No. 1018291

SUPREME COURT
OF THE STATE OF WASHINGTON

BROOKS ABEL,

Petitioner,

v.

GRANT COUNTY PUBLIC UTILITY DISTRICT, ET AL.,

Respondent.

ANSWER TO PETITION FOR REVIEW

GORDON TILDEN THOMAS & CORDELL LLP
Jeffrey M. Thomas, #21175
Mark Wilner, WSBA #31550
John Cadagan, WSBA #47996
600 University St., Ste 2915
Seattle, WA 98101
Tel. 206.467.6477

Attorneys for Respondent Grant County Public Utility District

TYSON & MENDES

Tracy Duany, WSBA #32287
Bryan Scholnick, WSBA #42741
811 First Ave., Ste 260
Seattle, WA 98104
Tel. 206.420.4267

Attorneys for Respondent Grant County Public Utility District

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I. INTRODUCTION

Respondent Grant County Public Utility District ("Grant PUD") requests that the Court deny Petitioner Brooks Abel's Petition for Review. Abel seeks review of an unpublished Court of Appeals decision that affirmed a civil jury trial verdict. Abel filed a personal injury lawsuit against Grant PUD beyond the three-year statute of limitations. He argued the statute should be tolled for incompetency. Both the trial court and Court of Appeals properly applied the governing statutes and Washington Supreme Court precedent in ruling that the burden of proof to show incompetency is that of clear, cogent, and convincing evidence. Abel does not cite legal authority to the contrary, much less demonstrate a decisional conflict warranting review under RAP 13.4(b)(1) or (2). Nor is there a basis for review under RAP 13.4(b)(3) or (4).

Abel also seeks review of three additional fact-specific evidentiary decisions of the trial court on which the Court of Appeals affirmed. Abel's arguments do not warrant further

appellate review under any prong of RAP 13.4(b). His Petition for Review should be denied accordingly.

II. STATEMENT OF CASE

A. Grant PUD and the Sandbar

This case arises out of an accident near the shore of the Columbia River in Central Washington known as Quilomene Dune and Bay ("Sandbar"). The Sandbar was formed thousands of years ago, and Grant PUD has done nothing to change it. CP 391-96; VRP 2286. The Sandbar remains today the natural treasure it has always been. Ex. 501 (available at https://www.youtube.com/watch?v=R9Gb7SBqRrU).

Grant PUD owns and operates the Priest Rapids Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC"). CP 402-626, 3504-05, 3513-30. The project includes Wanapum and Priest Rapids dams and is defined by a boundary that includes all lands and waters necessary to operate and maintain the project purposes, including public recreation and protection of environmental and

cultural resources. CP 397-98. The Sandbar is a natural, undeveloped, recreational site within project boundaries. CP 398; Ex. 505.

B. Abel's Diving Accident & Post-Accident Competency

Abel was bartending at the Blue Rock Saloon in Ellensburg on April 30, 2016. While working, Abel invited friends to boat with him and boat owner Derek Driscoll from Vantage to the Sandbar the next day—May 1, 2016. VRP 1074-75, 1087, 1125-26, 1565.

On May 1, 2016, when the group got to the Sandbar, Driscoll anchored his boat near shore. VRP 862, 1128, 1136. Abel observed others get off the boat in waist-deep water. VRP 808-09, 811-13, 873, 1093-94. Abel also got off the back of the boat, walked from the boat to shore, and walked from shore back to the boat. VRP 871-72. Abel knew how shallow the water was. *Id.* When back in the boat, Abel, Jacob Mauer, and one other man decided to jump into the water. VRP 876-79.

Mauer jumped feet first. VRP 877. Abel dove headfirst and suffered injuries. CP 2.

After the accident, Abel had an extensive record of medical treatment. As discussed further below, no medical provider indicated any concern regarding Abel's competency, and the medical record provides ample evidence that Abel was competent when he was released from the hospital in July 2016.

C. Procedural History

Abel filed his complaint on April 16, 2020, more than three years after the accident. CP 3497-3500. Abel claimed the statute of limitations should be tolled because he had been incompetent. The parties engaged in a three-week Zoom trial in King County Superior Court presided over by Judge Sean P. O'Donnell. VRP 417-2921.

The jury returned a defense verdict. CP 3380-82. It decided the case on a threshold procedural issue: statute of limitations. *Id.* The trial court entered judgment accordingly. CP 3501-03.

Abel appealed the jury verdict to Division One of the Washington Court of Appeals. The Court of Appeals unanimously affirmed in an unpublished[1] decision filed February 21, 2023. *See Abel v. Grant PUD*, No. 83348-1-I, slip op. (Wash. Ct. App. Feb. 21, 2023) (unpublished) ("Slip op.").

III. ARGUMENT

A. There Is No RAP 13.4(b) Basis to Review Whether Incompetency Must Be Shown by Clear, Cogent, and Convincing Evidence to Toll the Statute of Limitations—the Court of Appeals Decision Is Based on Governing Statutes and This Court's Decisions.

Negligence-based claims are subject to a three-year limitations period. RCW 4.16.080(2). The defendant bears the burden of proving this affirmative defense. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267 (2008). Grant PUD met its burden because Abel undisputedly commenced his lawsuit more than three years after the accident.

[1] Abel inaccurately refers to the Court of Appeals' decision as "published." Pet. at 1.

Abel argued the three-year period was tolled for incompetency under RCW 4.16.190(1). Proving incompetency was his burden. *Rivas,* 164 Wn.2d at 267. It required proof with clear, cogent, and convincing evidence. As one of the jury instructions provided, Abel had to show "with clear, cogent, and convincing evidence" that he was "incompetent to understand the nature of legal proceedings" for a specified time period. CP 3345.

The Court of Appeals affirmed the trial court's use of the clear, cogent, and convincing evidence burden. Slip op. at 3-5. The Court of Appeals based its decision on the governing statutory language and this Court's decisions. *Id.* There is no basis for review under RAP 13.4(b).

1. The Governing Statutes Require Proof of Incompetency with Clear, Cogent, and Convincing Evidence.

The tolling statute (RCW 4.16.190) explicitly refers to the Guardianship Act to determine incompetency, and the Guardianship Act explicitly provides that to overcome a

presumption of competency, one must establish incompetency with "clear and convincing evidence." RCW 11.130.265(1)(a) (current statute); *see also* RCW 11.88.045(3) (former statute) ("clear, cogent, and convincing evidence.").[2]

Under the Guardianship Act, an adult is "presumed" competent. RCW 11.130.037; *see also Found. for Handicapped v. DSHS*, 97 Wn.2d 691, 694 n.2 (1982).[3] To overcome the presumption, a guardian can be appointed only if incompetency is established with "clear and convincing evidence." RCW 11.130.265(1)(a); RCW 11.130.310(1)(a); *Stamm v. Crowley*, 121 Wn. App. 830, 842 (2004). In other words, the statute on tolling for incompetency explicitly refers to the Guardianship Act to determine incompetency, and the

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[2] There is no material difference between "clear and convincing" and "clear, cogent, and convincing" evidence. Tegland & Turner, 5 *Washington Practice* § 301.3 (2022).

[3] The current statute uses "capacity," not "competency." RCW 11.130.037. The difference, if any, does not matter here. At all times relevant to this case, the former statute was in effect, and it defined "incapacitated" as including "incompetence." *Rivas*, 164 Wn.2d at 268 (citing RCW 11.88.010(1)(f)).

Guardianship Act explicitly requires clear, cogent, and convincing evidence to establish incompetency.

The Court of Appeals applied this basic statutory analysis, noting additional support found in the statute's legislative history. Slip op. at 5-7. There is no RAP 13.4(b) justification for Supreme Court review over this issue where, as here, the Court of Appeals properly applies controlling statutory language.

2. *Rivas*'s Rationale Supports the Court of Appeals Decision—No RAP 13.4(b) Conflict.

Abel claims the Court of Appeals "disagree[d] with this Court's decision" in *Rivas*. Pet. at 14. This is not accurate. The Court of Appeals "disagree[d] with ***Abel's reading of*** *Rivas*." Slip op. at 5 (emphasis added). It concluded "Abel's reading of *Rivas* is unpersuasive." *Id.* at 8.

Notably, the Court in *Rivas* did not discuss the burden applicable to tolling for incompetency. The burden issue was

not before the Court and thus not addressed.[4] Accordingly, Division One was correct to note that *Rivas* "is not controlling." *Id.* There can be no direct RAP 13.4(b) conflict with *Rivas* because the burden of proof issue was not even addressed by *Rivas*.

Nor is there any indirect conflict. The underlying rationale in *Rivas* supports the Court of Appeals decision. The *Rivas* court reasoned that the reference in RCW 4.16.190 to the Guardianship Act's incompetency determination is a reference to "substantive standards of incompetence," not "procedural" aspects of "establishing and prosecuting a guardianship" itself. 164 Wn.2d at 270-71. But as the Court of Appeals here noted, burdens of proof are inherently tied to the merits of claims and, as such, are deemed "substantive," not "procedural," aspects of

[4] The Court of Appeal properly summarizes the issue in *Rivas* as whether a period of incapacity of four days was long enough to toll the statute of limitations, given the 10-day notice requirement for Guardianship Act petitions. Slip op. at 8. The substantive burden of proof was not before the Court in *Rivas* and not discussed.

such claims. Slip op. at 8 (citing *Spratt v. Toft*, 180 Wn. App. 620, 636 (2014)).[5] Thus, when the Guardianship Act statutes refer to the clear and convincing evidence burden, that defines a substantive aspect of an incompetency claim—and, under the rationale in *Rivas*, the substantive burden of proof is therefore incorporated into Washington's tolling statute. This is why the Court of Appeals was not persuaded by Abel's reading of *Rivas*.

3. *Grannum* Holds Incompetency Must Be Proved with Clear, Cogent, and Convincing Evidence.

There is no RAP 13.4(b) basis for review for yet another reason. This Court has already ruled as a matter of Washington common law that the burden of proving incompetency in civil cases is the same burden as set forth in the governing statutes—clear, cogent, and convincing evidence:

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[5] *See also Raleigh v. Illinois Dep't of Rev.*, 530 U.S. 15, 20-21 (2000) (holding "we have long held the burden of proof to be a 'substantive' aspect of a claim"); *Peterson v. Mountain States Tel. & Tel. Co.*, 349 F.2d 934, 936 (9th Cir. 1965) (same).

> It is well settled that the law will presume … competency rather than incompetency; it will presume that every man is … fully competent until satisfactory proof to the contrary is presented. In Washington we have held that the standard of proof required to overcome this presumption, in civil cases, is that of clear, cogent and convincing evidence.

Grannum v. Berard, 70 Wn.2d 304, 307 (1967).

Abel argues that the Court of Appeals erred by not distinguishing *Grannum*. Pet. at 17. Abel misses the point of Division One's reasoning: if the guardianship act's language incorporating the clear, cogent, and convincing burden were not applicable,[6] the only possible source of law to fill the gap would be Washington common law. Slip op. at 8-9. And under the "well-established common law, the burden of proof required to overcome the presumption of competency in civil cases is that of clear, cogent and convincing evidence." *Id.* at 9 (citing *Grannum* and other cases).

[6] It clearly is. *See* § III.A.1 *supra*.

Finally, Abel's attempt to distinguish competency to enter contracts (*Grannum*) as being "much different" than competency to bring a lawsuit (this case) fails. Pet. at 17. The Court of Appeals properly viewed this as a distinction without a meaningful doctrinal difference. Both contexts address how people's mental or cognitive abilities can impact their decision making in legal settings. Slip op. at 11. The Court of Appeals' rationale is sound.

In short, Abel does not point to any conflicting decision under RAP 13.4(b)(1) or (2). Indeed, the governing law—both statutory and decisional—are contrary to Abel's position. Nor is the issue one of substantial public interest warranting Supreme Court review under RAP 13.4(b)(4). The Legislature has already stated the burden of proof to establish incompetency for statute of limitations purposes specifically,

and this Court has already decided the issue as a matter of common law in civil cases more generally.[7]

B. The Court of Appeals' Harmless Error Analysis Regarding the Trial Court's Discretionary Decision to Admit Evidence of Abel's Cognitive Assessments Does Not Warrant Further Review Under RAP 13.4(b).

The Court of Appeals ruled it was error for the trial court to admit cognitive assessments to impeach Abel's expert witness (Dr. Martha Glisky) because she did not rely on the assessments to form her expert opinions; however, it was appropriate for the assessments to be used by Grant PUD's expert (Dr. Mark McClung) because he did rely on them to form his opinions. Slip op. at 16-19 (discussing *Washington Irrigation & Development Co. v. Sherman*, 106 Wn.2d 685 (1986)). Because Dr. McClung properly testified about the assessments, "[a]ny error in the PUD's method of cross-

[7] Abel does not contend the issue involves a significant constitutional question under RAP 13.4(b)(3).

examining Dr. Glisky [about the assessments] was therefore harmless." *Id.* at 19.

Abel argues the Court of Appeals' harmless error analysis contravenes "well-established law," Pet. at 18 (heading), but Abel does not cite or discuss any such law, much less show how it would justify further appellate review under RAP 13.4(b). Indeed, the "well-established law" regarding harmless error review supports the Court of Appeals' analysis. As the Court of Appeals points out, "[e]rror in the inclusion of hearsay evidence is harmless unless it was reasonably probable that it changed the outcome of the trial." Slip op. at 18 (citing *State v. Bourgeois*, 133 Wn.2d 389, 403 (1997)). Abel cannot meet this standard because the challenged evidence was properly admitted via Dr. McClung's expert testimony. *Id.*

Moreover, a jury verdict should be affirmed under straightforward harmless error review when, apart from any

claimed evidentiary error,[8] sufficient ***other*** evidence supports the verdict. *In re Kronenberg*, 155 Wn.2d 184, 194 (2005). Here, the jury had substantial evidence showing Abel's competency sufficient to sustain its verdict on tolling even if the challenged cognitive assessments were never discussed at all. Indeed, Dr. McClung testified the best evidence of Abel's competency was contemporaneous records made by those observing and assessing Abel, and he also relied on these records. VRP 2364. He testified Abel was competent by mid-July 2016 based on his ability to comprehend and understand, make decisions, and weigh information, and that after that date, he had only intermittent and brief issues due to lack of focus. VRP 2365-66. He testified about many other underlying facts and data supporting his expert opinion beyond the cognitive assessments Abel challenges on appeal, including:

- Harborview occupational therapy records. VRP 2367-68, 2374-75; Ex. 29 at 883, 898.

[8] To be clear, Grant PUD does not agree there was any such error committed by the trial court in the first place.

- Harborview discharge summary upon Abel's hospital release. VRP 2375-78; Ex. 518.
- Harborview Rehab Psychological Evaluation from October 2016, three months after Abel's hospital discharge. VRP 2378-81; Ex. 29 at 2558.
- Dr. Reidel's January 2017 notes. VRP 2381-84; Ex. 31 at 15.
- UW Valley Medical records from October 2017, over a year after the accident. VRP 2384-86; Ex. 31 at 27.
- Testimony from Abel's friend Rachel O'Connor about her interactions with Abel. VRP 2392-93; *see also* VRP 1094-97 (O'Connor trial testimony).

Dr. McClung also testified that many issues Abel was emphasizing, e.g., anxiety, suicidality, depression, unwillingness to think about hard issues, and tunnel vision, did not equate to incompetency. VRP 2393-98.

Moreover, Abel's extensive medical records reflect a uniform lack of concern about Abel's competency. *Accord* VRP 1636 (Glisky acknowledging Abel never diagnosed as incompetent). Finally, and arguably the most persuasive

evidence of all, the jury saw a video of Abel taken just one year after the accident that showed precisely how competent Abel was during the period he claimed to be incompetent. Ex. 512.

All of this evidence was before the jury regarding Abel's competency (the statute of limitations issue). It had nothing to do with the cognitive assessments Abel challenges on appeal. And it provided substantial evidentiary justification for the jury's verdict.

There is no basis for Supreme Court review. Harmless error review is a fact-based analysis that turns on assessing all the evidence presented to the jury at a trial. *In re Kronenberg*, 155 Wn.2d at 194. There is no decisional conflict under RAP 13.4(b)(1) or (2), and harmless error review of the civil trial here does not raise a significant constitutional question under RAP 13.4(b)(3)), or an issue of substantial public interest under RAP 13.4(b)(4).

C. The Court of Appeals' Harmless Error Analysis Regarding the Discretionary Decision to Admit Limited Evidence of Abel's Blood Alcohol Concentration on the Day of the Accident Does Not Warrant Review Under RAP 13.4(b).

Abel also seeks review of the trial court's discretionary decision, affirmed by the Court of Appeals, to permit a defense expert toxicologist to testify about Abel's .03 BAC test result, which the trial court allowed as evidence to impeach Abel's denial of drinking any alcohol on the day of the accident. The Court of Appeals, like the trial court, properly viewed this case as distinguishable from *Gerlach v. Cove Aparts., LLC*, 196 Wn.2d 111 (2020), and *Needham v. Dreyer*, 11 Wn. App. 2d 479 (2019), because Abel denied drinking any alcohol; whereas in *Gerlach* and *Needham*, the plaintiff admitted to drinking alcohol. Slip op. at 20; CP 3482-83; VRP 35-53. In other words, unlike in *Gerlach* and *Needham*, the alcohol evidence here was impeachment evidence admissible to assess Abel's credibility. *Id.*; *see also* ER 607 ("The credibility of a witness may be attacked by any party").

Abel argues it is "simply not true" that he denied consuming alcohol on the day of the accident. Pet. at 23. But the evidentiary record shows otherwise:

> Q. Were you drinking that day?
>
> A. No I was not. If I did, I might have had one beer, but I – no.
>
> Q. No drinking?
>
> A. No.

CP 3105. Abel attempted to recharacterize this denial as an "I don't remember," and his attempted recharacterization also is featured in his Petition for Review. Pet. at 23. However, his trial court testimony is clear: he denied drinking alcohol on May 1, 2016—the day of the accident. Abel's denial distinguishes this case from *Needham* and *Gerlach*, and the trial court and the Court of Appeals were both correct to so acknowledge. There is no decisional conflict justifying review under RAP 13.4(b)(1) or (2).

Nor is there any other RAP 13.4(b) basis for Supreme Court review. The Court of Appeals opinion ultimately rests on a harmless error analysis. Slip op. at 20. It appropriately distinguished the facts of *Needham* where there was good reason to believe that improper evidence of alcohol affected the outcome of that trial. *Id.* The errors in *Needham* were flagrant and prejudicial—defense experts, despite no factual foundation, were allowed to testify to "chronic alcoholism" and "binge-drinking," and opine that Needham was "intoxicated" when he collapsed. Here, there was no inflammatory testimony from the defense toxicologist. His trial testimony was curtailed, limited to the BAC result to impeach Abel's testimony. He could not—and did not—express expert opinion about likely effects of alcohol on Abel's behavior or decision-making/judgment. VRP 2288-339.

Moreover, the impermissible alcohol testimony in *Needham* was intertwined with the substantive merits of the plaintiff's malpractice claim "as a whole." 11 Wn. App. 2d at

498. The court reasoned that "the jury necessarily considered alcohol consumption while making its determination of whether the standard of care was violated." *Id.* at 500.

Here, the jury did not decide the case against Abel based on the merits of Abel's conduct on May 1, 2016. It entered a defense verdict for an unrelated, procedural reason: failure to comply with the statute of limitations. There is no credible argument that the challenged evidence—that Abel had alcohol in his blood on May 1, 2016—is even possibly relevant to the jury's adjudication of whether Abel filed his lawsuit on time more than three years later. *See also Bell v. State*, 147 Wn.2d 166, 180 (2002) (holding any error is harmless when "not logically linked" to issue jury decided).[9] The Court of Appeals was correct to hold that "the jury decided this case on statute of limitations grounds, an issue with no logical connection to the

[9] Abel admitted in his appellate briefing that evidence of alcohol consumption was irrelevant to the statute of limitations issue on which the jury based its verdict. App. Br. at 37.

fact of Abel's consumption of alcohol on the day of the accident." Slip op. at 20. The Court of Appeals' fact-driven harmless error analysis does not implicate any RAP 13.4(b) consideration.

D. There Is No RAP 13.4(b) Basis for Review Over Recreational Use Immunity Given the Jury Verdict on Statute of Limitations.

The trial court determined Grant PUD met its prima facie burden of showing that Washington's recreational use immunity statute, RCW 4.24.210(1), was triggered as a matter of law, because Grant PUD undisputedly allowed members of the public such as Abel to use waterways it controls for outdoor recreation purposes without charging a fee. *See also* CP 2111, 3488, 3490. As a result of this ruling, the burden then shifted to Abel to show at trial that his injury was sustained "by reason of a known dangerous artificial latent condition" for which a warning was not conspicuously posted. *See* RCW 4.24.210(4)(a).

Abel seeks review of the trial court's preliminary decision that recreational use immunity was triggered as a matter of law in the first place. Pet. at 25. Abel describes this trial court decision as creating "structural error" in the civil trial.[10] *Id.* However, structural error in a civil trial cannot be a basis for further appellate review under RAP 13.4(b), because, as the Court of Appeals points out, the Washington Supreme Court holds "the doctrine of structural error is strictly limited to criminal trials." Slip op. at 20 (citing *In re Detention of Reyes*, 184 Wn.2d 340, 346 (2015)).

Nor is there any other basis for review under RAP 13.4(b). As with other issues summarized above, the Court of Appeals appropriately decided the recreational use issue on harmless error grounds. The trial court decision on recreational use immunity had nothing to do with the jury's statute of

[10] The trial court's decision was legally sound for the various reasons detailed in Grant PUD's appellate briefing. *See* Resp. Br. at 42-54.

limitations verdict. Slip op. at 20 ("Abel draws no connection between the court's ruling on the recreational use immunity statute and the jury's verdict on statute of limitations."); *see also Bell*, 147 Wn.2d at 180 (harmless error when "not logically linked" to issue jury decided). Abel points to no relevant decisional conflict under RAP 13.4(b)(1) or (2). Moreover, the Court of Appeals' harmless error analysis does not raise a significant constitutional question under RAP 13.4(b)(3)), nor an issue of substantial public interest under RAP 13.4(b)(4). Abel's Petition should therefore be denied.

IV. CONCLUSION

Abel's Petition for Review fails to meet the standard governing review under RAP 13.4(b). His Petition should be denied accordingly.

I certify that this document contains 3,734 words in compliance with RAP 18.17.

Respectfully submitted this 17th day of April, 2023.

GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Respondent Grant County Public Utility District

By *s/Mark Wilner*
Jeffrey M. Thomas, WSBA #21175
Mark Wilner, WSBA #31550
John D. Cadagan, WSBA #47996
600 University Street, Suite 2915
Seattle, Washington 98101
Tel. 206.467.6477
jthomas@gordontilden.com
mwilner@gordontilden.com
jcadagan@gordontilden.com

TYSON & MENDES
Attorneys for Respondent Grant County Public Utility District

By *s/Tracy Duany*
Tracy Duany, WSBA #32287
Bryan Scholnick, WSBA #42741
811 First Ave., Ste 260
Seattle, WA 98104
Tel. 206.420.4267
tduany@tysonmendes.com
bscholnick@tysonmendes.com

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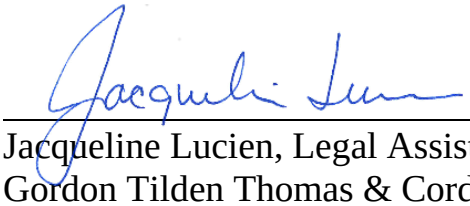
I certify that I initiated electronic service of the foregoing document via the Court's eFiling Application to counsel of record:

Counsel for Appellant:
Sumeer Singla, WSBA #32852
Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
ssingla@williamskastner.com
arosenberg@williamskastner.com
dbrown@williamskastner.com

DATED this 17th day of April, 2023, at Seattle, Washington.



Jacqueline Lucien, Legal Assistant
Gordon Tilden Thomas & Cordell LLP

GORDON TILDEN THOMAS CORDELL LLP

April 17, 2023 - 10:18 AM

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