitioners

v.

MIKE WALCH, ET AL.,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON

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IDENTITY OF RESPONDENTS

Respondents Mike Walch and Marcia Walch were the Appellants in the Court of Appeals and Plaintiffs at trial.

COURT OF APPEALS DECISION

The decision at issue is the unpublished opinion, *Walch et al. v. Clark et al.*, No. 30123-III, filed July 23, 2013.

ISSUES PRESENTED FOR REVIEW

Respondents Walch do not assign error to the Appellate Court's decision reversing the Trial Court award of attorney fees to the Petitioners for the common law claims, remanding for a segregation of statutory attorney fees, and determining that neither party was the prevailing party on appeal.

STATEMENT OF THE CASE

Respondents Walch are the owners of Rainier Skyline Excavators, Inc. (RSE), a company that designs and builds delivers portable hydraulic track drive skyline excavators, buckets, teeth and accessory equipment (Trial Court Finding of Fact 7 & 8; Ex. 40). These systems incorporate redesigned cable logging systems to span areas and are used to harvest gravel and sand below water tables (RP Vol. I, p. 10; Ex. 40). In 2000, the Walches became interested in the property in Cle Elum, Washington

because it had a large pond (Dalle pond) on the property; the Walches intended to use the land to demonstrate, display and sell RSE's machinery as well as to manufacture excavators on their land (Finding of Fact 8; RP Vol. II, pp. 19 & 21). Many components of this equipment are transported on extra-long lowboy trailers, called super-loads. These super-loads can be up to 165 feet in length and can carry several hundred thousand pounds (Finding of Fact 9). The Dalle pond was an artificial pond created by the removal of gravel during the development of Interstate 90 in the 1960's (CP p. 8).

On May 12, 2004, the Walches purchased the property. Their Real Estate Contract (Ex. 1) identified access to the property by way of an existing easement over the property to the East of the Walches' land, then through the Burlington Northern & Santa Fe Railroad (BNSF) corridor "so long as the railroad shall allow," then connecting to Owens Road, a private road (RP Vol. I, p. 126; BNSF Short Plat, App. Ex. 54). The grantors owned no interest in Owens Road. At Owens Road the access proceeds North through the BNSF corridor, across the BNSF railroad crossing to the North Edge of the BNSF corridor where Owens Road becomes a public right of way owned by the City of Cle Elum (RP Vol. I, pp. 125-26; Exs. 54 & 57). The City of Cle Elum does have a private agreement with the Owens Family to use Owens Road South of the BNSF railroad

crossing from the North Line of Section 36 to the City of Cle Elum's sewage treatment plant (RP Vol. I, p. 126; Ex. 58). No written agreement exists as to the railroad corridor and crossing granting permission for the City or any landowner south of the crossing to use the railroad corridor and crossing. The parties stipulated that the Walches' legal access does not include the railroad corridor two hundred feet North and South of the centerline and that no permits exist for the Walches or the City of Cle Elum to cross the BNSF Railroad corridor (RP Vol. I, 4-5; see also RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54). An alternate route takes the Walches to the privately held portion of Owens Road, but gives the Walches no legal right to use that road (BNSF Short Plat, Ex. 54) and it still requires the Walches to use the railroad corridor and crossing. The Walches attempted to obtain a railroad crossing and access directly from the North, but BNSF refused to consider any additional unguarded railroad crossings (RP Vol. II, p. 46).

The property of each Petitioner lies to the West of the Walch property (Exs. 45, 52 & 54), in Swiftwater Business Park. All property owned by the parties is zoned by the City as being within its Industrial District (Cle Elum Municipal Code, Chapter 17.36.)

On August 9, 2010, Respondents Walch filed a Complaint To Establish Easement From Prior Use And/Or Prescription; Or Alternatively

An Easement By Necessity Pursuant to RCW 8.24.010 et. seq. (CP 1 – 63). On January 14, 2011, pursuant to a stipulation by all parties, the Court entered its Order dismissing the Walches' claim for an easement from prior use, with prejudice. On February 8, 2011, the Trial Court entered its order for partial summary judgment dismissing, with prejudice, the Walches' claims for prescriptive easements over and across the lands of Clark, Clark, LLC and Folkman. The statutory claim proceeded to bench trial.

The Walches sought a 30-foot easement by necessity, asserting their property was landlocked because they had no legal right to cross the railroad right of way, at the Owens Road crossing or otherwise, and because the Easterly access route was unsuitable for Walches' heavy excavator equipment, including commercial extra long lowboy traffic: the super-load lowboy hauling equipment would be forced to traverse an elevated railroad crossing, risking the danger that it would get "high-centered" and caught on the tracks (RP Vol. I, p. 37; RP Vol. II, p. 44; 48-49). Additional physical obstacles included 1) the inability to negotiate the turns at Owens Road at the Dalle intersection; 2) the inability to negotiate turns at the intersection at First Street and Owens Road; 3) the inadequate width of Owens Road; and 4) the grade level at the Owens Road crossing. Each of the barriers renders it impossible for Walches to

drive the RSE super-load lowboys (some as long as 165 feet) to and from their property. As a result of these physical constraints, it is virtually impossible to use the Easterly Dalle Road access, necessitating an alternate right-of-way across the Petitioners' lands (RP Vol. I, pp. 42-44 & 56; Vol. II, pp. 47, 49, 73; Exs. 46 & 47).

In addition, the statutory easement by necessity was pursued because the Walches have no legal access to their property and cannot get their access insured (Ex. 9); the Walches do not have a BNSF permitted easement for access to their property, and BNSF was not willing to grant an easement along its corridor (RP Vol. II, pp. 4-5; Ex. 9). Further, the Walches cannot get bank financing to construct their manufacturing facility because of this condition of the title (RP Vol. II, p. 10). The Walches were unable to obtain direct access over the railroad and corridor directly to the North of their property (RP Vol. II, p. 46). They did file an Application for Purchase of Railroad Land (Ex. 114) on October 27, 2010, but BNSF has taken no action on that application (RP Vol. II, p. 40). The Walches have not sought a permit to cross the railroad at Owens Road (RP Vol. II, p. 43).

On May 24, 2011, the Trial Court issued its Memorandum Decision (CP 246-51) and on July 11, 2011, it entered Findings of Fact and Conclusions of Law (CP 445 – 454). Judgment was entered

dismissing Walches' claim of an easement by necessity under RCW 8.24.010, *without prejudice*, and granting each Defendants' counterclaim to quiet title in their respective properties (CP 461-65; 466-69). The court also awarded Clark, Clark LLC and Folkman their attorney fees and costs (CP 455-57; 458-60), failing to segregate the common law claim fees and costs from the statutory fees and costs allowed under the private condemnation statute. Reconsideration was denied on July 21, 2011 and Notice of Appeal was filed on August 4, 2011. On July 23, 2013, the Court of Appeals, Division III, issued an unpublished decision affirming the denial of an easement by necessity, reversing the award of common law attorney fees and costs to the Petitioners (Opinion at 9) and remanding for consideration of Petitioners' CR11 claim not decided at trial. It also determined that neither Petitioners nor Respondents were entitled to attorney fees on appeal as neither was a substantially prevailing party.

ARGUMENT

I The Case Before the Court Does Not Present Grounds For Discretionary Review Pursuant to RAP 13.4.

This case is a property dispute decided on the specific, narrow facts. The Petitioners claim that the Court of Appeals abused its discretion in requiring them to segregate their statutory attorney fees under the

private condemnation statute, RCW 8.24.030, from the attorney fees incurred in defending common law claims of prescriptive and implied easements. The Appellate Court applied the plain wording of the attorney fee provision of the private condemnation statute. There is no conflict with a decision of this Court, there is no conflict with a decision of the Court of Appeals, no state or federal constitutional issue is presented, nor does the application of the attorney fee provision involve a matter of substantial public interest. The Legislature provided for attorney fees under the statute; the Court of Appeals applied the statute as clearly written.

Although Petitioners argue there is a conflict with another Court of Appeals decision, they only cite an unpublished decision, *Kahne Properties v. Brown,* 145 Wn. App. 1051(2008) in violation of RAP 10.4(h) and GR 14.1(a). This alleged conflict does not create an issue of substantial public interest, as both the decision below and the allegedly conflicting unpublished decision have no precedential value.

II. The Appellate Court Properly Ruled, as a Matter of Law, That Petitioners Were Required To Segregate Their Attorney Fees Under RCW 8.24.030 From Attorney Fees For Common Law Claims For Prescriptive Easement And Implied Easement.

A. The Appellate Court Properly Applied RCW 8.24.030.

Interpretation of a statute is a question of law and is subject to de novo review. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 5, 282 P.3d 1093 (2012).

Petitioners argue that the abuse of discretion standard should apply in this case, and that the Appellate Court abused its discretion in reversing the award of common law attorney fees. The cases cited by Petitioners, *Kennedy v. Martin*, 115 Wn. App. 866, 65 P.3d 866 (2003), *Noble v. Safe Harbor Trust,* 167 Wn.2d 11, 216 P.3d 1007 (2009) and *Ruvalcaba v. Kwang Ho Baek, supra,* are distinguishable because they only involved statutory condemnation claims, not common law causes of action. The statute permits the award of attorney fees in the condemnation action, but does not require it. *Noble,* 167 Wn.2d at 17. An abuse of discretion occurs when a decision is manifestly unreasonable, exercised on untenable grounds or for untenable reasons. The discretion of the court pertains to the reasonableness of an award of attorney fees *under the statute*, not whether attorney fees for non-statutory claims may be awarded. *See Kennedy,* 115 Wn. App. at 872. Interpretation of a statute is a question of law and is subject to de novo review.

Petitioners argue that the use of the term "any action" in RCW 8.24.030 intended a broad application of that statute, so that it could encompass awarding fees expended on common law claims not brought

pursuant to that statute. The full sentence using the term "any action" states as follows: "In any action ***brought under the provisions of this chapter for the condemnation of land for a private way of necessity***, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee" (emphasis added). The plain meaning of this language is that it authorizes an award of fees only for any action brought under the private condemnation statute. Only by taking the phrase "any action" entirely out of context can it be read to embrace common law causes of action such as for an implied easement or a prescriptive easement. The award of non-statutory, common law attorney fees was based on untenable grounds, an error of law by the Trial Court. The Appellate Court properly reversed that decision.

B. The Appellate Court Properly Ruled That The Attorney Fees Should Be And Were Segregated.

This case, from its inception, was based upon separate and independent grounds for obtaining legal access to the Walch property. Two were based upon prescriptive use and implied easements. Only statutory attorney's fees of $200.00 are available for those claims. The third was based upon the statutory easement by necessity pursuant to RCW 8.24.030, which *may* entitle the Petitioners to an award of

reasonable attorney's fees for such statutory claim. The Appellate Court found that it was not impractical to segregate the claims and that the Petitioners did in fact segregate their requests based on the independent theories (Opinion at 11). Petitioners argue that a common nexus and common core of facts and related legal issues precluded segregation, but their actions proved otherwise. Thus, the Appellate Court correctly reversed the award of common law attorney fees.

The elements of proof for the separate theories for obtaining legal access are distinctly different. Except for the parties themselves, there was no commonality of witness testimony, and absolutely no commonality of factual testimony. The attorneys for Petitioners presented to the Trial Court Declarations of fees that were attributable exclusively to the common law claims. At the same time, they failed to explain to the Court why, if there was such a common core of facts, they did not present one, single non-party witness used in support of the Summary Judgment Motions to dismiss the prescriptive easement claim to counter the private necessity claim. The answer is simple. There was no common core of facts.

The requirements to establish a prescriptive easement are proof of: (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for ten years; and (3) knowledge of such

use at a time when the owner was able to assert and enforce his or her rights. *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 694, 709 P.2d 782 (1985); *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 288 P.2d 252 (1955); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 753 P.2d 555 (1988).

By contrast, the only requirement for an easement by necessity pursuant to RCW 8.24.010 is reasonable need based on the policy that landlocked land may not be rendered useless and the landlocked landowner is entitled to the beneficial uses of the land. The landlocked owner is given the right to condemn a private way of necessity to allow ingress and egress only to land; the landowner is also given the right to select the route. The only requirement is that the owner demonstrate a reasonable need for the easement for the use and enjoyment of his property. *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965); *Kennedy v. Martin, supra,* 115 Wn. App. 866; *Wagle v. Williamson, 51 Wn. App. 312, 754 P.2d 684 (1988), appeal after remand, 61 Wn .App. 474, 810 P.2d 1372 (1991).*

Other cases in which the courts have addressed statutory attorney fees in the context of multiple claims are illustrative. In *Brand v. Dept. of Labor & Industry*, 139 Wn.2d 659, 989 P.2d 1111 (1999), the petitioner employee, whose workers' compensation claim culminated in a lawsuit

over her disability level, sought review of the appellate court's order reducing and recalculating her attorney fees award, arguing that the award under RCW 51.52.130 should have been calculated without regard to her overall recovery on appeal, and should not have excluded fees for work done on unsuccessful claims. The court found that nothing in the language of RCW 51.52.130 suggested that an attorney fees award was dependent upon the worker's overall success on appeal. Thus, the court held that reducing attorney fees awards to account for a worker's limited success was inappropriate. Referring to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a case which it has followed, the Supreme Court of Washington said the following in *Brand:*

> We conclude that claims brought under the Industrial Insurance Act are different from the discrete, unrelated claims at issue in *Hensley*. Workers' compensation claims are statutorily based, and deal with one set of facts and related legal issues. The sole issue on appeal before the superior or appellate court in an Industrial Insurance Act case is whether or not the Board adequately assessed the worker's degree of injury. Alternative theories regarding the nature and extent of the worker's injury cannot be said to be unrelated, inseparable claims. An attorney's work on each theory is work "'expended in pursuit of the ultimate result achieved.'461 U.S. at 435. *Claims brought in the context of the Industrial Insurance Act are distinguishable from claims brought in the general civil context, which could, as in Hensley, be viewed as a series of discrete claims."*

Brand v. Dept.of Labor & Industry, supra, 139 Wn.2d at 673, 989 P.2d at 1118.

The Appellate Court properly reversed the award of fees for time spent on separate common law theories from the time spent on the only statutory claim for which an award of attorneys fees is authorized, easement by necessity. To award the Petitioners all of the fees incurred for all claims asserted against them, is to grant them a windfall, merely because one of the theories authorizes a fee award, RCW 8.24.030. Unlike in *Brand*, the distinct theories asserted by the Respondents Walch were not all within a single statutory scheme; rather, only the easement by necessity claim is statutory. Also unlike in *Brand*, there was not a sole set of facts or single issue that spanned all of the Respondents' theories; the alternative theories involve different factual proof and legal elements.

The Trial Court erroneously found that a common core of facts and related legal issues existed between the prescriptive easement and the statutory easement by necessity claims, finding that both easement claims were over identical roads. The Appellate court determined this was clear error as the statute only allows attorney fees for condemnation claims. The Petitioners attorneys were able to segregate their fees, and in fact did so. The condemnor in a statutory easement by necessity action has the right to select the route which, according to his own views, is reasonably

necessary for the full enjoyment of his land. *Wagle v. Williamson*, *supra.* The identity of location of the route for prescription and the route for necessity neither strengthens nor weakens either party's case. Petitioners are correct in stating that the statute does not per se mandate the segregation of fees. Nonetheless, the statute does expressly limit the cause of action for which fees may be recovered: "any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity."

In *Ethridge v. Hwang*, 105 Wn.App. 447, 20 P.3d 958 (2001), cited and relied upon by the Petitioners, the circumstances are distinguishable. The plaintiff sued the defendant, alleging violations of the Mobile Home Landlord Tenant Act, RCW 59.20.010 et seq., the Consumer Protection Act, and tortious interference with contract. The central and pivotal fact, common to all of the claims, was that the defendant had unreasonably rejected potential purchasers of the plaintiff's mobile home. The plaintiff prevailed at trial, receiving money damages for interference with business expectancy, for pain and suffering, and for violation of the Consumer Protection Act (CPA). She was awarded attorney fees incurred in the prosecution of all of her theories of recovery, and that award was affirmed on appeal. The Court of Appeals reasoned that a trial court in calculating an award of attorney fees under RCW 19.86.090 of the Consumer

Protection Act is not required to segregate the time expended by counsel on the Consumer Protection Act claim from the time expended by counsel on other claims, where the claims all relate to the same fact pattern but allege different bases for recovery. In *Ethridge,* because the plaintiff was entitled to all attorney's fees occurring after arbitration, and all attorney's fees incurred in connection with the MHLTA and CPA claims, the only work for which attorney's fees might not be awarded would be for work on the tortious interference claim prior to arbitration. The challenged fees were but a small part of the total fees in the case.

Only one of the claims by the Respondents is under a statute authorizing a fee award, and the Petitioners have sought to bootstrap an exorbitant fee recovery for time spent not only on the statutory claim, but also on the two additional and separate claims brought under the common law.

In *Ethridge* each claim involved the same central fact—the defendant's unreasonable rejection of prospective buyers at the park. Proof of the tortious interference claim involved the same preparation as the other claims--establishing that the defendant acted unreasonably. As the court put it, "because nearly every fact in this case related in some way to all three claims, segregation of the fee request was not necessary and the trial court did not abuse its discretion in awarding fees as it did."

Ethridge v. Hwang, supra, 105 Wn.App. at 461. The facts necessary for each of the claims asserted by Respondents were not identical, so that segregation of the fee request was required. Except for the parties themselves, in this case there was no commonality of witness testimony among the separate claims asserted, and no commonality of factual testimony.

If an attorney fee recovery is authorized for only some of the claims (in this case, the statutory private condemnation claim), the attorney fee award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues (in this case, the common law claims for an implied easement or a prescriptive easement). The attorneys must separate the time spent on those theories essential to the cause of action for which attorneys' fees are properly awarded and the time spent on legal theories relating to the other causes of action; this must include, on the record, a segregation of the time allowed for the separate legal theories . *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994).

In this case, the Clarks, Clark, LLC and Folkman attorneys have already separated their time according to the three (3) causes of action asserted against their clients. The three (3) theories asserted by the Respondents Walch obviously were not so intertwined factually or legally

that this task could not be accomplished. The Clarks, Clark, LLC and Folkmans are entitled to *reasonable* fees attributable to their attorneys' time actually spent on the statutory easement by necessity claim under the attorney fee provision in RCW 8.24.030, but they are NOT entitled to the windfall of fees for the time devoted to the distinct common law claims brought by the Walches. The Appellate Court properly reversed the award of attorney fees.

C. The Award of Attorney Fees and Costs Was Excessive and Unjustified.

Washington courts use the Lodestar Method to calculate an award for reasonable attorney's fees. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998)). The court applies the Lodestar Method by multiplying the total number of attorney hours spent on the action by the attorney's hourly compensation rate. *Mayer*, 102 Wn. App. at 79 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). Trial courts may not exclusively rely upon the billing records of the attorney seeking fees but must instead make an independent calculation of a reasonable amount of attorney fees. *Mayer*, 102 Wn. App. at 79 (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). "The reasonableness of attorney fees is a factual issue depending

upon the circumstances of a given case, and the trial court has broad discretion in fixing attorney fees." *Sign-O.Lite Signs, Inc.*, 64 Wn. App. 553, 566, 825 P.2d 714 (1992) (citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)).

When an attorney is authorized fees for only some of the Petitioner's claims, a trial court - and, hence the fee applicant - must make a reasonable attempt at segregating fees. *Hume v. American Disposal Co., supra,* 124 Wn.2d 656, 673. A court may not just accept at face value a fee applicant's claim for fees:

> Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Court should not simply accept unquestioningly fee affidavits from counsel. Consistent with such an admonition is the need for an adequate record on fee decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Not only do we affirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

Mahler v. Szucs, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998). The burden of demonstrating that a requested fee is reasonable "always remains on the fee applicant." *Absher Const. Co. v. Kent Sch. Dist. No.* 415, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995).

The Declarations of Petitioners' attorney were deficient on multiple levels. Among other things, they charged excessive time for multiple entries to prepare, review, re-review, re-draft; they did not segregate between fees and costs; they lacked detail in many entries that appeared to be secretarial in nature; and included many fees attributable only to defense of the prescriptive easement claim. To put it another way, the Petitioners' counsel failed to provide the Court with sufficient information to conduct a Lodestar Calculation.

D. The Appellate Court Properly Determined That Petitioners Did Not Substantially Prevail on Appeal.

Pursuant to RAP 14.2, a clerk may award costs to a substantially prevailing party, *unless the appellate court directs otherwise* in its decision terminating review. In its Opinion, the Appellate Court found that Respondent Walches' appeal was not frivolous, noting that Walches presented debatable issues on appeal. It also concluded that the Petitioners had not substantially prevailed because their award of attorney fees had been reversed and substantially reduced (Opinion at 13). That was a central issue in the appeal. In this case, the Appellate Court determined to remand the case for a determination of the appropriate attorney fee award and made attorney fees on appeal dependent on that determination. The

decision was entirely within the Appellate Court's discretion, and no abuse of discretion has been shown.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Petition be denied.

DATED this 21st day of October, 2013

Respectfully submitted,

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Attorneys for Respondents
Mike and Marcia Walch

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 21, 2013 I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true copy of Respondent Walches' Answer to Petitioner Clarks' Petition for Review by the Supreme Court of Washington addressed to:

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DATED this 21st day of October, 2013 at Colville, Washington.

Chris A. Montgomery
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Mike and Marcia Walch

OFFICE RECEPTIONIST, CLERK

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Hi Camilla!

Transmitted herewith is Respondent's Answer to Petition for Review by the Supreme Court of Washington filed by Kerry A. Clark, et al in Supreme Court Case No. 89348-9. The Certificate of Service is attached as the last page.

I will be snail mailing the original today, unless that is not necessary.

Thanks!

Very truly yours,

MONTGOMERY LAW FIRM

By: Chris A. Montgomery
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