SUPREME COURT NO. 90385-9
COURT OF APPEALS NO.: 30546-5-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THELMA, KARL, LORI, and KARIN KLOSTER,

Petitioners.

v.

SCHENECTADY ROBERTS; PACIFIC RIM BROKERS, INC., a corporation; AMERI-TITLE, INC., a corporation; MICHAEL MOORE; FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation; and DOES ONE through FIFTY, inclusive,

Respondents.

RESPONDENTS PACIFIC RIM BROKERS, INC. AND ROBERTS'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Defendants-Respondents are Pacific Rim Brokers, Inc. and Schenectady Roberts Raney (hereinafter PRB and Ms. Raney).

II. CITATION TO COURT OF APPEALS DECISION

Kloster v. Roberts, et al., no. 30546-5-III 179 Wn. App. 1025 (Feb. 6, 2014) (unpublished).

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny Plaintiffs-Appellants Thelma, Karl, Lori, and Karen Kloster's Petition for Review under RAP 13.4(b)(1), (2), and (4), where:

1. The Court of Appeals' decision does not conflict with any other reported Washington decision that would warrant review under RAP 13.4(b)(1) or (2);
2. the Court of Appeals' decision is unpublished and therefore has no precedential value;
3. the Court of Appeals' decision was correct for many reasons, including that the jury found that the Klosters had suffered no damages and were 100% at fault; and
4. this case presents no substantial public interest under RAP 13.4(b)(4), because the present dispute involves no one but the parties to this action and will not recur.

IV. STATEMENT OF THE CASE

PRB and Ms. Raney adopt by reference their Statement of the Case in their Brief to the Court of Appeals. However, the Klosters make an inaccurate factual assertion in their Petition for Review that requires correction. The Klosters assert they have been denied legal access to their property. This assertion is false. Both the trial court and the Court of Appeals repeatedly held that the Klosters have both legal and physical access. CP 298; RP 493; Court of Appeals' Decision at 18-19.

Furthermore, it bears emphasis that **the jury expressly found that the Klosters suffered zero damages, and that the Klosters were 100% at fault.** CP 3714-16. The Klosters did not appeal either of these jury findings. Klosters' Petition for Review at 2-4. The Klosters did not assign error to this jury finding. App. Br. at 6-8. The Court of Appeals left undisturbed this jury finding. Court of Appeals' Decision at 12. Even if the Klosters had a basis for seeking review by this Court pursuant to RAP 13.4, which they do not, these findings by the jury render entirely moot every issue they now argue against PRB and Ms. Raney.

V. ARGUMENT

A. The Klosters fail to establish any basis under RAP 13.4 for this Court to accept review.

The Klosters Petition for Review does not present a proper basis for review by this Court under RAP 13.4 (b) (1)-(4).

Under RAP 13.4, this Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Furthermore, nothing in RAP 13.4 or in Washington law entitles the Klosters to review by this Court simply because they disagree with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

The Klosters base their petition on sections RAP 13.4 (1), (2), and (4) but cite no such conflicting authority and establish no issue of substantial public interest. This Court should deny the Klosters' Petition for Review because it establishes no basis for Supreme Court review.

1. The Court of Appeals' refusal to publish its decision weighs strongly against review by this Court.

The Klosters base their Petition for Review on the Court of Appeals' unpublished decision. Because the Court of Appeals' Decision is unpublished, it has no precedential value. RCW 2.06.040.

Washington law has long held that unpublished opinions do not have precedential value. *State v. Fitzpatrick*, 5 Wn. App. 661, 668, 491 P. 2d 262, (1971). Unpublished opinions of the Court of Appeals will not be considered in the Court of Appeals and should not be considered in the trial courts. *Id.* They do not become a part of the common law of the State of Washington. If the trial courts were to consider them, it not only would waste their time but also would permit any group of lawyers to collect such opinions and create an unfair advantage by citing cases not available to their opponents. *Id.* "Unpublished opinions ... should not be cited or relied upon in any manner." *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701, *rev. denied* 144 Wn.2d 1021, 34

P.3d 1232 (2001) (citing RAP 10.4(h)).

Washington courts strongly discourage citing unpublished cases, and sanctions can be imposed on those that do. In *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519-20, 108 P. 3d 1273, 1278 (2005) the court admonished Allstate for its use of citing unpublished opinions to the trial court in the guise of "non-controlling authority." The court held, "We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court." *Id.*

The Court of Appeals' Decision here has no precedential value. Therefore, there is no possibility that the Court of Appeals' Decision creates supposedly bad precedent, because it is not precedent at all.

2. This case involves no issue of substantial public interest that this Court needs to determine.

The Klosters assert that this Court should accept their Petition for Review because the petition involves an issue of substantial public interest that the Supreme Court should decide. The Klosters do not explain why any issue raised in his petition has any ramifications for anyone beyond the parties to this case.

The Klosters have the burden of persuading the Court that its petition involves an issue of substantial public interest because "the issue is recurring in nature or impacts a large number of persons." *Wash. Appellate Prac. Deskbook* at § 27.11. No reported Washington Supreme

Court decision includes a detailed analysis of the "substantial public interest" criterion of RAP 13.4(b)(4), but this Court weighed what amounts to "public interest" when considering the related question of whether to decide a moot issue:

> When determining the requisite degree of public interest, courts should consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) 'the likelihood of future recurrence of the question.

In re Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (internal quotation marks omitted). Where the Court has directly addressed the "substantial public interest" criterion of RAP 13.4(b)(4), it has used these principles. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

In *Watson*, the issue was whether a prosecutor's office delivered a memo to all members of the bench regarding its decision not to recommend drug offender sentencing alternative (DOSA) sentences was an improper ex parte communication. This Court held that the Court of Appeals' decision was reviewable under RAP 13.4(b)(4) because the ruling (1) could affect every sentencing proceeding involving a DOSA sentence; (2) created confusion and invited unnecessary litigation; and (3) could chill policy actions by both attorneys and judges in the future. *Id.*

In contrast, this case involves only the parties to this action and

affects no one but them. The unique facts of this case are highly unlikely to recur. And as discussed above, this is an unpublished decision, thus has no precedential value, and cannot possibly disrupt the current state of Washington common law. Therefore, RAP 13.4(b)(4) does not provide a basis for review of that decision. The Court of Appeals' Decision was entirely correct.

3. The Klosters' assertion that his is a case of first impression is neither true nor a basis for review under RAP 13.4.

The Klosters assert that theirs is a case of first impression and that this Court therefore should accept review. They fail to support either assertion with citation to authority. Where no authorities are cited, the Court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn. 2d 122, 126, 372 P.2d 193 (1962). This Court will not consider an assignment of error where there is no argument in the brief in support thereof. *Johnson Serv. Co. v. Roush*, 57 Wn.2d 80, 89-90, 355 P.2d 815 (1960). Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. *DeHeer*, 60 Wn.2d at 126.

This is not a case of first impression. The Klosters have failed to cite a single case that supports their assertion. This Court should not consider this argument.

B. The Klosters suffered zero damages as a result of the conduct of PRB or Ms. Raney.

Most damning to all of the Klosters' claims is the jury's verdict. The jury decided the Klosters' negligent-misrepresentation claim against PRB. The jury unanimously found that **the Klosters' property suffered no difference in market value** as a result of the easement issue:

> QUESTION 1: Do you find by clear, cogent, and convincing evidence that there was any difference between the price the Klosters paid for the property and its actual market value? If yes, state the dollar amount.
>
> **ANSWER:** **YES** **(NO)**
>
> **ANSWER:** $_____

CP 3714-16. The jury found that **the Klosters were 100% at fault**:

> QUESTION 4: Do you find by clear, cogent, and convincing evidence that Pacific Rim Brokers, Inc., committed the following cause of action concerning the validity of the disputed easement running along the northern 30 feet of WS-146?
>
> Negligent Misrepresentation: **ANSWER:** **YES** **(NO)**
>
> *INSTRUCTION: Circle "Yes," or "No." Answer Question 5.*
>
> QUESTION 5: Do you find by a preponderance of the evidence that the Klosters' conduct constituted failure to minimize their loss?
>
> **ANSWER:** **(YES)** **NO**

INSTRUCTION: Circle "Yes," or "No." Answer Question 6.

QUESTION 6: As to each party as to which you answered "Yes" to any part of Questions 4 or 5, set forth those parties' percentage shares of fault. The total percentage shares of fault must equal 100%.

Klosters:	100 %
Pacific Rim Brokers, Inc.:	Ø %
TOTAL:	100%

Id. **These jury findings trump all of the Klosters' assignments of error relating to their claims against Ms. Raney and PRB.**

C. Contrary to the Klosters' argument, Washington law continues to follow aspects of caveat emptor.

The Klosters argue that the Court of Appeals erred by following a rule of caveat emptor. The Klosters raise this argument for the first time in their Petition for Review. Under RAP 2.5(a), as a general rule appellate courts will not consider issues raised for the first time on appeal. This Court therefore should ignore it. Yet even if the Klosters had preserved this argument for appeal, their argument is wrong on its merits.

1. The Klosters have clear and marketable title to their property.

The Klosters confuse their supposed easement problems on their property with a title defect. They argue that Ms. Raney is liable under the statutory warranty deed given to the Klosters and that the Court of Appeals' decision is in contrary to *Edmonson v. Popchoi,* 172 Wn. 2d 272, 278, 256 P.3d 1223 (2011). Petition for Review at 11. However, the

Klosters fail to recognize that the trial court ruled on more than one occasion that, as a matter of law, the Klosters have clear and marketable title. The law observes an important distinction between economic lack of marketability, which relates to physical use of the property, and title marketability, which relates to legal rights and incidents of ownership. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158 Wn. App. 895, 901, 249 P.3d 625 (2010) (citation omitted). A landowner can hold perfect title to land that is without value and can have marketable title to land while the land itself is not marketable. *Id.* While the Klosters baldly assert that they were "evicted" from their property, Petition for Review at 13, this is simply untrue. Here, no one else has a recorded ownership interest in the Klosters' property. No defects affect the Klosters' legal rights and incidents of ownership. No one has made any claim against the property that impairs its clear title. The Klosters have both legal access and physical access to the property. CP 2908; RP 493; Court of Appeals' Decision at 18-19. That the Klosters have an access easement 30 rather than 60 feet wide is not a title defect and does not render title unmarketable.

2. Contrary to the Klosters' argument, caveat emptor is not a "discredited doctrine."

The Klosters assert that the Court of Appeals "implicitly invoked the discredited doctrine of *caveat emptor*[.]" The Court of Appeals in fact

did not mention caveat emptor. Even if the Court of Appeals had followed caveat emptor, doing so here would not have been error.

Generally, Washington real estate law does require that the "buyer beware." Once a property buyer discovers some evidence of a potential defect, he or she is on notice and has a duty to make further inquiries. The buyer cannot prevail on a claim where the extent of the defect is merely greater than anticipated. For example, in *Douglas v. Visser,* 173 Wn. App. 823, 832, 295 P.3d 800, 804 (2013), plaintiffs learned of some amount of pest infestation and dry rot prior to closing but failed to pursue the issue. Only after closing did they discover that these defects were far more extensive than they previously assumed. The *Douglas* court held that the buyers were on notice of the problem and had the duty to inquire further, rather than simply assume the best and close on their purchase. *Id.* Because the Douglases were on notice of the defect and had a duty to make further inquiry, the defect was not unknown to them. They could have discovered it by a reasonable inspection. The Douglases therefore could not prove that they justifiably relied on the Vissers' misrepresentations. *Id.* at 834. Similarly here, the Klosters had information indicating that the width of the easement was not resolved, so that they had a duty to inquire further but failed to do so. CP 1046-51.

Caveat emptor continues to apply to the sale of real property. The

doctrine of caveat emptor became imbedded in the common law during the 17th and 18th centuries. *Frickel v. Sunnyside Enterprises, Inc.,* 106 Wn.2d 714, 724, 725 P.2d 422, 427-28 (1986) (internal citations omitted). Under this doctrine, "[t]he vendee took the property at his risk. If he failed to discover defects, caveat emptor prevented him from maintaining an action against the vendor." *Id.* The rule "was based upon an arm's-length transaction between the seller and buyer and contemplated comparable skill and experience." *Id.* Recent Washington case law shows that our courts continue to follow elements of caveat emptor. *See, e.g., Alejandre v. Bull,* 159 Wn.2d 674, 153 P.3d 864 (2007); *Douglas,* 173 Wn. App. at 834.

The Klosters argue that a "retail buyer," as they cast themselves, have no duty to find a defect. That argument is flatly wrong, especially under these facts. The Klosters had notice of conflicting information as to the 30- versus 60-foot width of the easement. At that point they absolutely had a legal duty to inquire further. They failed to do so.

3. The Court of Appeals correctly did not expand the *Sheridan* ruling.

The Klosters cite *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wn.2d 423, 440, 100 P.2d 1024 (1940), seemingly arguing that Ameri-Title voluntarily assumed the obligation to warn the Klosters of the inability to use an easement across the Rickey property. However, the Court of

Appeals noted that *Sheridan* involved a personal-injury claim against a liability insurer and that any relevance to duties of a title insurer was remote. Court of Appeals' Decision at 31. Further, *Sheridan* does not relieve the Klosters of their own duties to themselves. Even if it was found that Ameri-Title assumed an obligation to warn the Klosters, the law retains a duty on a buyer to beware, to inspect, and to question. *Douglas,* 173 Wn. App. at 834.

D. PRB is successor in interest to Pacific Rim Properties only, not to Mr. Heany as a developer.

The Klosters argue that the Court of Appeals erred by dismissing their successor-in-interest liability theory seeking to impose liability on PRB for fault of Mr. Heany. Petition for Review at 16-18. They cite *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 482-83, 209 P.3d 863 (2009), for the notion that PRB is successor in interest not only to Mr. Heany's sole-proprietorship real estate brokerage, Pacific Rim Properties but also to Mr. Heany's entirely separate development activities. PRB does not quarrel with *Cambridge Townhomes*. Unfortunately, the Klosters try to stretch the *Cambridge Townhomes* rule far beyond this Court's holding.

In *Cambridge Townhomes*, this Court held that an entity had successor liability because "the undisputed facts show that [the successor corporation] is a mere continuation of the sole proprietorship." *Id.* at 483.

This holding does not help the Klosters. Regardless of whether PRB is the mere continuation of the Pacific Rim Properties real estate brokerage, PRB is not the successor in interest to Mr. Heany as a real estate developer. Mr. Heany testified that he developed Pacific Rim Estates in his individual capacity as a real estate developer, not as part of his brokerage activities at Pacific Rim Properties. RP 574-75. That testimony was unrebutted.

PRB was a continuation of **Pacific Rim Properties** only. Pacific Rim Properties and PRB have always been real estate brokerages only. Mr. Heany acted not as a real estate broker for a principal, but in a separate business as a developer who was the principal himself, when he created this plat in 1981. The trial correctly held that PRB had no successor liability for Mr. Heany's development activities, as opposed to his real estate brokerage activities as Pacific Rim Properties, a sole proprietorship. CP 1307.

Even if the Klosters are correct that PRB somehow had successor liability for Mr. Heany's actions, any error is harmless. The jury found that the Klosters suffered zero damages. CP 3714-16. Had this theory been presented to the jury, the Klosters still would have recovered nothing. The Klosters never appealed the jury's finding of zero damages and cannot now raise this as an issue.

The Court of Appeals agreed with PRB's argument, holding:

> The "continuity of individuals" test supports a conclusion that PRB is a continuation of the former brokerage sole proprietorship. *Cambridge,* 166 Wn. 2d at 483. But the evidence also conclusively supports the trial court's conclusion that Heany's development activities were not performed for Pacific Rim Properties and were not intended to be incorporated in PRB. Consequently, the trial court did not err in rejecting the Klosters' argument that PRB had successor liability for Heany's development activities for Pacific Rim Estates.
>
> Any error in dismissing PRB was harmless. The jury ruled that the Klosters suffered no damages from any defect in the easement.

Court of Appeals' Decision at 27-28.

PRB is not a successor in interest to Mr. Heany. The Klosters fail to cite any authorities that contradict the Court of Appeals' Decision, much less raises any issue of substantial public interest. The Klosters have not met the requirements for this Court's review pursuant to RAP 13.4, and this Petition for Review should be denied.

E. The Klosters' failure to sue Mr. Heany is no basis for review by this Court pursuant to RAP 13.4.

The Klosters failed to properly bring Heany in as a party at the trial court level. CP 1056-63, 1083.

The Klosters argue that the trial court erred when it quashed the summons and complaint served on Mr. Heany. A complaint must name a defendant for the court to acquire personal jurisdiction over the defendant.

Prof'l Marine Co. v. Underwriters at Lloyd's, 118 Wn. App. 694, 705, 77 P.3d 658 (2003). When the Klosters served Mr. Heany, he was not named as a defendant in the complaint. The trial court properly quashed the summons and complaint.

The Klosters then moved to amend their complaint and substitute Mr. Heany for defendant "Doe One." The designation of "John Doe" is used "as a fictitious name to designate a party until his real name can be ascertained." *State v. Rossignol*, 22 Wn.2d 19, 25, 153 P.2d 882 (1944). Here, Mr. Heany's involvement regarding the non-recorded easement was long known by the Klosters, as his name appeared as the developer of the short plat, the long plat, and the seller of record for the lots. His name was not unknown to the Klosters when they filed the complaint and, thus, he could not be properly substituted for "Doe One." The Klosters did not seek to join Mr. Heany as a necessary party under CR 19 or 20 below and they are not permitted to do so for the first time on appeal. RAP 2.5.

The Klosters' causes of action were for fraud, concealment, and misrepresentation. Here, as the Court of Appeals noted that Heany transferred his interest in PRB to Blades in 1983 and made no representations at all the Klosters. Court of Appeals' Decision at 24. Mr. Heany testified at trial that he intended to create an easement over Tract 2 when he sold that tract to the previous owner. RP 566-67. A person must

be joined as a necessary party if (1) a complete determination of the controversy cannot be made without that party, and (2) the party claims an interest in the subject of the case that would be impeded by a judgment. CR 19 (a); *DeLong v. Parmelee*, 157 Wn. App. 119, 165, 236 P.3d 936 (2010).

The Court of Appeals correctly held that Mr. Heany was not a necessary party because his participation in this suit was unnecessary for a complete determination of the controversy. Court of Appeals' Decision at 23.

The Klosters again fail to establish any basis for this Court to accept review under RAP 13.4. They cite *Burt v. Wash. State Dept. of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010) as conflicting case law. As discussed above, the Court of Appeals' Decision is unpublished, so it does not have precedential value. Further, the Klosters raise this argument for the first time in this petition for review, which is improper under RAP 2.5. However, even if the Court of Appeals' Decision did have precedential value, and even if the Klosters had properly cited *Burt* in the court below, it still does not conflict with the Court of Appeals Decision.

In *Burt*, an inmate was a necessary party to correctional officers' public records injunction proceeding, as no party represented inmate's position as the records requester. The *Burt* court ruled "to determine

whether a party is necessary, CR 19 requires the potentially necessary party to have an interest relating to the subject of the action. Once such an interest is established, the party must be "so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest[.]" CR 19(a)(2)(A); *Burt,* 168 Wn.2d. at 833. The *Burt* decision in no way conflicts with the decision made by the Court of Appeals, Mr. Heany was not a necessary party because his participation in this suit was unnecessary for a complete determination of the controversy.

F. The Klosters' remaining issues fail to meet the criteria of RAP 13.4.

The Klosters identify nine issues in their Petition for Review. Issues 1-3 and 5-7 do not pertain to Ms. Raney and PRB. However, for the same reasons discussed above, and those given in First American Title Insurance Company's and Ameritite, Inc.'s Answer to Petition for Review, incorporated here by reference, the Klosters cannot meet the strict requirements of RAP 13.4. As discussed at length above, the Court of Appeals' Decision is unpublished and thus has no precedential value. It therefore is impossible for the Decision to create any conflict in the Washington common law. Further, the Klosters have failed to show that any of the issues presented present an issue of substantial public interest; this case affects only the parties to this action, and its unique facts will not

recur. Contrary to the Klosters' assertions, the law is clear: claims arising out of a single and isolated real estate transaction are insufficient to implicate the public interest. *cf. Sato v. Century 21 Ocean Shores Real Estate,* 101 Wn.2d 599, 602, 681 P.2d 242 (1984). This Petition for Review should be denied.

G. The Klosters are not entitled to fees; instead, this Court should award reasonable attorney fees to Ms. Raney and PRB or direct the Court of Appeals to do so.

Pursuant to RAP 18.1(a), Ms. Raney and PRB ask that this Court assess against the Klosters all attorney fees and expenses Ms. Raney and PRB have incurred in responding to this Petition for Review. The VLPSA's fee provision expressly provides that "any prevailing party shall recover reasonable attorneys' fees and costs (including those for appeals) which relate to the dispute." CP 27 at 16. A contractual provision for an award of attorney fees at trial, such as the VLPSA here, supports an award of attorney fees on appeal. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 694 P.2d 1101 (1985).

Here, Ms. Raney and PRB are the clear prevailing parties. In order for the Klosters to recover attorney fees, they would have to show that they were the prevailing parties. Not only would this Court have to accept review of their petition, but the Klosters would have to win before the Supreme Court. Their motion for fees is at best premature; they have not

prevailed on anything.

PRB and Ms. Raney previously moved before the Court of Appeals for an award of fees and expenses. That motion has been pending for several months. PRB and Ms. Raney ask that this Court either (1) assess fees and expense against the Klosters in responding to this Petition for Review, in an amount to be determined in later proceedings, or (2) direct the Court of Appeals to do so.

VI. CONCLUSION

The Klosters have not presented grounds under RAP 13.4 on which this Court should grant review. Accordingly, PRB and Ms. Raney respectfully request that this Court deny the Klosters' Petition for Review.

Respectfully submitted this 1st day of July, 2014.

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