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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2025-000529

James Dustin Lucas, ... Appellant,

v.

State Farm Mutual Automobile
Insurance Company, ... Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STANDARD OF REVIEW

Rule 242(b), SCACR, states that a writ of certiorari is not a matter of right, but is one of sound judicial discretion and is granted only where there are special and important reasons. A writ of certiorari may be issued when there are exceptional circumstances or when one of the five categories set forth in Rule 242(b) is applicable. *In Re: Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 503 S.E.2d 445, n.2 (1998); *Lafitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154

(2009). Additionally, when parties file cross-motions for summary judgment, the issue is a question of law for the appellate court to decide de novo. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 854 S.E.2d 836 (2021). Furthermore, interpretation of a rule of procedure is a question of law an appellate court reviews de novo. *Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019).

STATEMENT OF THE CASE

This lawsuit concerns an alleged agreement between counsel in a different lawsuit, *James Dustin Lucas v. Meghan Seely and Andre Knox*, 2020-CP-23-02877 (the "underlying action"), which Petitioner filed against Seeley and Knox, the individuals he alleges caused him injuries in a motor vehicle accident. (R. pp. 16-22). Respondent State Farm Mutual Automobile Insurance Company ("State Farm") was not a party to the underlying action. (R. p. 17 at ¶ 11; R. p. 24 at ¶ 11). Rather, State Farm was Knox's liability carrier which retained an attorney to defend Knox against the Petitioner's claims. (R. p. 17 at ¶ 12; R. pp. 24-25 at ¶ 12).

The alleged agreement in the underlying action between Petitioner's counsel and Knox's counsel was made through a series of emails. The exchange of emails stated Knox, who was in default, would be let out of default and the Petitioner and Knox would participate in an immediate mediation in which State Farm would "negotiate between the amount of [State Farm's] reserve and the policy limit," which was $25,000. (R. p. 17 at ¶ 12; R. pp. 24-25 at ¶ 12; R. pp. 33-37; R. pp. 49-57). Following the exchange of emails, Knox was let out of default, and a mediation, which did not result in a settlement, took place in the underlying action.

After the unsuccessful mediation, Petitioner's counsel emailed Knox's counsel expressing disappointment and asserting State Farm had not negotiated between its reserve and the policy limit:

> We were disappointed by [State Farm's] bad faith at mediation today, especially since we agreed to let [Knox] (who was not present) out of default. Part of the deal… was an agreement to negotiate between the reserve… and the policy limit. State Farm breached that agreement.

(R. p. 59).

Knox's counsel replied, asserting State Farm had negotiated between its reserve and the policy limit[1]:

> I'm sorry to hear you were disappointed. We did negotiate between the reserves and the limits, as we agreed to. Given the liability dispute, however, I do not believe this case is worth limits, which from my understanding was your only demand.

(R. p. 60). Nothing in the record contradicts this email, nor does the record reference any negotiation by the Petitioner other than demanding the $25,000 policy limits.

Ten months later, Petitioner filed this lawsuit asserting breach of contract accompanied by a fraudulent act and fraud against State Farm based on Petitioner's counsel's belief State Farm, during the mediation in the underlying action, did not negotiate between its reserve and the policy limits (*See gen*. R. pp. 16-22). The complaint stated it was not an action for improper claims practices or bad faith.[2] (R. p. 19).

Following State Farm's answer to the complaint, both State Farm and the Petitioner filed cross motions for summary judgment. (R. pp. 30, 31; 81-87). The Petitioner filed a response in opposition to State Farm's Motion for Summary Judgment (hereinafter, "Petitioner's opposition brief"), which purported to fully respond to and oppose State Farm's motion and, conversely, did not raise nor demonstrate the need for any discovery. (R. pp. 65-70). Both the Petitioner's and

[1] As State Farm was the liability insurer in the underlying action, it is unclear how Petitioner would even know what reserve State Farm had established.

[2] Even though the Petition concedes the claim against State Farm does not involve bad faith or unfair claim practices (Petition for Writ of Cert. at 14), it nonetheless argues bad faith (Petition for Writ of Cert. at 16).

State Farm's motions for summary judgment were heard before Circuit Judge G. D. Morgan, Jr. who, after taking the matter under advisement, granted State Farm's Motion for Summary Judgment and denied the Petitioner's motion. The Petitioner never requested a continuance of the hearing and never submitted an affidavit demonstrating the need for discovery to fully respond to and justify opposition to State Farm's Motion for Summary Judgment.

The Petitioner moved for reconsideration of Judge Morgan's March 20, 2023 order on the motions for summary judgment. (R. pp. 124-142). The Petitioner's Motion for Reconsideration was denied on May 23, 2023. R. p. 12). Petitioner filed a Notice of Appeal of the May 23 order denying reconsideration, but not the March 20 order ruling on the Motion for Summary Judgment. (Notice of Appeal, May 26, 2023). Despite the Notice of Appeal being limited to the May 23 order, the Petitioner's brief argued the circuit court erred only in its March 20 order by granting summary judgment on the breach of contract accompanied by a fraudulent act claim.

On January 15, 2025 the Court of Appeals issued a unanimous unpublished opinion affirming the order of the trial court granting State Farm's Motion for Summary Judgment. *Lucas v. State Farm Mut. Auto. Ins. Co.*, Op. No. 2025-UP-011 at 3 (Ct. App. January 15, 2025). The Petitioner filed a Petition for Rehearing. The Court of Appeals issued an order filed March 12, 2025 denying the Petition for Rehearing. The Petitioner then on May 1, 2025 filed a Petition for Writ of Certiorari.

ARGUMENT

I. The Petition for Writ of Certiorari does not fall within any of the five requirements of Rule 242(b), SCACR, for granting a Writ of Certiorari.

While not an exclusive list, Rule 242(b), SCACR, sets forth five reasons the Supreme Court will consider in deciding whether to grant review of a final decision of the Court of Appeals. The five reasons are (1) novel questions of law, (2) a dissent in the decision of the Court of Appeals,

(3) a conflict between the decision of the Court of Appeals and a prior decision of the Supreme Court, (4) direct involvement of substantial constitutional issues, or (5) a federal question where the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. None of these reasons apply to the Petition in question. In fact, the Petitioner makes no reference to Rule 242, SCACR, and only argues the opinion of the Court of Appeals condones conduct forbidden by "general legal principles" and "our legislature." The Petition makes no reference to any statute violated by State Farm.

A writ of certiorari may be granted when exceptional circumstances exist. *In re: Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 503 S.E.2d 445, n.2 (1998); *Lafitte v. Bridgestone Corp*., 381 S.C. 460, 674 S.E.2d 154 (2009). None of the issues raised by the Petitioner involve exceptional circumstances. Issues such as whether a contract existed between the parties, whether the contract is subject to Rule 43(k), SCRCP, and whether the Petitioner presented admissible evidence of a fraudulent act or of damages are far short of exceptional circumstances.

II. The Petitioner's recitation of facts and argument do not comply with Rule 242(d)(3), SCACR, which requires a specific reference to pertinent portions of the Record on Appeal.

Rule 242(d)(3), SCACR, requires "specific reference to pertinent portions of the record on appeal." In the Petitioner's recitation of facts, there is no reference to the Record on Appeal. (Petition for Writ of Cert. at 3-6). Nor does the statement of the case reference the Record on Appeal. (Petition for Writ of Cert. at 2-3). In the entire 25-page Petition, the only reference to the Record on Appeal are references to the transcript of the hearing on State Farm's Motion for Summary Judgment. (*See* Petition for Writ of Cert. at 9, 10, 11, 13, 18, 23). Additionally, the statement of the case and the recitation of facts are more argumentative than an objective recitation of the litigation. (Petition for Writ of Cert. at 2-6). For these reasons, the Petitioner's statement of the case and recitation of facts should be disregarded.

III. The Petitioner's statement of the case and recitation of facts should be disregarded to the extent the source of the statements is the Petitioner's attorney, who cannot be a witness.

The Record on Appeal contains no affidavit or deposition testimony of Petitioner. Instead, portions of the recitation of facts can only have come from the Petitioner's attorney. For example, the Petition purports to describe the circumstances of the accident between Petitioner and Knox. (Petition for Writ of Cert. at 3). This information is not in the Record of Appeal from an independent source and, even assuming it is true, the information could only have come from counsel for the Petitioner. As a further example, the Petition states "Petitioner relied on Respondent's deception…" (Petition for Writ of Cert. at 4). The Record on Appeal is devoid of any evidence of reliance by the Petitioner himself.

Under Rule 3.7 of the Rules of Professional Conduct, a lawyer shall not act as an advocate of a trial in which the lawyer is likely to be a necessary witness. *In re Westmoreland*, 353 S.C. 44, 577 S.E.2d 209 (2003); *Collins Ent. v. White*, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005). Accordingly, any information in the Record on Appeal derived from Petitioner's counsel should be disregarded.

IV. The Petition should be dismissed because it is based upon confidential communications made during a mediation in violation of Rule 8(a), SCADR, and because this part of the Court of Appeals' opinion is not addressed in the Petition.

One of the grounds for State Farm's Motion for Summary Judgment was that the Complaint filed against it was based upon information about occurrences during a mediation and violated the confidentiality of Rule 8, SCADR. (R. p. 30). In granting State Farm's Motion for Summary Judgment the trial court stated, "in order to prove its case, plaintiff must present evidence of confidential communications during mediation, which is prohibited." (R. p. 7). The decision of the Court of Appeals affirming the grant of summary judgment stated, "the Circuit Court also ruled that State Farm was entitled to judgment as a matter of law because Lucas could not prove his case

without presenting confidential communications made during mediation. We agree with this as well." *Lucas,* Op. No. 2025-UP-011 at 4.

The Petitioner's response in his Petition for Rehearing was: "Simply being in mediation does not provide a license to lie, cheat, and steal… The Record on Appeal includes emails exchanged outside of mediation and transcripts of in-court statements proving that State Farm gained a benefit through deception, refused to perform, and violated ADR rules." (Petition for Rehearing at 3-4). This argument side-stepped the point that what happened in the mediation itself is the foundation of the plaintiff's case and without that information the plaintiff has no case. Additionally, the source of information about what happened in the mediation is the Petitioner's counsel. Arguments of plaintiff's counsel are not evidence and cannot supply otherwise prohibited information. *In re: Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals,* 433 S.C. 419, 858 S.E.2d 638 (Ct. App. 2021); *S.C. Dep't of Transp. v. Thompson,* 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003). Further, the Petition for Writ of Certiorari does not identify this in the list of statement of issues on appeal, nor is this holding of the trial court or the Court of Appeals argued in the Petition. The only instance in which the Petitioner references the ADR rules is to claim it was State Farm which "intentionally violated mandatory ADR rules…" (Petition for Writ of Cert. at 6).

Because the rulings by the trial court and the Court of Appeals that the Petitioner violated the rule against revealing confidential communications during a mediation is not addressed in the Petition, that issue is unpreserved and this alone is grounds for denial of certiorari.

V. The Petition ignores the ruling in *Hood v. United Services Automobile Association,* which the Petition references as an unpublished opinion.

The Petition purports to cite to a South Carolina Supreme Court decision in *Hood v. United Services Automobile Association,* which Petitioner states is unpublished, quoting "this Court" as

follows: "[i]t may be that USAA [the insurer] had a duty to answer truthfully if asked whether it was offering the maximum amount of its authority, but that question was not asked here and is not before us." (Petition for Writ of Cert. at 17). That quote does not appear in the decision of the Supreme Court. *See Hood v. U.S. Auto. Ass'n*, 445 S.C. 1, 16, 910 S.E.2d 767, 775 (2025), *reh'g denied* (Jan. 24, 2025). What is in the published decision of the Supreme Court is a holding that "South Carolina law does not require an insurance company to disclose and offer its full reserves or full authority…" and "USAA nor was it obligated to offer Hood the full amount of its reserve, nor was it obligated to offer the full amount of its settlement authority." *Hood v. U.S. Auto. Ass'n*, 445 S.C. 1, 16, 910 S.E.2d 767, 775 (2025), *reh'g denied* (Jan. 24, 2025). In any event, the email of JeanMarie Tankersley stating, "we did negotiate between the reserves and the limits, as we agreed to" is uncontradicted. (R. p. 60).

VI. The attorney representing Knox did not offer "testimony" at the hearing on State Farm's Motion for Summary Judgment; no statements by that attorney concerned the merits of either party's Motion for Summary Judgment; and counsel for the Petitioner waived any complaint about that attorney's statements by not requesting to cross-examine that attorney.

The Petitioner argues the Court of Appeals failed to address that State Farm's offer live testimony from an insurance defense lawyer at the summary judgment hearing deprived the Petitioner of the right to cross-examine that attorney. (Petition for Writ of Cert. at 20-21). This argument fails for a number of reasons.

First, this issue was not preserved in the Petition for Rehearing before the Court of Appeals. Second, the transcript of the hearing shows attorney Tankersley was never sworn in by the court to testify and therefore did not offer testimony. (R. pp. 153-205). Third, Attorney Tankersley made no statements in support of State Farm's Motion for Summary Judgment and counsel for State Farm stated, "the reason Ms. Tankersley was participating today is because this case is related to the underlying case… She has not made any arguments on the merits of any of these motions

today.… She does not [represent State Farm].” (R. pp. 160, 161; 168; 203, 204). In response, the trial court stated “I do agree with plaintiff’s counsel . . . that Ms. Tankersley would be foreclosed from making any kind of argument. So she has indicated she is not making any argument, going forward. So that resolves that.” (R. p. 204). The trial court then asked if there was anything from the plaintiff and plaintiff’s counsel responded “no, Your Honor.” (R. p. 204). At no point in the hearing did the attorney for the Petitioner ask to cross-examine Ms. Tankersley.

For all these reasons, part VI of the Petition for Writ of Certiorari has no merit.

VII. The Petitioner’s alleged agreement or contract with counsel for Knox was subject to the requirements of Rule 43(k), SCRCP, and did not comply with that rule.

The Petitioner argues that Rule 43(k), SCRCP, applies to “pending litigation” and this lawsuit against State Farm is not the “pending litigation.” (Petition for Writ of Cert. at 6). This argument fails for several reasons. First, the term “pending litigation” is not in Rule 43(k). Instead, this rule applies to agreements between counsel affecting “proceedings in an action…” Rule 43(k), SCRCP. Second, the Petitioner’s lawsuit against State Farm is “pending litigation.” Third, even if Rule 43(k) applied to an alleged agreement in the Petitioner’s case against Knox, it is proper to apply this rule to Petitioner’s case against State Farm; otherwise, a party could circumvent the requirements of Rule 43(k) simply by filing a separate lawsuit, which is what the Petitioner has attempted. The Court of Appeals correctly concluded it had “no difficulty determining Rule 43(k) applies to this case.” *Lucas*, Op. No. 2025-UP-011 at 3.

An exchange of emails does not comply with Rule 43(k). As noted in the *Ashford* case cited by the Petitioner, the intent of Rule 43(k) is to require all agreements regarding pending litigation to either be announced in open court or be reduced to a consent order or written stipulation and entered. As noted by the Court of Appeals, neither the Petitioner nor Knox signed the alleged agreement as required by Rule 43(k). The only exception to this rule is where the parties

reach a settlement agreement during mediation and the settlement agreement involves payment by an insurer. Here, however, the parties did not reach a settlement agreement, so the exception in Rule 43(k) is inapplicable.

As noted by the Supreme Court in *S.C. Hum. Affs. Comm'n v. Chen*, substantial compliance with Rule 43(k) is not sufficient. 430 S.C. 509, 846 S.E.2d 861 (2020). Additionally, the Court of Appeals did not err in citing the *Chen* case. The Petitioner appears to argue *Chen* is distinguishable because it is limited to settlement agreements, whereas the alleged agreement here was one to mediate within certain limits. This argument is inconsistent with the wording of Rule 43(k). While the rule does reference "a settlement agreement," the rule commences with a general statement about agreements "affecting the proceedings in an action…" (*See* State Farm's Response Brief in the Court of Appeals at 6). Neither *Chen* nor Rule 43(k) state that the rule is limited to settlement agreements.

VIII. Even if Rule 43(k) did not apply to the alleged agreement between counsel for the Petitioner and counsel for Knox, there is no evidence State Farm breached that agreement.

The only potentially admissible evidence presented to the circuit court relating to whether State Farm complied with or breached the alleged agreement between counsel for Petitioner and counsel for Knox was the email from Knox's counsel to Petitioner's counsel asserting State Farm had negotiated between its reserves and the policy limit. (R. p. 60). The petitioner never submitted an affidavit of a competent witness or any admissible evidence creating a genuine issue of material fact as to State Farm's compliance with the alleged agreement. The circuit court therefore did not improperly weigh evidence as argued by the Petitioner; rather, there was simply no countervailing evidence to weigh.

Additionally, the sole source of the claim that State Farm breached the alleged agreement by failing to mediate between its reserves and Knox's liability limits was the Petitioner's counsel

and his uninformed, subjective belief of what reserves State Farm must have established. It is well-established that counsel's statements regarding the facts of the case and counsel's arguments are not admissible evidence. *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006).

IX. The Petition for Writ of Certiorari misreads the holding in *Shores v. Weaver*.

The Petitioner argues he was entitled to a monetary recovery, relying upon *Shores v. Weaver*, for the proposition minimum limits of liability insurance are not defeated by an insured's default. Relying upon *Shores*, the Petitioner argues he would not have been precluded from collecting minimum financial responsibility limits from State Farm and that by letting Knox out of default the Petitioner "gave up his right to have a judgment of up to $25,000 awarded in his favor…" (Petition for Writ of Cert. at 23). The Petitioner claims under the *Shores* case he was "entitled to Respondent's minimum limits policy…" (Petition for Writ of Cert. at 18). If this was the case, that raises the question of why there was a mediation at all when, according to the Petitioner, he was already entitled to State Farm's minimum limits.

The *Shores* case addresses an issue of insurance coverage; it does not relieve a plaintiff from having to prove damages. *Shores v. Weaver*, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993). The Court of Appeals correctly stated, "the idea that State Farm's insured being in default would have automatically entitled Lucas to a $25,000 judgment is patently meritless." *Lucas*, Op. No. 2025-UP-011 at 4.

X. The Petitioner presented no probative, admissible evidence of a fraudulent act by State Farm.

The Petitioner asserts State Farm engaged in fraudulent conduct by agreeing to negotiate above its reserves and then not doing so. (Petition for Writ of Cert. at 18; R. p. 21). There is no evidence in the record that State Farm did not negotiate between its reserves and the liability limits. Counsel for Knox stated in an email subsequent to the mediation that "we did negotiate between

the reserves and the limits, as we agreed to. Given the liability dispute, however, I do not believe this case is worth policy limits, which from my understanding was your only demand." (R. p. 60). Nothing in the record contradicts the statement in this email.

The Petitioner's claim of fraud fails for a multitude of reasons, as noted in the trial court's order. (R. p. 8). There was no false statement. There was no evidence of Petitioner's reliance on the alleged false statement. There was no evidence of a consequent and proximate injury and the alleged statement to mediate in any event related to an act in the future, not a present or pre-existing fact. (R. p. 8).

XI. The Petitioner has no proof of damages.

The Petitioner argues that at the time of the mediation he "was, in fact, entitled to a monetary recovery." (Petition for Writ of Cert. at 22). In support of this statement, the Petitioner continues to reference *Shores v. Weaver* and claims, based upon that case, he "would not have been precluded from collecting minimum financial responsibility limits from the Respondent…" and by letting Knox out of default the petitioner "gave up his right to have a judgment of up to $25,000 awarded in his favor…" (Petition for Writ of Cert. at 23). Again, the Court of Appeals properly characterized this reading of *Shores* as "patently meritless." *Lucas*, Op. No. 2025-UP-011 at 4. And, if the Petitioner was automatically entitled to $25,000, one wonders why there was a mediation at all.

The Petitioner argues he was damaged by paying for a mediation "that was worthless…" (Petition for Writ of Cert. at 23). It is undisputed, however, that State Farm did offer $1,000 at mediation and it is undisputed that the Petitioner's only offer at mediation was the policy limits. (R. pp. 32, 60) If the Petitioner considers the mediation "worthless" it is because the Petitioner refused to negotiate.

While the trial court correctly characterized the plaintiff's damages as speculative because settlement negotiations in the context of mediation or otherwise depend upon a myriad of factors (R. p. 9), the Court of Appeals did not address the issue of damages as the issues the Court of Appeals considered were dispositive. The Petition for Rehearing did not address the issue of damages. Rule 242, SCACR, states the only questions to be included in a petition for writ of certiorari are questions raised "in the petition for rehearing." Rule 242(d)(1), SCACR. The issue of damages is therefore not preserved for review by the Supreme Court.

XII. No question of fact was presented to the Circuit Court because both parties filed cross motions for summary judgment.

The Petitioner claims there was "conflicting evidence" the Circuit Court improperly weighed. (Petition for Writ of Cert. at 23, 24). In fact, there was no conflicting evidence to weigh. The so-called "weighed evidence" was whether a contract compliant with Rule 43(k) existed. Whether an agreement complies with Rule 43(k) is a question of law, not one of fact, and in any event, there was no genuine issue of material fact whether the exchange of emails complied with Rule 43(k). Furthermore, the Petitioner filed his own Motion for Summary Judgment (R. pp. 81-87) and, as noted by the trial court (R. p. 4) and by the Court of Appeals, when parties file cross-motions for summary judgment the issue becomes a question of law for the Court to decide de novo. This part of the Court of Appeals' ruling is not addressed in the Petition for Rehearing to the Court of Appeals. Again, under 242(d)(1), SCACR, only questions raised in a petition for rehearing are to be included in a petition for writ of certiorari.

XIII. The "at-issue" doctrine is inapplicable to the Petitioner's case and, even if it applies, this issue is not preserved for review when it was not raised to the Circuit Court, was not discussed in the Court of Appeals opinion, and was not raised in the Petition for Rehearing.

This issue is not in the trial court's order. This issue is not in the Court of Appeals' order. This issue was not argued in the Petition for Rehearing to the Court of Appeals. It is therefore not preserved for inclusion in the Petition for Writ of Certiorari.

Nonetheless, this issue was addressed in State Farm's final brief to the Court of Appeals because the Petitioner's brief to the Court of Appeals argued this issue. (State Farm's Response Brief in the Court of Appeals at 17). As set forth in State Farm's final brief to the Court of Appeals, summary judgment was proper even if the Petitioner had discovery on State Farm's reserves as it is undisputed State Farm did negotiate between its reserve and the liability limits. (R. p. 60).

XIV. Granting summary judgment to State Farm did not improperly deprive the Petitioner of a right to trial by jury.

Rule 242(d)(3), SCACR, requires an argument on each question to include a citation of authority. There is no citation of authority that granting summary judgment deprives a party of a right to trial by jury. In fact, the purpose of Rule 56, SCRCP, is to preserve judicial resources by dismissing cases undeserving of a trial by jury. Acceptance of the Petitioner's argument would, in effect, abrogate Rule 56. Additionally, this argument was never raised to the trial court and is not preserved for appeal.

CONCLUSION

The Petition for Writ of Certiorari is procedurally and substantively deficient for a number of reasons and should be denied. Numerous parts of the Petition are not preserved for appeal, and the Petitioner has continued to advance an argument the Court of Appeals has characterized as "patently meritless." The Court should, under Rule 269, SCACR impose sanctions upon the Petitioner.

Respectfully submitted,

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