

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| TRACY RUTHER, | : | Case No. 2011-0899 |
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| Plaintiffs-Appellees, | : | On Appeal from the Warren |
| | : | County Court of Appeals, |
| v. | : | Twelfth Appellate District |
| | : | |
| GEORGE KAISER, D.O., et. al., | : | Court of Appeals Case No: CA2010-07-066 |
| | : | |
| Defendants-Appellants. | : | |

**MEMORANDUM OF AMICI CURIAE,
OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION,
AMERICAN MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION,
AND OHIO ALLIANCE FOR CIVIL JUSTICE
IN SUPPORT OF JURISDICTION**

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents an issue of great importance to hospitals, physicians, and other health care providers throughout the State of Ohio. The Ohio Hospital Association (OHA), Ohio State Medical Association (OSMA), American Medical Association (AMA), Ohio Osteopathic Association (OOA), and Ohio Alliance for Civil Justice (collectively, “Amici”) have a strong interest in obtaining certainty and finality as to potential litigation against their members for medical negligence. If the Twelfth District Court of Appeals decision stands, Ohio will join a very small minority of states that refuse to protect medical providers¹ from perpetual litigation for alleged negligence.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred sixty-five private, state and federal government hospitals and more than eighteen health systems, all located within the state of Ohio, and in which more than 350,000 people work. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute² that is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.³ to restore stability and predictability to Ohio's medical litigation insurance market.

¹ The term “medical providers” when used herein refers to hospitals, health systems, physicians, medical residents, nurses, and other health care providers.

² <http://www.ohiopatientsafety.org>.

³ <http://www.ohainsurance.com>.

The OSMA is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the state of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The OOA is a non-profit professional association, founded in 1898 that advocates for Ohio's 4,600 licensed physicians (DOs), Ohio health-care facilities accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program (HFAP), and the Ohio University College of Osteopathic Medicine in Athens. DOs represent twelve percent of the total physicians practicing in Ohio and twenty-six percent of the state's family physicians. OOA's mission includes promoting Ohio's public health and advancing the distinctive philosophy and practice of osteopathic medicine within the state.

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies, and other physician groups, seated in the AMA's House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.⁴

The OACJ is a group of over 200 small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.

⁴ The AMA and the OSMA are participating in this brief in their own capacity and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

The OACJ strongly supports laws that provide stability and predictability in the civil justice system—such as Senate Bill 281 (which included the statutory provision at issue, R.C. 2305.113(C))—so that Ohio’s businesses and professions may know what risks they assume as they carry on commerce in Ohio. OACJ members support a balanced civil justice system that not only awards fair compensation to injured persons, but also imposes safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched.

Amici urge this Court to accept Appellants’ appeal in order to clarify R.C. 2305.113(C) and affirm the rights of Ohio medical providers to be free from the possibility of litigation relating to medical negligence after a four-year period of time.

**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS
OF PUBLIC OR GREAT GENERAL INTEREST**

The issue in this case is whether R.C. 2305.113 violates Section 16, Article I of the Ohio Constitution. Thus, this case involves a substantial constitutional question. Additionally, this case is one of public or great general interest because it involves a paramount issue to all Ohio hospitals, physicians, and other healthcare providers: Whether Ohio should become one of the only jurisdictions in the United States to impose never-ending uncertainty upon its physicians and hospitals.

The Twelfth District Court of Appeals’ decision, finding that R.C. 2305.113 violates the “open courts” provision of Section 16, Article I of the Ohio Constitution, will adversely affect members of each of the Amici groups. Indeed, the Twelfth District’s decision creates the unending possibility of litigation against medical providers for medical claims, affecting innumerable medical providers who have practiced medicine in the State of Ohio.

Hundreds of thousands of patients are treated by medical providers in Ohio each year, and a statute of repose is absolutely necessary to provide a legislative end to litigation relating to

medical negligence in order to create stability and certainty for medical providers. The General Assembly agrees, and has made a policy decision to impart upon Ohio medical providers the right to be free of litigation for alleged acts of medical negligence occurring outside of a certain specified period, creating the four-year statute of repose for medical negligence codified in R.C. 2305.113(C).

If allowed to stand, the Twelfth District's decision will adversely impact hospitals and physicians in Ohio by permitting claims to be brought ten, twenty, or even fifty years after an alleged incident of medical negligence. This evisceration of the statute of repose will affect the ability of every Ohio hospital, physician, and medical provider to plan for the future given the omnipresent specter of unknown old medical claims that could be filed at any time under the "discovery rule" without any regard to the absolute bar found in R.C. 2305.113(C).

By enacting the statute of repose for medical negligence claims, the General Assembly sought to strike a balance between the rights of prospective tort claimants and the rights of Ohio hospitals and physicians. See Section 3(A)(6)(a), Am.Sub.S.B. 281. But the Twelfth District decision throws this reasoning to the wind, making Ohio one of a very small minority of states that have found medical malpractice statutes of repose to be unconstitutional in this context.

STATEMENT OF FACTS

Amici defer to the Statement of Facts presented by Appellants.

ARGUMENT

Proposition of Law No. 1: The medical malpractice statute of repose contained in R.C. 2305.113(C) does not violate the open courts provision (Section 16, Article I) of the Ohio Constitution and is therefore constitutional.

A. Ohio's Statute of Repose Does Not Impair Any Vested Right.

The Twelfth District decision relies heavily upon this Court's decision in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 47, 512 N.E.2d 626, which found the prior version of

Ohio's medical malpractice statute of repose (R.C. 2305.11(B)(2)) to be unconstitutional as to those "who suffer bodily injury from medical malpractice but do not discover that injury until four years after the act of malpractice." *Ruther v. Kaiser*, 12th Dist. No. CA 2010-07-066, 2011-Ohio-1723, ¶24 (quoting *Hardy*, 32 Ohio St.3d at 46-47).

This Court's recent precedent in *Groch v. General Motors Corporation*, 117 Ohio St.3d 192, 2008-Ohio-546, suggests that now is an appropriate time to revisit the Court's medical malpractice statute of repose. In *Groch*, this Court reviewed the history of the statute of repose applicable to real property claims in determining whether the new statute of repose applicable to product liability claims was constitutional. In its analysis in *Groch*, the Court noted that even though it had previously held the statute of repose applicable to real property claims to be unconstitutional (on the basis that it deprived claimant of a right to a remedy before the claimant knew or should have known of his injury), the Court was required to review the new statute of repose before it "in its own light." *Groch*, at ¶¶126-129 (citing *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425). When the Court reviewed the new, but similar, statute of repose in *Groch*, it concluded that the statute passed constitutional muster. The same analysis applies and the same result should be reached here.

Significantly, in *Groch*, this Court noted that "[t]he right-to-a-remedy provision of Section 16, Article I applies only to *existing, vested rights*, and it is state law which determines what injuries are recognized and what remedies are available." *Id.* at ¶150 (quoting *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 202, 551 N.E.2d 938) (emphasis added). Thus, a statute of repose does not violate Section 16, Article I of the Ohio Constitution if it "does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises." *Groch*, 2008-Ohio-546, at ¶142.

The question in *Groch* was whether the statute of repose that barred certain product liability claims denied an injured party a remedy for a “vested” right. *Id.* at ¶149. The *Groch* Court concluded that the statute of repose was not unconstitutional because it did not deny an injured party a remedy for a *vested* right.⁵

This Court should take the opportunity to apply this analysis to the medical malpractice statute of repose. A medical malpractice cause of action does not accrue under Ohio law until the claimant “discovers” the injury. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St.3d 1, 4, 516 N.E.2d 204 (“the cause of action accrues when the physical injury complained of is or should have been discovered by the patient.”). Therefore, applying this reasoning: where a party does not discover his injury until after the statute of repose has passed, his “cause of action never accrues * * * [and] it never becomes a vested right.” *Groch*, 2008-Ohio-546, at ¶149.

In other words, R.C. 2305.113(C) does not unconstitutionally deprive Appellee of a vested right. Rather, because Appellee did not discover the alleged injury until more than fourteen years after the alleged act of medical negligence, no claim ever accrued, and thus did not vest, during the four-year statute of repose set forth in R.C. 2305.113(C). See also *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 55 (Wright, J. dissenting) (“To suggest, as does the majority, that every common-law right is indelibly embedded in the Ohio Constitution and that subjective awareness of a potential claim is required prior to the abolishment of a cause of action is sheer legal fiction.”).

⁵ Although the Court in *Brenneman* found that the product liability statute of repose “violates the right to a remedy,” the Court in *Groch* found just the opposite—that the subsequently enacted product liability statute of repose—R.C. 2305.10(C)—did not violate the right to a remedy because for claims brought outside of the ten-year repose period, “an injured party’s cause of action never accrues against the manufacturer or supplier of the product” and thus “it never becomes a vested right.” *Groch*, 2008-Ohio-546, at ¶¶149-154.

When the Wisconsin Supreme Court analyzed this issue in *Aicher v. Wis. Patients Compensation Fund*, 237 Wis.2d 99, 2000 WI 98, ¶82, it came to a similar conclusion, finding that a medical malpractice “cause of action ‘accrues’ when the claimant ‘discovers’ the injury.” *Id.* Thus, “if a statute of repose has run, no legally recognized cause of action can accrue, and therefore, no right can vest.” *Id.* (quoting Susan C. Randall, Comment, Due Process Challenges to Statutes of Repose (1986), 40 Sw. L.J. 997, 1007).

Moreover, *Hardy* relied heavily upon *Daugaard v. Baltic Co-op. Bldg. Supply Assn.* (S.D. 1984), 349 N.W.2d 419, 424-425, which was subsequently overruled. In 2003, the South Dakota Supreme Court overruled *Daugaard* and joined the majority of state supreme courts that have upheld statutes of repose in the context of medical negligence claims. *Cleveland v. City of Lead*, 2003 SD 54, 663 N.W.2d 212 ¶¶35-36 (holding that *Daugaard* “can no longer be supported as a correct interpretation of” the open courts provision of the South Dakota constitution); see also *Green v. Siegel, Barnett & Schutz*, 1996 SD 146, 557 N.W.2d 396, ¶7 (upholding the constitutionality of the statute of repose for legal malpractice claims).

In overruling its decision in *Daugaard*, the South Dakota Supreme Court asked when, if ever, a statute of repose could be constitutional under *Daugaard*’s reasoning: “[W]hat about 20 years, 50 years or 100 years or ‘any longer length of time into perpetuity?’” *City of Lead*, 2003 SD 54, ¶44. The same analysis applies here. If the Twelfth District reasoning is left to stand, the Court will have effectively barred the General Assembly from passing any statute of repose in Ohio for any tort for which the discovery rule might apply. See also *Methodist Healthcare System of San Antonio, Ltd., et al. v. Schorlemer*, 307 S.W.3d at 287.

For all of these reasons, Amici respectfully request that this Court accept Appellants' appeal and clarify for the benefit of all Ohio medical providers that the statute of repose found in R.C. 2305.113(C) does not deprive Appellee (or anyone else) of a vested right.

B. R.C. 2305.113(C) Properly Strikes a Balance Between the Rights of Claimants and Medical Providers.

Senate Bill 281—the bill through which R.C. 2305.113(C) was enacted—specifies the General Assembly's important policy considerations in enacting a statute of repose for medical malpractice claims. In Senate Bill 281, the General Assembly concluded:

That a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners

Section 3(A)(6)(a), Am.Sub.S.B. 281.

The General Assembly went on to state why a statute of repose is necessary to ensure justice and fairness for Ohio medical providers, including:

(b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable with respect to the diagnosis, care, or treatment of a prospective claimant becomes problematic.

(c) The maintenance of records and other documentation related to the delivery of medical services, for a period of time in excess of the time period presented in the statute of repose, presents an unacceptable burden to hospitals and health care practitioners.

(d) Over time, the standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered.

(e) This legislation precludes unfair and unconstitutional aspects of state litigation but does not affect timely medical malpractice actions brought to redress legitimate grievances.

Id. at Section 3(A)(6)(b)-(e).

In his dissent in *Hardy*, Justice Wright noted similar policy considerations:

The present predicament that the medical profession and health care facilities have in obtaining malpractice insurance at a reasonable cost will rapidly spread to other professions. Whether one is attracted to the concept or not, modern-day tort liability is premised upon spreading the cost of monetary losses through the medium of insurance. Insurance companies are not in business to sustain losses and thus they will not accept a risk where their exposure is incalculable on the basis of actuarial analysis. Today we have simply taken the insurance industry "out of play" in many areas of professional malpractice.

Hardy, 32 Ohio St.3d at 55 (Wright, J. dissenting).

Other states that have passed and approved of medical malpractice statutes of repose have stated similar policy rationale for their legislative decision-making. In a recently decided Texas Supreme Court case holding that the Texas medical malpractice statute of repose did not violate the Texas open courts provision, the Texas Supreme Court explained the paramount policy considerations at issue:

Without a statute of repose, professionals * * * would face never-ending uncertainty as to liability for their work. Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants.

Methodist Healthcare System of San Antonio, Ltd., et al. v. Schorlemer (2010), 307 S.W.3d 283, 287.

This never-ending exposure to litigation and potential liability would further "inject[] actuarial uncertainty into the insurance market." *Id.* at 291. Although a few plaintiffs would be barred by this statutory roadblock, the Texas Supreme Court noted, "some defendants would likewise suffer unfortunate consequences were potential liability left indeterminate." *Id.* at 288.

In upholding the statute of repose, the Texas Supreme Court went on to note that:

One practical upside of curbing open-ended exposure is to prevent defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.

Id.

The Texas Supreme Court further noted that the “essential function of all statutes of repose is to abrogate the discovery rule and similar exceptions to the statute of limitations” and that “[t]o hold that a statute of repose must yield to the plaintiff’s ability to discover her injury would treat a statute of repose like a statute of limitations, and would effectively repeal this and all other statute of repose.” Id.

Similarly, in upholding the Wisconsin medical malpractice statute of repose, the Wisconsin Supreme Court noted: “We remain persuaded that the time limitation periods articulated by statutes of repose inherently are policy considerations better left to the legislative branch of government.” *Aicher*, 2000 WI 98, ¶54. No right to remedy, then, was found to exist under Wisconsin law because:

the legislature chose not to recognize a right based on a claim discovered more than five years after the allegedly negligent act or omission * * * * Were we to extend a right to remedy outside the limits of these recognized rights, we effectively would eviscerate the ability of the legislature to enact any statute of repose.

Aicher, 2000 WI 98, ¶54.

Each of these policy decisions and reasoning are equally applicable to Ohio law. As in Texas and Wisconsin, to disregard the General Assembly’s reasoned policy decisions underlying the Ohio medical malpractice statute of repose and to eviscerate the absolute bar imposed by the statute of repose under the guise of the discovery rule will have ripple effects beyond the medical

malpractice context. To hold that the “discovery rule” applies to statutes of repose puts into question the ability of the General Assembly to ever impose a statute of repose in any context.

C. The Vast Majority of Other States Have Rejected Similar Challenges to Medical Malpractice Statutes of Repose Premised Upon An Open Courts Or Right to Remedy Challenge.

Thirty-two states and one territory have enacted medical malpractice statutes of repose. See Robin Miller, *Validity of Medical Malpractice Statutes of Repose* (2011), 5 A.L.R.6th 133, Summary; see also *Methodist Healthcare System of San Antonio*, 307 S.W.3d at 288, fn. 29-30.⁶

At least nineteen states have upheld statutes of repose in medical malpractice cases against constitutional challenges premised, as here, on an open courts provision or similar provision guaranteeing the right to a remedy. See Robin Miller, *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R.6th 133, 9-11. See also *Barlow v. Humana, Inc.* (Ala. 1986), 495 So.2d 1048, 1051; *Stein v. Katz* (1989), 213 Conn. 282, 285, 567 A.2d 1183, 1185; *Dunn v. St. Francis Hosp., Inc.* (Del. 1979), 401 A.2d 77, 80-81; *Carr v. Broward County* (Fla. 1989), 541 So.2d 92 (upholding medical malpractice statute of repose against open courts challenge); *Hawley v. Green* (1990), 117 Idaho 498, 788 P.2d 1321, 1323-24; *Mega v. Holy Cross Hosp.* (1986), 111 Ill.2d 416, 490 N.E.2d 665 (upholding statute of repose, noting “[w]e realize our holding here means that [plaintiff’s] action was barred before he learned of his injury”); *Marzolf*

⁶ The statutes cited in Robin Miller, *Validity of Medical Malpractice Statutes of Repose* (2011), 5 A.L.R.6th 133 and *Methodist Healthcare System of San Antonio*, 307 S.W.3d at 288, fn. 29-30 include: Ala. Code 6-5-482; Cal. Civ. Proc. Code 340.5; Colo. Rev. Stat. 13-80-102.5(3)(b); Conn. Gen. Stat. Ann. 52-584; Fla. Stat. Ann. 95.11(4)(b); Ga. Code Ann. 9-3-72; Guam Code Ann. tit. 7, 11308; 735 Ill. Comp. Stat. Ann. 5/13-212(a); Haw. Rev. Stat. Ann. 657-7.3; Iowa Code Ann. 614.1(9)(a); Kan. Stat. Ann. 60-513(c); Ky. Rev. Stat. Ann. 413.140(2); La Rev. Stat. Ann. 9:5628(A); Mass. Gen. Laws Ann. Ch. 260, Section 4; Md. Code Ann., Cts. & Jud. Proc. 5-109(a)(1); Mich. Comp. Laws Ann. 600.5838a(2); Miss. Code Ann. 15-1-36(2)(a); Mont. Code Ann. 27-2-205(1); Mo. Ann. Stat. 516.105(3); N.C. Gen. Stat. 1-15(c); N.D. Cent. Code 28-01-18(3); Neb. Rev. Stat. Ann. 44-2828; Ohio Rev. Code Ann. 2305.113; Or. Rev. Stat. 12.110(4); 40 Pa. Const. Stat. Ann. 1303.513(b); S.C. Code Ann. 15-3-545(B); Tenn. Code Ann. 29-26-116(a)(4); Utah Code Ann. 78B-3-404(2)(a); Va. Code Ann. 8.01-243(C); Vt. Stat. Ann. tit. 12, 521; Wash. Rev. Code Ann. 4.16.350; W. Va. Code Ann. 55-7B-4(a); Wis. Stat. Ann. 893.55(1m).

v. *Gilgore* (D. Kan. 1996), 924 F.Supp. 127 (applying Kansas law); *Crier v. Whitecloud* (La. 1986), 496 So.2d 305 (upholding statute on the grounds that the legislature may abolish a right before it vests); *Plummer v. Gillieson* (Mass. App. Ct. 1998), 44 Mass. App. Ct. 578, 692 N.E.2d 528, 532; *Hill v. Fitzgerald* (1985), 304 Md. 689, 501 A.2d 27 (upholding statute of repose against open courts challenge finding no vested right in the common law discovery rule); *Choroszy v. Tso* (Me. 1994), 647 A.2d 803; *Colton v. Dewey* (1982), 212 Neb. 126, 321 N.W.2d 913 (upholding statute holding that a party has no vested right in an injury occurring more than ten years after the negligent act); *Schendt v. Dewey* (1994), 246 Neb. 573, 520 N.W.2d 541; *Walker v. Santos* (1984), 70 N.C. App. 623, 320 S.E.2d 407; *Barke v. Maeyens* (2001), 176 Ore. App. 471, 31 P.3d 1133; *Harrison v. Schrader* (Tenn. 1978), 569 S.W.2d 822; *Aicher*, 2000 WI 98; *Methodist Healthcare System of San Antonio, Ltd.*, 307 S.W.3d at 283.

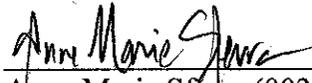
In contrast, only one state other than Ohio has found a medical negligence statute of repose to be unconstitutional on this ground. See *McCollum v. Sisters of Charity of Nazareth Health Corp.* (Ky. 1990), 799 S.W.2d 15. Thus, if the Twelfth District decision is left to stand, Ohio will remain an outlier in failing to recognize that a statute of repose does not violate the constitutional right to open courts or right to a remedy. See *McCollum*, 799 S.W.2d at 15.

The Court should take this opportunity to consider the most recent version of the medical malpractice statute of repose in light of its recent precedent and in light of the prevailing wisdom of the vast majority of other states that have considered this issue. Accepting this appeal and analyzing the constitutionality of R.C. 2305.113(C) will provide clarity for all of Ohio's medical providers and for the lower courts tasked with deciding whether claims may be pursued against Ohio's medical providers.

CONCLUSION

The Twelfth District has imposed an unending burden of potential litigation on the medical community, taking away the legislatively imposed right of Ohio medical providers to be free from potential litigation after the four-year period of repose set forth in R.C. 2305.113(C). Amici urge the Court to accept this appeal and to reverse the Twelfth District's broad-reaching decision.

Respectfully submitted,



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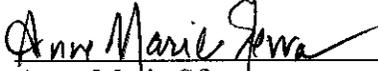
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Amici Curiae in Support of Jurisdiction was sent via regular U.S. mail, postage prepaid this 20th day of May 2011, to the following:

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