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No. 34722-2

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

PALMER D. STRAND and PATRICIA N. STRAND,
APPELLANTS

v.

SPOKANE COUNTY, et al., RESPONDENTS

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENTS

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I. RESPONDENTS' RESTATEMENT OF THE ISSUES

1. Whether summary judgment was properly granted?
2. Whether the trial court acted within its discretion in denying reconsideration?
3. Whether the trial court acted within its discretion in awarding costs and penalties?
4. Whether the record should be supplemented?

II. STATEMENT OF THE CASE

On March 2, 2015, the Assessor Office received Mrs. Strand's public records request dated February 27, 2015. (CP 20-21) The public records request was for "all records that show what caused the changes in value of land and/or structures on the following parcels...."

On March 5, 2015, Spokane County acknowledged receipt of Mrs. Strand's Public Records Request by e-mail and advised an installment response would be provide by March 12, 2015. On March 13, 2015, Spokane County sent an e-mail to Mrs. Strand advising that the 3rd party notification would be necessary, which would delay production until March 27, 2015. (CP 1383)

On March 27, 2015, Spokane County provided Mrs. Strand the requested records. (CP 44-264 and CP 655-1378)

On March 21, 2016, the Strands filed a Complaint. (CP 4-5)

On May 3, 2016, Spokane County provided Strands four (4) additional documents relating to a 2011 State Board of Tax Appeals (SBTA) case that was responsive to the public records request.

On May 9, 2016, Spokane County moved for Summary Judgment. (CP 1406-1408).

On June 3, 2016, Spokane County provided Strands 79 pages of additional records relative to Parcel #17274.9100 (hereinafter referred to as the "Margitan file") and the website where on-site photos are located.

On June 24, 2016, Spokane County submitted a Reply Memorandum asking the Court to grant partial summary judgment on the issue of liability arising out of production of the following documents: (1) Board of Tax Appeal records and (2) the Margitan file and that the matter of costs and penalties, if any be heard at a later time. (CP 272-277) On July 1, 2016, Judge Price entered an Order Granting Defendant's Motion for Partial Summary Judgment. (CP

392-293) On July 26, 2016, Judge Price entered an Order denying Plaintiffs' Motion for Reconsideration. (CP 576-577) On August 11, 2016, Spokane County filed a Motion for Regarding Costs and Penalties. (CP 1390-1400) On August 24, 2016, Judge Price entered an Order Regarding Costs and Penalties awarding Strands \$1473.00 in costs and penalties. (CP 652-653)

On January 31, 2018, Strands filed with the Court of Appeals a Motion to Reopen the Record for New Evidence. On February 4, 2018, Strands filed with the Court of Appeals Motions to Reference Brief and Evidence in Case 35597-7-III. On June 13, 2018, the Commissioner issued a ruling on the motions stating in part:

The commissioner now refers that motion to add evidence to the panel of judges of this Court that decides the Stands' appeal. The Strands are allowed to reference the additional documents in their opening brief on appeal so long as they also state that the reference is to documents outside the appellate record and that their motion to add the documents to the record has been referred to the panel.

III. APPLICABLE LAW

• SUMMARY JUDGMENT

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Smith v. Safeco Ins.*

Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). When reasonable minds can only reach one conclusion, questions of fact may be determined as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

- **Reconsideration**

We review the superior court's denial of a motion for reconsideration for abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013). A court abuses its discretion if its ruling is manifestly unreasonable. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002). A court's ruling is manifestly unreasonable when it is " 'outside the range of acceptable choices, given the facts and applicable legal standard.' " *Id.* (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

- **Costs and Penalties**

“[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.” *Yousoufian II*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial “court's decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take.” ’ ” *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990))). *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010)

IV. ARGUMENT

1. SUMMARY JUDGMENT WAS PROPERLY GRANTED

On March 27, 2016, Frank Oesterheld provided Mrs. Strand 937 pages via the County's FTP site in the “Assessor” folder (CP 15).

1. Pre/post inspection appraisals downloaded for inspection

Mr. Oesterheld advised Mrs. Strand that the following documents did not exist (CP 15):

Parcel	Records Requested
17274.9110	Pre/post inspection appraisals downloaded for inspection
17352.9006	Pre/post inspection appraisals downloaded for inspection
17352.9007	Pre/post inspection appraisals downloaded for inspection
17352.9020	Pre/post inspection appraisals downloaded for inspection
17355.9012	Pre/post inspection appraisals downloaded for inspection
17355.9028	Pre/post inspection appraisals downloaded for inspection
17363.9043	Pre/post inspection appraisals downloaded for inspection
26201.0922	Pre/post inspection appraisals downloaded for inspection
27323.9054	Pre/post inspection appraisals downloaded for inspection

The County has no duty under the Act to produce a record that is nonexistent and there is no agency action to review under the Act where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the public record did not exist. *West v. Washington State Dep't of Nat. Res.*, 163 Wn. App. 235, 245, 258 P.3d 78 (2011).

2. Cyclical inspections

The County erroneously indicated that the following documents did not exist (CP 15):

Parcel	Records Requested
17274.9110	Schedules of cyclical inspection
17352.9006	Schedules of cyclical inspection
17352.9007	Schedules of cyclical inspection
17352.9020	Schedules of cyclical inspection
17355.9012	Schedules of cyclical inspection
17355.9028	Schedules of cyclical inspection
17363.9043	Schedules of cyclical inspection
26201.0922	Schedules of cyclical inspection
27323.9054	Schedules of cyclical inspection

However, these records were provided to Ms. Strand on March 27, 2015 and are found at bates stamped numbers (CP 16):

Parcel	Bates #
17274.9110	20-45
17352.9006	61-72
17352.9007	101-120
17352.9020	140-149
17355.9012	164-173
17355.9028	188-199
17363.9043	212-221
26201.0922	238-245
27323.9054	261-272

The cyclical schedules are included on the property records cards designated by the above bates numbers. Properties are inspected every 6 years. Cyclical inspection schedules are designated by

Routing Numbers of 1 through 6 on the Property Records Cards. In the current inspection cycle, Routing #1 represented 2011 and Routing #6 represents 2016. (CP 280)

3. Board of Tax Appeal Documents

On May 3, 2016, Spokane County provided Mrs. Strand certain documents related to a 2010 State Board of Tax Appeal case #76493. These documents were responsive to Plaintiffs' February 27, 2015 public records request. According to established State retention schedules, these records should have been destroyed two years after case 76493 was settled. That case was settled on March 11, 2011. (CP 279)

4. Documents relating to parcel #17274.9110 (Margitan File)

Strands' Response to Defendant's Motion for Summary Judgment (CP 265-271) included 79 pages relative to parcel #17274.9110. Strands contended those documents should have been provided in response to their public records request. Spokane County reviewed the documents and determined that 44 pages were responsive to Strands' public records request. Spokane County

disagreed that the remaining documents were responsive but did provide them to Mrs. Strand. (CP 306)

There are no material facts in dispute. All responsive documents were timely provided to the Strands with the exception of the SBTA records and the Margitan file. Summary judgment should be affirmed.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING RECONSIDERATION.

Judge Price denied Strands' Motion for Reconsideration on July 26, 2016 (CP 576-577). In doing so, Judge Price:

[R]eviewed all pleadings in support of and in opposition to motions which were heard by the Court on July 1, 2016 and is mindful of the parties' oral argument at that time. Further, the Court has reviewed Plaintiffs' Motion for Reconsideration with attached *Exhibit A*, dated July 6, 2016, Memorandum, in Response to Plaintiffs' Motion for Reconsideration, dated July 12, 2016, and Plaintiffs' Supplemental Memorandum in Support of Motion for Reconsideration with *attachments A, B, C, D, E, F, G*, dated July 14, 2016, and is otherwise fully advised.

The Strands do not make any argument on the denial of reconsideration. RAP 10.3(a)(5) requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. "Assignments

of error unsupported by citation authority will not be considered on appeal unless well taken on their face.” *State v. Kroll*, 87 Wn.2d 829, 838, 558 P.2d 173 (1976). We need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). A party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of an alleged error. *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005).

In any event, Judge Price acted within his discretion in denying reconsideration.

3. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN AWARDING COSTS AND PENALTIES.

RCW 42.56.550 (4) provides:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

1. Attorney fees

Costs are to include reasonable attorney fees. Nonlawyer defendant litigating a PRA action pro se incurs no attorney fees and is not entitled to receive an attorney fee award under RCW 42.56.550(4). *West v. Thurston Cnty.*, 168 Wn. App. 162, 195, 275 P.3d 1200 (2012).

2. Penalties

Courts have discretion in determining whether penalties if any are applied per page, per record, per groups of record, per request, or per group of requests. *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (2d ed. Wash. State Bar Assoc. 2014) § 18.5(3)(a); *Sanders v. State*, 169 Wn.2d 827, 864, 240 P.3d 120 (2010); *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 435, 98 P.3d 463, 470 (2004), *as amended* (Jan. 25, 2005) and *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 278, 372 P.3d 97 (2016).

3. Later Discovered Documents

Spokane County's Public Records Policy Act Rules address later discovered documents. The Rules specifically provide as follows:

(11) **Later discovered documents.** If, after Spokane County has informed the requestor that it has provided all available records, Spokane County becomes aware of additional documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

On May 3, 2016, the Assessor's Office mailed Mrs. Strand 19 responsive pages relating to a 2011 State Board of Tax Appeals case for parcel #17352.9007, 403 days after the Assessor's March 27, 2015 production. (CP 1382-1389)

On June 3, 2016, the Assessor's Office e-mailed to Mrs. Strand 79 pages which included only 44 responsive pages relating to parcel #17274.9110 (Margitan), 434 days after the Assessor's March 27, 2015 production. (CP 1382-1389)

4. Penalty Factors

The penalty mitigating and aggravating factors are commonly referred to as the *Yousoufian* factors and were restated in *Sargent v.*

Seattle Police Dep't, 179 Wn.2d 376, 397-398, 314 P.3d 1093 (2013)

as follows:

Mitigating factors:

- (1) a lack of clarity in the PRA request;
- (2) the agency's prompt response or legitimate follow-up inquiry for clarification;
- (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions;
- (4) proper training and supervision of the agency's personnel;
- (5) the reasonableness of any explanation for noncompliance by the agency;
- (6) the helpfulness of the agency to the requestor; and
- (7) the existence of agency systems to track and retrieve public records.

Aggravating factors:

- (1) a delayed response by the agency, especially in circumstances making time of the essence;
- (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions;
- (3) lack of proper training and supervision of the agency's personnel;
- (4) unreasonableness of any explanation for noncompliance by the agency;
- (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency;
- (6) agency dishonesty;

- (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency;
- (8) any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency; and
- (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

A. Application of Mitigating Factors to this Case

1. A lack of clarity in the PRA request.

Defendants are not contending the Public Records Request lacked clarity but note that Plaintiff in her Public Records Request stated in part: “Asking me for further clarification than that included herein is a waste of my time...”

2. The agency's prompt response or legitimate follow-up inquiry for clarification

Byron Hodgson, Chief Deputy Assessor acknowledged receipt of the Public Records Request on March 2, 2015 by email dated March 5, 2015 and advised an installment response would be provided by March 12, 2015. (CP 1383) On March 13, 2015, Mr. Oesterheld sent an e-mail to Mrs. Strand advising that 3rd party notification would be necessary, which would delay production until March 27, 2015.

(CP 1383) On March 27, 2015, Mr. Oesterheld provided Mrs. Strand 936 pages of responsive documents. (CP 1384)

3. Agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions

In responding to Plaintiffs' Public Records Request, Mr. Oesterheld searched the Assessor's main drive, which contains all of the electronic records they maintain, using the following search terms: 17274.9110, 17352.9006, 17352.9007, 17352.9020, 17355.9012, 17355.9028, 17363.9043, 26201.0922, 27323.9054, inspection, permit, Strand, Margitan, Dibler, Blair, Schuyler, Cline, Abeyta, Fryett, Andres, Yaritz-Tareski, appeal. Mr. Oesterheld searched the terms one at a time and in various combinations (Strand+appeal, for example). Mr. Oesterheld manually searched the BOE and SBTA appeals file, the Final Review file, the image files linked to Proval and our website, and the H-drive (personal drive) belonging to Residential Appraiser Jay Sporn, who is the appraiser of record. Mr. Oesterheld asked Appraisal Supervisor Joe Hollenback, Residential Appraisal Supervisor Rey Amundson, and Commercial (formerly Residential) Appraiser Larry Splater if they had any information relevant to any of

the parcels listed in Mrs. Strand's Public Records Request. Mr. Oesterheld printed property record cards from Proval and downloaded images from Pictometry. (CP 1383-1384)

The Assessor's office made a good-faith effort to provide Mrs. Strand the records she requested and complied with statutory requirements and procedures at each step. Mr. Oesterheld communicated the production timeline to Mrs. Strand and advised her of the changes. (CP 1383)

4. Proper training and supervision of agency's personnel,

From 2012 to 2014, while completing his master's degree, Frank Oesterheld worked for two (2) years as an archivist intern for the Washington State Archives Eastern Region Branch and Digital Archives where he fulfilled hundreds of public records requests covering a wide variety of documents. He also completed the Electronic Records 1.0 and the Public Records 101 courses. (CP 1382-1383)

5. Reasonableness of any explanation for noncompliance,

State Board of Tax Appeal Documents

By correspondence dated May 3, 2016, Mr. Oesterheld provided Mrs. Strand 19 pages relating to a 2011 State Board of Tax Appeals case for parcel #17352.9007. These documents were responsive to the Public Records Request. According to established State retention schedules, these records should have been destroyed two years after case 76493 was settled on March 11, 2011. In addition to the 19 pages sent to Plaintiffs, a cover letter and a Retention Schedule were also included for a total of 21 pages. (CP 1385)

State Board of Tax Appeals (SBTA) files are typically obtained directly from the State Board of Tax Appeals and are available to the public on the SBTA website. The SBTA files were organized by SBTA case number rather than by parcel number, neighborhood number, or owner name like the rest of the Assessor's records, which complicated the search effort. Additionally, SBTA documents do not include the subject parcel number, which is the primary way the Assessor's office organizes its records. This makes it impossible to cross reference a search of SBTA records by parcel number. (CP 1385)

Margitan File

The Assessor's office maintains records on approximately 182,000 residential parcels, the vast majority of which are in an electronic format. Paper files in the Residential section are extremely uncommon and are usually generated due to unusual circumstances. This was just the case with the Margitan file, which was compiled over time because Mr. Margitan did not allow the Residential Appraiser access to his property. (CP 1386)

6. Helpfulness of agency to the requestor

The Assessor's office responded timely to Mrs. Strand's request and communicated at every step in providing Mrs. Strand over a 1GB of material that included property record cards, appeal information, and aerial images of the requested parcels. (CP 1382-1387)

7. Existence of agency systems to track and retrieve public records.

The Assessor's record system is based on clear, linear folder structure and file nomenclature that reflects archival and records management best practices. The Assessor has implemented and is continuing to refine an industry standard flat-file structure that identifies the departments within the Assessor's office (Residential

Appraisal, Commercial Appraisal, Personal Property, Appraisal Support, Property Information, Senior Exemptions, and Administration), each of which is assigned a folder. Within each of those folders are others organized by our most common work activities (Residential Appraisal, for instance, has appeals, neighborhood reports, correspondence, images, and so on), the labels of which also feature the Disposition Authority Number (DAN) and number of years retained. The next folder layer down is arranged by year according to the retention schedule, which facilitates access and disposal. (CP 1386)

B. Application of Aggravating Factors to this Case

1. Delayed response

The Assessor's office responded timely to the initial Public Records Request and provided later discovery documents pursuant to Spokane County's Public Records Policy Act Rule 11. (CP 1384)

2. Lack of strict compliance with PRA procedural requirements and exceptions

The Assessor's office complied with all procedural requirements and did not withhold any records based on exemptions. (CP 1382-1386)

3. Lack of proper training and supervision

Frank Oesterheld has a master's degree in Public History with concentration in archival science and public records. He had worked for two (2) years as an archivist intern for the Washington State Archives Eastern Region Branch and Digital Archives where he fulfilled hundreds of public records requests covering a wide variety of documents. Mr. Oesterheld has completed the Electronic Records 1.0 course in January 2015 and the Public Records 101 course in March 2015. (CP 1382-1383)

4. Unreasonableness of any explanation for noncompliance

Not applicable

5. Negligent, reckless, wanton, bad faith, or intentional noncompliance

Not applicable

6. Dishonesty

Not applicable

7. Public importance of issue to which request is related, where loss was foreseeable

Not applicable

8. Actual, personal economic loss to requestor, where loss was foreseeable

Not applicable

9. Penalty amount necessary to deter future misconduct, considering agency's size and facts of case.

Assessor Horton issued following Memorandum dated July 12, 2016, to address the reasons that the BTA and Margitan file were not timely produced:

All Staff,
Board of Equalization and State Board of Tax Appeal records are organized by BOE and SBTA case number, which complicates the public records search process because they are not titled nor organized the same way as rest of our records. Effective immediately all BOE and SBTA records will be labeled with the **subject parcel number first, then case number, then the date, e.g.: 17355.9014_2016-0404_20160713.**

Also, while we have very few paper files (around .005% of our total records stock), all staff who maintain paper files shall review them periodically to insure that they remain current, organized, and retrievable.

There will be no exception to this policy.

(CP 1387)

Following consideration of:

1. Defendant's Memorandum RE: Costs and Penalties, if any;

2. Third Declaration of Frank Oesterheld, including Attachment "A";
3. Plaintiffs' Memorandum on Penalties and Fees, including Exhibit "A" and "B";
4. Defendant's Reply Memorandum Regarding Costs and Penalties, if any

Judge Price Ordered, Adjudged and Decreed:

That Plaintiffs are awards costs in the amount of \$632.00* and penalties in the amount of \$841 calculated:

BTA record 407 days at 1.00 per day	=	\$407
Margitan Records 437 days at 1.00 per day	=	<u>\$434</u>
		\$841
240 – filing fee		
252 – BTA transcript		
40 – Service Fee		
<u>100</u> – Court transcript		
\$632		

Interest shall accrue at 12% unless \$1473 is paid in full by 09/15/16

(CP 652-653)

Based upon the arguments and facts Judge Price acted within his discretion in determining the amount of costs and penalties.

4. THE RECORD SHOULD NOT BE SUPPLEMENTED

The Commissioner issued a ruling on January 13, 2018 stating:

On May 8, 2018, this Commissioner withdrew by notation ruling her ruling of May 4, 2018 that had denied Patricia and Palmer Strand's motion to add

evidence to the appellate record. The commissioner now refers that motion to add evidence to the panel appellate record. The Strands are allowed to reference the additional documents in their opening brief on appeal so long as they also state that the reference is to document outside the appellant record and that their motion to add the documents to the record has been referred to the panel.

Strands did not make any argument on supplementing the record pursuant RAP 9.11 or RAP 9.12 requires the appellant to present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. “Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face.” *State v. Kroll*, 87 Wn.2d 829, 838, 558 P.2d 173 (1976). We need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). A party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error precludes appellate consideration of an alleged error. *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005),

Had the Strands argued that the record should be supplemented with the 50 photos (Brief of Appellant, p. 38) the County would have responded that 45 of the 50 photos were dated outside of the date parameters (2013 to February 27, 2015) of Strands request (CP 20). The remaining 5 photos if arguendo they were responsive would have been available on-line.

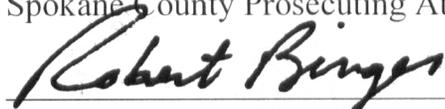
Strands have not complied with the Commissioner's Ruling nor provided any basis to supplement the record under RAP 9.11 or RAP 9.12.

V. CONCLUSION

Spokane County requests the Court of Appeals affirm the Trial Court's Orders.

Dated this 20th day of August, 2018.

LAWRENCE H. HASKELL
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PROOF OF SERVICE

I hereby certify that on the 20th day of August, 2018, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Portal, which in turns automatically generates an e-mail to Patricia Strand.

Dated this 20th day of August, 2018, in Spokane, Washington.



Donna Monroe
Donna Monroe

SPOKANE COUNTY PROSECUTOR

August 20, 2018 - 1:27 PM

Transmittal Information

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