

STATE OF MICHIGAN  
SUPREME COURT

EARL H. ALLARD, JR.,

Plaintiff/Appellant,

v

CHRISTINE A. ALLARD,

Defendant/Appellee.

No. \_\_\_\_\_

Court of Appeals No. 308194

Wayne Circuit Court

No. 10-110358-DM

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PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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## BASIS OF JURISDICTION

The is an application for leave to appeal from a decision of the Court of Appeals. The Court of Appeals decision was entered December 18, 2014, and this application is being filed within 42 days pursuant to MCR 7.302(C)(2)(b).

STATEMENT OF QUESTION PRESENTED

I. WAS IT CLEAR ERROR FOR THE COURT OF APPEALS TO RULE THAT THE LLCs WERE NOT OWNED BY PLAINTIFF IN HIS INDIVIDUAL NAME WHEN THE UNDISPUTED EVIDENCE SHOWED THEY WERE TITLED IN HIS NAME ALONE; THAT ASSETS OWNED BY THE LLCs COULD BE REGARDED AS PART OF THE MARITAL ESTATE; AND THAT INCOME EARNED BY PLAINTIFF AUTOMATICALLY BECAME A MARITAL ASSET EVEN THOUGH IT WAS EARNED IN HIS NAME ONLY?

Appellant says “yes.”

Appellee says “no.”

The trial court did not reach this issue.

The Court of Appeals would answer “no.”

## STANDARD OF REVIEW

The interpretation of a contract is a legal issue and is reviewed de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

## INTRODUCTION

This is a divorce case in which the Court of Appeals created a new unpreserved issue to attempt to minimize the result of an antenuptial agreement that the Court found was voluntarily entered into and completely lawful. After concluding that the agreement was valid, including a finding that it was not procedurally or substantively unconscionable (Opinion, Exhibit A, p 9), the Court of Appeals questioned whether particular assets – several limited liability companies owned by the husband – were within the scope of the agreement. By injecting this issue *sua sponte*, the Court failed to give the parties an opportunity to brief the issue, to discuss it at oral argument, or to point out how it was not relevant to the case. This also led the Court to create its own factual finding that is directly contradicted by the record and was not challenged on appeal: namely, the appellate court's finding that limited liability companies were not acquired in plaintiff's individual name. The uncontested proofs at trial showed that the LLCs were acquired by plaintiff in his individual name and operated as single-member LLCs.

This Court should grant leave (or reverse in lieu of granting leave) because the Court of Appeals' decision of December 18, 2014, injects clear error, MCR 7.302(B)(5) and creates dangerous precedent in multiple ways. First, it sends a message to the bench and bar in a published binding decision that antenuptial agreements, while technically lawful, can be avoided

in backhanded ways. With the increasing use of both LLCs and antenuptial agreements, this issue involves legal principles of major significance to Michigan's jurisprudence, MCR 7.302(B)(3). Second, it sends a message that parties need not preserve issues at trial or in their appellate briefs, as the Court will come to their rescue if it senses an imbalance. Third, the Court of Appeals remand order puts the parties through unnecessary expense and time for an effort that should have no legal consequence, causing material injustice. MCR 7.302(B)(5).

## STATEMENT OF FACTS

The parties were wed on September 11, 1993. Two sons were born, in 1997 and 1999. The action was filed in July 2010, and the divorce was final on January 13, 2012. See Judgment of Divorce, pp 1-2 [Exhibit B].

An antenuptial agreement had been entered into two days before the wedding. The essential provisions of the agreement provided that each party would bring their premarital property into the marriage free and clear of any claim by the other (Antenuptial Agreement, Exhibit C, ¶¶ 3 & 4); property inherited from the parents of the respective parties would be non-marital property held by the individual party (*id.* ¶ 9); and, most important to this appeal, each party was entitled to obtain property in his or her individual name *during* the marriage, and that property would similarly be considered individual property outside of the marital estate:

Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name. (Antenuptial Agreement, ¶ 5[b]).

The agreement also confirmed that it was the complete agreement between the parties (*id.* ¶¶ 3, 12), the parties were entering into the agreement freely and voluntarily (*id.* ¶ 11[c]), each party had an opportunity to consult with an attorney (*id.* ¶ 11[a]), and each had weighed their options before signing the agreement (*id.* ¶ 11[b]).

The divorce was tried in Wayne County Circuit Court. The circuit court ruled during summary disposition that the agreement was valid and enforceable (M Tr 8/8/2011 pp 37-41).

On the first day of trial, plaintiff argued a motion in limine to restrict the proofs at trial to the issue of the title ownership of assets, rather than conducting a full trial into the nature of assets and how they should be divided under normal equitable principles.

The court granted the motion in limine in part and denied it in part, ruling:

I do agree with plaintiff's attorney, that the existence of this valid prenuptial agreement does effect [*sic* – affect] and govern the distribution of the properties in this case. However, I disagree that the testimony at trial should be limited only to the distribution of personal property and the calculation of child support. Like any other divorce case, one which would not involve a antenuptial agreement, this court must first identify, through testimony and documentary evidence, the separate and marital properties of the parties. However, because we have a valid antenuptial contract here, the scope of that direct testimony and cross-examination will be limited, in terms of relevancy, by the terms of the contract. So, we'll proceed in that fashion. I hope you understand what I just ruled.

MS. TOBIN-LEVIGNE [for defendant]: No, your honor. I'd ask for clarification.

\* \* \*

THE COURT: Well, I believe that at trial I need to hear – I need to hear testimony about the assets, the separate assets of the party, that they brought to the marriage, and identifying those, the marital assets that were acquired during the marriage, or the assets that were acquired during the marriage. I believe that the other side will be able to cross-examine on that, identifying those items. Those that have been identified and distributed, whether or not there's a prenup or not. The scope will be governed by the contract. How was it titled? But I have to identify the property of the parties, and I'll allow cross-examination on that. I can't just – unless we have a stipulation of what the properties are and how they're titled, the we don't have to go through that, but I don't think we have that, because I haven't seen that as a stipulation. . . .

\* \* \*

THE COURT: . . . The contract is going to govern my ruling in the end. But if you're claiming that some of these items may be marital, or may – you know, applying the contract, then you have your right to pursue that. You have the right to examine that at trial. [Tr 8/17/2011 pp 35-38.]

During trial, as testimony proceeded, a dispute arose whether the defendant's cross-examination of the plaintiff had exceeded the proper scope of relevant evidence. In particular,

defendant desired to continue examining Mr. Allard about the source of funds from which assets had been acquired – did the money come from marital funds or from outside the marriage? Tr 9/8/2011 p 5. Because the defendant had earlier (Tr 8/17/2011 p 19) denied that she had any evidence that the assets were acquired with marital funds, the court inquired of any additional proofs the defense would be offering. Defendant offered only a brief summary of anticipated evidence from the defendant herself: she denied signing any deeds that would have waived any dower interest (Tr 9/8/2011 pp 12-13).

Defendant filed a brief containing law outlining why the scope of examination should be broad, and plaintiff renewed his motion in limine to restrict the evidence (*id.* pp 4-5). Boiled to its essential terms, defendant argued during that discussion that titling an asset in Mr. Allard's name alone was not dispositive, and Mr. Allard would also have to show that the asset was acquired without the involvement of marital funds (Tr 9/8/2011 p 19). After taking a recess to consider the arguments, the court decided it “will stand by its previous ruling and allow the cross-examination to proceed” and to “allow the cross-examination of Mr. Allard in that regard, limiting it to the inquiries regarding any transfer of title, and the actual deeds themselves” (*id.* pp 21-22). Clarifying, the court stated that “any of the properties that were acquired after they were married you can inquire about here as to how they were titled and how they were conveyed during the marriage, I’m going to allow that” (Tr 9/8/2011 pp 26-27). In summary, the court allowed inquiry into the nature of the assets and how they were titled.

The primary witnesses at trial were the two parties and Mr. Allard's accountant. Much of the trial focused on the nature of the assets and in what manner they were titled for ownership. The testimony showed that plaintiff Earl Allard owned single-member LLCs, which in turn owned various business properties as rental properties or as part of home health-care companies

(see, e.g., Tr 8/18/2011 pp 13, 39). The LLCs<sup>1</sup> were organized during the marriage (2000 to 2008) and held as single-member LLCs in Mr. Allard's individual name (testimony of accountant James R. Graves, Tr 8/17/2011 p 73; testimony of Earl Allard, Tr 8/18/2011 pp 13-14).

Following a four-day bench trial, the circuit court awarded Mr. Allard the ownership interest in the LLCs as well as other property that had been acquired in his name. The Judgment of Divorce awarded the parties individually all property that had been held in their individual capacities, with the bulk of the property being awarded to plaintiff (see Judgment of Divorce, ¶ 30[a]). Defendant did not challenge in her appeal whether that property was actually held in another fashion (such as being titled in the wife's name, or jointly).

The court also awarded child support (Judgment of Divorce, ¶ 19). The award would have been calculated as \$3,093 per month (for two minor children) pursuant to the child support guidelines (*id.* ¶ 16).<sup>2</sup> The court opined that this amount would not be fair under the child support guidelines and in light of the property division. Judgment of Divorce, ¶¶ 17-18, pp 5-6. Accordingly, the court added \$1,000 per month to the child support award, for a total monthly child support obligation (two children) of \$4,093. While plaintiff did not seek to overturn the child support amount, he argued in the Court of Appeals that this accommodation in the circuit court's judgment should be considered if the Court of Appeals felt it necessary to examine any equitable aspects of the Judgment.

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<sup>1</sup> Eastpointe Transitional Living LLC, Grosse Pointe Properties LLC, Eastpointe Transportation LLC, Eastpointe Apartment Group LLC, and New Detroit REO LLC.

<sup>2</sup> The child support guidelines first yielded a total of \$3,041 for two children (Judgment of Divorce, ¶ 16), but the court recalculated the amount and changed it to \$3,093 (*id.* ¶ 19).

The Court of Appeals issued its published opinion on December 18, 2014. It rejected the defendant's arguments that the antenuptial agreement was voidable as the product of duress (Opinion, p 8), it rejected her claims that alleged abuse constituted a "changed circumstance" to void the agreement (*id.* p 6), and it found that the agreement was not procedurally or substantively unconscionable (*id.* p 9). The Court also found that the trial court did not err when it determined that two divorce statutes (MCL 552.23 and MCL 552.401) did not require the court to ignore the terms of the antenuptial agreement when dividing property (Opinion, p 13).

After upholding the agreement, the Court of Appeals injected its own issue questioning whether the assets of the LLC became marital property since they were titled in the name of the LLC.<sup>3</sup> By the Court's reasoning, if the assets were titled in the name of the LLC that acquired them, they were not – by definition – titled in the name of Earl Allard and therefore were not excluded from the antenuptial agreement's provision that assets acquired in an individual's name would remain individual property (Opinion p 15). Moreover, the Court stated that "the LLCs created by plaintiff during the course of the marriage were not acquired in plaintiff's individual capacity or name." Opinion p 17. That finding was clearly erroneous. Mr. Allard and his accountant had testified without contradiction that the LLCs were created as single-member LLCs and held solely by Mr. Allard (testimony of Earl Allard, Tr 8/18/2011 pp 13-15; testimony of accountant James R. Graves, Tr 8/17/2011 p 73). While cautioning against piercing the corporate veil, the Court of Appeals nonetheless remanded the case to the circuit court to determine whether income earned by Earl Allard in his own name was used to purchase LLC assets (Opinion p 17).

Other facts specific to the issues will be presented in the discussion.

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<sup>3</sup> The Court stated that this was defendant's argument, Opinion p 13, but it was not.

The following exhibits are attached:

- A. Court of Appeals Opinion
- B. Trial court order and judgment
- C. Antenuptial Agreement

ARGUMENT

I. IT WAS CLEAR ERROR FOR THE COURT OF APPEALS TO RULE THAT THE LLCs WERE NOT OWNED BY PLAINTIFF IN HIS INDIVIDUAL NAME, THAT ASSETS OWNED BY THE LLCs COULD BE REGARDED AS PART OF THE MARITAL ESTATE, AND THAT INCOME EARNED BY PLAINTIFF BECAME A MARITAL ASSET.

The Court of Appeals committed clear error when it concluded that “the LLCs created by plaintiff during the course of the marriage were not acquired in plaintiff’s individual capacity or name.” Opinion p 17. The proofs at trial clearly showed that the LLCs were owned by plaintiff in his individual name. He was the member who created and operated the LLCs (testimony of Earl Allard, Tr 8/18/2011 pp 13-15; testimony of accountant James R. Graves, Tr 8/17/2011 p 73). Mr. Allard specifically testified:

Q. I’ve handed to you these exhibits [Plaintiff’s exhibits 8 and 13]. Could you identify those please, Mr. Allard?

\* \* \*

A. Articles of Organization that were filed through the State of Michigan forming the LLCs.

BY MS. BREITMEYER:

Q. Okay. And say which LLC’s.

A. There is Grosse Pointe Properties.

Q. And when was that formed, Mr. Allard?

A. February 2, 2000 – February 28, 2000.

Q. Okay. And is that a single member LLC?

A. It is.

- Q. And are you the single member?
- A. Yes.
- Q. Okay. Could you identify the next document?
- A. Eastpointe Apartment Group.
- Q. And is that a single member LLC?
- A. Single member.
- Q. And are you the single member?
- A. Yeah. Right on here it says, name of resident agent, Earl H. Allard, Jr.
- Q. Okay. You're also the registered agent. Now, when was that established, Mr. Allard?
- A. 2-18-2005.
- Q. Okay. And would you identify the next document, please, in [exhibit] 13?
- A. Eastpointe Transitional Living. 3-23-05.
- Q. So, 2005, is that what you're saying?
- A. Right.
- Q. Okay. And is that a single member LLC?
- A. Yes.
- Q. All right. Are you the single member?
- A. Yes.
- Q. All right. And what is the next document?
- A. Eastpointe Transportation.
- Q. And when was that established?
- A. July of 2005.
- Q. And is that a single member LLC?
- A. Yes.
- Q. And are you the single member?

A. Yes.

Q. Al right. And is there a final one?

A. Yeah. New Detroit REO.

Q. Okay. And is that a single member LLC?

A. Yeah.

Q. Are you the single member?

A. Yes.

\* \* \*

Q. . . . And when was that established?

A. 3/14/2008.

Q. 3-14-2008, all right. And do you cause the tax returns to be filed in the fashion Mr. Graves described as the sole owner of those each year?

A. Yeah. [Tr 8/18/2011 pp 13-15.]

Mr. Allard further testified about various real estate transactions. Some of the properties were rental properties acquired in his name and eventually transferred to LLCs. See Tr 8/18/2011 pp 38, 41-43, 45-49). Two buildings were acquired by Eastpointe Transitional Living, LLC, through its own funds and in its own name (*id.* pp 35-37, 50-51). Others were acquired directly by Grosse Pointe Properties in its name (*id.* pp 49-50, 52).

Although the Court of Appeals suggested that the rules for piercing a corporate veil still apply, the Court applied a presumption that the assets owned by the LLC can be attached as marital property. This is a de facto method for piercing the corporate veil on undisclosed terms, and shifting the burden on plaintiff to defeat the presumption. That move casts great doubt on the standards applicable to “piercing” cases, a problem this Court has noted in prior decisions. See *L&R Homes, Inc v Jack Christensen Rochester, Inc*, 475 Mich 853; 713 NW2d 263 (2006) (dissenting statement of Corrigan, J.) (“I would grant leave to appeal to articulate clear standards

for piercing the corporate veil and settle the confused state of Michigan jurisprudence regarding this problem”); *Daymon v Fuhrman*, 474 Mich 920; 705 NW2d 347 (2005) (separate dissenting statements from denial of leave by Chief Justice Taylor and Justices Young and Corrigan).

That ruling also contradicts the manner in which LLCs (or any business entity) operate. It suggests that earnings of an LLC that are put back into the company may be considered commingled assets that have converted into marital assets. Just as importantly, it exceeds how the issues were framed and presented at both the trial court and the circuit court.

The Court of Appeals framed the issue in this fashion:

We conclude, therefore, that as a matter of law, the LLCs created during the course of the marriage are separate legal entities and *not* to be construed, for purposes of interpreting and applying the plain and unambiguous terms of this antenuptial agreement, as being the same as plaintiff “in his individual capacity or name.” Thus, to the extent any real estate properties or other assets were acquired during the course of the marriage by the various LLCs created during the marriage, we find that their disposition in this divorce action is *not* governed by the antenuptial agreement. [Opinion, p 15 (emphasis in original).]

This is not, however, how the issue was presented at trial. In fact, the defendant stated the following when the trial court was examining the nature of the assets:

I’m not conceding this is all separate property. Do I have evidence that this property is in any name other than other [sic] the plaintiff and/or an entity? No, I don’t, your Honor. But we have entities that were all formed during the marriage, all as a result of – and I have advanced my theories. My client is staying home and allowing Mr. Allard to go out and do what he did. All those other theories are in tandem with [that].

So, is it separate? We don’t believe so. Is it in his name? Obviously it is what it is. [Tr 9/8/11 pp 18-19.]

Thus, defendant proceeded under a theory that she had stayed home, enabling plaintiff to work and build his business, and she was entitled to the LLC’s assets under this theory. That is a far cry from the Court of Appeals’ approach to this issue. The Court has remanded for further hearings into something defendant admitted she had no evidence to support. Defendant further

admitted that whether the property was held in Mr. Allard's individual name or in an entity's name, it would have no further consequence. Her theory was that *all* property should be treated as marital property because she stayed home and raised the children – a position the antenuptial agreement, the law, and the Court of Appeals rejected.

A limited liability company (LLC) is, under Michigan law,

a business formed by an organizer who may, but need not be a member. It is a business entity separate from its members and liability is limited to the financial contribution made by the member. The members are the owners of the company. The management of the company is carried out by its members, unless the Articles of Organization provide for management by managers. Governance is set forth by the Articles of Organization or operating agreement. [Michigan Dep't of Licensing and Regulatory Affairs website, [http://www.michigan.gov/lara/0,4601,7-154-35299\\_61343\\_35413\\_35429-115005--,00.html](http://www.michigan.gov/lara/0,4601,7-154-35299_61343_35413_35429-115005--,00.html), retrieved 1/21/2015.]

An LLC has the same powers possessed by a corporation to acquire and dispose of property. See MCL 450.4210.<sup>4</sup> An LLC's tax liability flows through to its members; it does not file its own tax return (testimony of accountant James R. Graves, Tr 8/17/2011 p 70). The profits are reported on the member/owner's tax returns, on Schedules C and E. *Id.* pp 74, 79, 83.

The Court of Appeals properly recognized that an LLC may own property in its name, as happened here. See Opinion, p 15. It is a separate legal entity and can own property in its name. The Court therefore erred when it treated the LLC as an alter ego of Mr. Allard and chose to potentially bring its assets within the marriage – all while still cautioning that the rules about piercing a corporate veil must be respected (Opinion, pp 16-17). The Court recognized that “[p]iercing the corporate veil of a limited liability company is permissible where there is evidence that the corporate entity (1) is a mere instrumentality of another individual or entity, (2) was used to commit a wrong or a fraud, and (3) caused an unjust injury or loss.” Opinion, pp 16-

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<sup>4</sup> There is a dearth of reported cases involving the legal aspects of LLCs.

17. This standard has evolved in the Court of Appeals, see, e.g., *Foodland Distr v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1997), but has not been endorsed by this Court. See *L&R Homes, Inc, supra; Daymon, supra*. Considering that the LLCs were active ongoing businesses (as opposed to a mere instrumentality – or shell – of Mr. Allard), and there was no allegation that the LLC was used to commit a wrong or a fraud, the Court of Appeals is clearly using this unpreserved legal theory to avoid what they might consider an “unjust” result of the legal decisions the Court had already made – that the agreement was not unconscionable and was not the product of fraud or duress. In so doing, they have dispensed with the first two qualifiers of their own legal standard for piercing the corporate veil and have allowed LLC assets to be attached on the basis of the third standard, albeit in an unstated way.

Membership in an LLC may be owned by individuals, or by husband and wife jointly. MCL 450.4504(1). Here, the LLC’s membership was owned by Mr. Allard individually. Tr 8/18/2011 pp 13-15. However, while Mr. Allard owned the LLC, neither he nor Mrs. Allard owned the property owned by the LLC. See MCL 450.4504(2) (“A member has no interest in specific limited liability company property”); *Vanderwerp v Plainfield Twp*, 278 Mich App 624, 630; 752 NW2d 479 (2008). In this way, it is similar to stock ownership. If Mr. Allard had owned Ford Motor Company stock in his own name, there is no doubt that asset would have remained his separate property under the antenuptial agreement. It makes no difference that the stock may have been worth \$10 at one point and \$15 later. The value may change, but his ownership interest did not. Moreover, if the Ford Motor Company made good financial decisions and built new profitable factories, Mr. Allard’s interest as a stockholder would not have changed. He does not acquire a direct interest in the new factory or the company’s increased profits. The decisions made on behalf of the company will have elevated the value of

his shares, but it would not have meant that Mr. Allard purchased or owned new assets.

*Allowing defendant to reach the assets of the LLC would be akin to allowing her to reach the assets of Ford without proving any of the elements necessary to pierce the corporate veil.*

Mr. Allard owns the membership of the LLC (or, by comparison, the shares of a corporation) in his own name, which should “unambiguously” (using the Court of Appeals’ own conclusion, Opinion, p 11) exclude the transaction from the scope of marital assets under the antenuptial agreement. The Court of Appeals was correct when it determined that assets acquired by the LLC during its lawful business are actually owned in the name of the LLC. The Court erred, however, when it concluded that assets owned in the name of the LLC are (or could be) marital assets. That decision does not conform to the antenuptial agreement, and it dishonors the legal protection LLCs enjoy as separate legal entities. From the perspective of the marriage, Mr. Allard’s ownership of the LLC membership in his *own individual name* triggered the application of the unambiguous provision in the antenuptial agreement. Even if the value of his membership increased, ownership of his membership remained in his individual name.

The Court of Appeals also applied a similar rationale to income earned by Mr. Allard during the marriage, ruling that “income” was not an “asset” as defined in the antenuptial agreement and that it therefore could be considered marital property. This is erroneous for the simple fact that his income was earned in his name, and remained in his name (often remaining in the companies to fund operations or expansion). It was therefore an asset in his individual name and, like in the *Reed* case,<sup>5</sup> it remained separate property for purposes of the agreement. The fact that it was earned in an individual name and used to purchase physical assets in an individual name does not convert it to a marital asset. The Court specifically noted that the

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<sup>5</sup> *Reed v Reed*, 265 Mich App 131, 145; 693 NW2d 825 (2005).

record “is insufficient for us to make definitive rulings regarding the extent of plaintiff’s earnings to be treated as marital income” (Opinion, p 16). The reason for this insufficiency is simple: it was never an issue at trial or in the Court of Appeals. The trial court allowed defendant wide latitude to explore these issues (see Tr 8/17/2011 pp 35-38), but defendant simply did not have the necessary proofs to sustain any position (let alone the one the Court of Appeals has created for her). See Tr 8/17/2011 p 19.

The Court of Appeals raised its *sua sponte* issue in a published opinion that will guide the bench and bar. The Opinion upsets the sanctity of antenuptial agreements (while proclaiming to uphold their enforceability) and casts great doubt on the independent legal status of limited liability companies. It should be reversed.

RELIEF REQUESTED

This Court should:

1. Grant leave to appeal;
2. Invite amicus briefs from interested State Bar groups, such as the business law and family law sections; and
3. Ultimately vacate that portion of the Court of Appeals opinion erroneously treating LLC assets as potential marital property under the terms of the antenuptial agreement, and vacate the order remanding the case to the circuit court for further proceedings. The divorce judgment should be affirmed in its entirety.

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