

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,  
Petitioner on Review,

v.

SCOTT B. GERHARDT,  
Defendant-Appellant,  
Respondent on Review.

Polk County Circuit Court  
Case No. 12P3329

Supreme Court No. S063612

Court of Appeals No. A152760

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BRIEF OF *AMICI CURIAE* S.G. (CRIME VICTIM),  
NATIONAL CRIME VICTIM LAW INSTITUTE,  
AND OREGON CRIME VICTIMS LAW CENTER

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Review of the Decision of the Court of Appeals  
on Appeal from a Judgment of the Circuit Court for Polk County  
Honorable Monte S. Campbell, Judge

*En Banc* Opinion Filed: September 16, 2015

Author of Opinion: Armstrong, J. (joined by Haselton, C.J., and Sercombe,  
Duncan, Hadlock, DeVore, Tookey and Garrett, JJ). Dissenting Judges: Egan,  
J.; Flynn, J. (Joined by Ortega, Nakamoto, and Egan, JJ).

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## **STATEMENT OF *AMICI CURIAE*'S INTERESTS**

S.G. is the victim of the strangulation at issue in the underlying criminal case against the defendant, and she is the person to whom restitution has been ordered. S.G. has a personal stake in the outcome of this case.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates; researching and analyzing developments in crime victim law; and litigating issues of national importance regarding crime victims' rights in cases in state, federal, tribal, and military courts.

The Oregon Crime Victims Law Center (OCVLC) is a nonprofit organization that provides crime victims across Oregon with no-cost legal representation in asserting and enforcing their rights in criminal proceedings in Oregon's state, federal and tribal courts, including issues surrounding the right to restitution. OCVLC also provides crime victims with non-legal victim assistance.

This case directly impacts S.G. and involves issues that are fundamental to the rights and interests of crime victims across Oregon, including the rights

to protection, justice, fairness, and prompt restitution. Allowing the Court of Appeal's decision to stand would result in serious injustice for victims.

## INTRODUCTION

This Court recently held that “a victim’s attorney fees and litigation costs may, in an appropriate case, constitute ‘economic damages’ under ORS 137.106,” the criminal restitution statute, as long as they were “the result of reasonably foreseeable risks of harm[.]” *State v. Ramos*, 358 Or 581, 604, 368 P3d 446 (2016). The issue on review is whether this is such a case.

The victim was attacked by her husband in the presence of their children. He was arrested and jailed on charges including Strangulation, and ordered to have no contact with the victim. The victim hired an attorney to protect herself and her children on the day her husband was released on bail after he had repeatedly violated the “no contact” order while in jail. Her attorney assisted her in attempting to have the “no contact” order in the criminal case enforced, in exercising her constitutional and statutory rights as a crime victim in the criminal case, and in seeking and obtaining a Family Abuse Prevention Act (FAPA) restraining order.<sup>1</sup> She incurred \$1,880 in attorney fees, for which the trial court awarded her restitution.

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<sup>1</sup> Civil protective order are “the most frequently used and, in the view of many experts, the most effective legal remedy against domestic violence.” Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can*



The Court of Appeals reversed the restitution award, finding that although there was a causal relationship between defendant's strangulation of the victim and her retention of an attorney to assist with her protection rights, "the attorney fees that the [trial] court awarded as restitution do not represent an expense that the victim necessarily incurred to redress harm that she suffered as a result of defendant's strangulation of her." *State v. Gerhardt*, 273 Or App 592, 597, 359 P3d 519 (2015 ) (*en banc*).

The Court of Appeals' conclusion reflects a fundamental misunderstanding of the nature and consequences of intimate partner violence,<sup>2</sup> and also relies upon a causation analysis that is inconsistent with this Court's

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*Law Help End the Abuse Without Ending the Relationship?*, 29 Cardozo L Rev 1487, 1503-04 (2008).

<sup>2</sup> Domestic violence offenders have a high rate of recidivism, and the termination of the relationship vis-à-vis separation or reporting of the crime creates a serious risk of an escalation of violence toward the victim. *See, e.g., United States v. Skoien*, 614 F3d 638, 644 (7th Cir 2010) (*en banc*) (citing research showing that "the recidivism rate is high" for offenders arrested for misdemeanor domestic violence offenses and observing that domestic violence offenders "remain dangerous to their spouses and partners" post-arrest and conviction as support for holding that the Second Amendment does not bar the application of the federal statute barring firearm possession); Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 Vand L Rev 1015, 1024-25 (2014) (explaining that "[d]omestic violence is different from other crimes in ways that make past acts highly relevant and predictive of future danger"; "domestic violence survivors are more likely to be reassaulted, experience more severe levels of violence, and sustain worse injuries" in the future; and "domestic violence survivors face the greatest risk of acute violence and lethality during the actual separation from an abusive partner").

recent decisions in *Ramos* and *State v. Kirschner*, 358 Or 605, 368 P3d 21 (2016). Those cases impose a requirement of reasonable foreseeability, the test for which “is whether a reasonable person in the defendant’s position would have foreseen that someone in the victim’s position could reasonably incur damages of the same general kind that the victim incurred.” *Ramos*, 358 Or at 597.

Although it seems incongruous to suggest that a “reasonable person” standard applies to a man who strangles the mother of his children in the children’s presence and then persists in harassing her, the question is whether a reasonable person would have foreseen that someone in the victim’s position could reasonably incur attorney fees in taking steps to: (1) have the assailant held accountable; (2) prevent future assaults by the assailant; and (3) protect herself and their children from either witnessing or being victimized by the assailant in the future. Applying this standard in a manner consistent with the penological purposes of restitution,<sup>3</sup> this Court must conclude that the victim is entitled to a restitution award that reimburses her for the attorney fees she incurred.

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<sup>3</sup> See *Ramos*, 358 Or at 599, n 11 (reaffirming that restitution serves a penal purpose: “It is intended to serve a rehabilitative and deterrent purpose by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.”) (quoting *State v. N.R.L.*, 354 Or 222, 226, 311 P3d 510 (2013)).

## SUMMARY OF FACTS

The defendant was arrested and charged with Strangulation – Presence of Minor Children (C felony), Interference with Making a Report, and Harassment after assaulting his wife in the presence of their children on July 4, 2012. (ER 1-3, Tr 7-8, Tr 12) Because the Strangulation charge was a crime of domestic violence, the trial court was required to order the defendant not to contact or attempt to contact the victims while he was in custody. ORS 135.247(2). The defendant was released on bail on July 23, 2012. (Payment-Security Deposit, Filed July 23, 2012, *State v. Gerhardt* (12P3329); Tr 15) His victim hired an attorney that same day. (ER 5) She did so “after [the defendant’s] repeated violations of the no contact order while in jail[.]” (ER 4)

The victim incurred attorney fees totaling \$1,880.00 for her attorney’s services in contacting the jail to obtain a copy of the no contact order and release provisions; contacting the prosecutor and victim advocate concerning the plea offer, restitution, and sentencing; obtaining a FAPA restraining order “after [the defendant’s] previous violations of no contact order with no repercussions”; and gathering evidence of the defendant’s violation of the no contact provisions. (ER 4-5; *see also* Tr 22)

Pursuant to a plea agreement, the defendant entered a plea of “no contest” to a misdemeanor lesser-included offense of the Strangulation charge. (Tr 4-6) In his plea petition, defendant acknowledged that the state could prove beyond a

reasonable doubt that on or about July 4, 2012, he had “unlawfully and knowingly impeded the normal breathing or blood circulation of [S.G.], a family or household member, by applying pressure on the throat and neck of [S.G.]” (Tr 7, 26)

The victim submitted a written request for restitution for: (1) counseling costs for herself and her children in an amount to be determined; (2) attorney fees in the aforementioned amount of \$1,880.00; (3) lost wages totaling \$1,005.60 for missed work on three dates after the attack “as a result of physical and psychological injuries to myself and the children” and for six additional dates because after the defendant’s release, the victim felt “unsafe to attend work” because “he repeatedly violated the no contact order while in jail and threatened to find [her] and the children”; and (4) \$565.00 for moving expenses consisting of a U-Haul rental, gas, and supplies. The total restitution request was for \$3,450.60. (ER 4) Accompanying the request was the victim’s attorney’s invoice for \$1,880, which the defendant’s counsel conceded was sufficient proof to support the request for that amount. (Tr 23) The victim provided no documentary or other support for the remaining expenses and did not appear for the restitution hearing, so the trial court declined to order restitution for those expenses. (TR 23)

The defendant’s counsel objected to a restitution award for the victim’s attorney fees, arguing that attorney fees are not economic damages within the

meaning of ORS 31.710, and that the victim “chose to go hire the attorney; she did not necessarily have to go hire the attorney. \* \* \* [S]he hired this attorney to help her with her restraining order. \* \* \* She chose to have the restraining order.” (Tr 24-26) The trial court responded by noting that the defendant was convicted of strangling the victim, “which would be a reason she’d need a restraining order, wouldn’t it?” The trial court ordered the defendant to pay restitution for the attorney fees incurred by the victim. (Tr 26-27)

On appeal, the defendant assigned error to the trial court’s order of restitution, arguing that attorney fees do not constitute economic damages for the purpose of restitution because: (1) the attorney fees were to obtain a restraining order for post-arrest violations of the no-contact order, and not for the July 4<sup>th</sup> incident; and (2) attorney fees in a separate civil protective order case are not the type of damages that could be recovered in a civil suit. (Appellant’s Opening Brief at 2-3, *State v. Gerhardt*, 273 Or App 592, 359 P3d 519 (2015 ) (*en banc*) (CA A152760))

The Court of Appeals agreed, holding that the victim was not entitled to recover her attorney fees as restitution because the fees were incurred in “address[ing] defendant’s post-arrest conduct,” not in redressing the harm caused by his crime of conviction. *Gerhardt*, 273 Or App at 595.

## ARGUMENT

### **I. The Victim's Attorney Fees "Resulted From" the Defendant's Assault.**

Attorney fees and litigation costs are recoverable in restitution if they satisfy a two-part causation test: (1) they must “‘result from’ a defendant’s criminal activity in the ‘but-for’ sense”; and (2) they “must be a reasonably foreseeable result of defendant’s criminal activities.” *Ramos*, 358 Or at 603. Here, the Court of Appeals’ reversal of the award of restitution to the victim was premised upon a finding that there was *no* causal connection at all between the crime of Strangulation and the victim’s attorney fees:

[T]he attorney fees that the court awarded as restitution do not represent an expense that the victim necessarily incurred to redress harm that she suffered as a result of defendant’s strangulation of her. Rather, they represent an expense that the victim concluded that she needed to incur as a result of conduct in which defendant had engaged *after* he had committed the crime for which he was convicted.

*Gerhardt*, 273 Or App at 597 (emphasis in original).

The Court of Appeals misapprehends the nature of the defendant’s conduct—erroneously treating his post-arrest conduct as though it occurred in a vacuum—as well as the state of the victim’s fear—erroneously seeing the victim’s fear as disconnected from her strangulation. The victim’s fear of the defendant was the result of his violent attack on her. She would not have been in fear and needed to retain counsel to secure her rights, including protection, if

the defendant had not violently attacked her in front of their children. She hired an attorney because the defendant strangled her; therefore, the attorney fees she incurred to secure her right to protection clearly “resulted from” his strangulation, which was the “but for” cause of the fees.<sup>4</sup>

The Court of Appeals attempted to distinguish prior case law by attributing the legal fees to post-crime conduct. In doing so, the Court of Appeals ignored the fact that it was the defendant’s act of strangling the victim that caused her to fear for her own safety and for the safety of her children, which in turn caused her to hire an attorney. That the defendant exacerbated

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<sup>4</sup> See, e.g., *State v. Dillon*, 292 Or 172, 181, 637 P2d 602 (1981) (concluding that the trial court properly ordered defendant to pay restitution to the police department for damage to a patrol car hit by gunfire from an officer who was aiming at defendant because “the damage is a result in fact of defendant’s criminal activities” for “the police officer who fired at defendant did so in reaction to defendant’s assault”); *State v. Doty*, 60 Or App 297, 300, 653 P2d 276 (1982) (concluding that all losses the theft victim suffered, including losses that may have been caused by someone else who may have entered the victim’s home and stolen property after defendant had kicked the victim’s door open, because “regardless of whether defendant actually stole the jewelry, the entire loss ‘resulted’ from his ‘criminal activities,’ including the admitted kicking in of the victim’s door, because it at least created free access to the home for the hypothetical subsequent theft”); *State v. Stephens*, 183 Or App 392, 397, 52 P3d 1086 (2002) (affirming a restitution order directing defendant—convicted of unauthorized use and possession of a stolen car—to pay \$4,000 to the owner for tires and wheels stolen from the car after defendant left the car unattended); *State v. Pumphrey*, 266 Or App 729, 734-36, 338 P3d 819 (2014), *rev den*, 357 Or 112 (2015) (affirming a restitution order directing defendant—convicted of violating a court’s stalking protective order (SPO)—to reimburse the victim for various expenses incurred after the SPO violations, including the cost of a new phone number, rent payment for a temporary residence, and lost wages for missing work to facilitate changing the locks).

her fear by violating the “no contact” order from jail did not break the causal connection between his crime and her fear. Indeed, it was fear from the strangulation in light of the imminence of the defendant’s release on bail that caused the victim to retain counsel to assist her in protecting herself and her children from the defendant. Under Oregon law, “but for” causation requires no more.<sup>5</sup> See note 4.

**II. A Reasonable Person in the Defendant’s Position Would Have Foreseen that Someone in the Victim’s Position Could Reasonably Incur Attorney Fees.**

In *Ramos*, the Court stated that the test for reasonable foreseeability “is whether a reasonable person in the defendant’s position would have foreseen

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<sup>5</sup> The same is true in numerous other jurisdictions. See, e.g., *United States v. DeGeorge*, 380 F3d 1203, 1221 (9th Cir 2004) (concluding the trial court did not err in applying the Victim and Witness Protection Act and awarding restitution to defendant’s insurance company for attorney fees incurred while litigating a civil action to rescind the insurance policy on which defendant attempted to collect after illegally sinking the insured boat, and defendant was later convicted of perjury committed in the civil suit; and finding that “the attorney’s fees incurred in the civil case were a direct result of [defendant’s] criminal conduct”); *United States v. Gordon*, 393 F3d 1044, 1056-57 (9th Cir 2004) (concluding the trial court did not err in applying the Mandatory Victims Restitution Act and awarding restitution to the corporate victim for its investigation expenses; and finding that the victim’s “investigation costs, including attorneys’ fees, were necessarily incurred by [the victim] in aid of the proceedings” and “a direct and foreseeable result of” defendant’s wire fraud and insider trading); *State v. Alcala*, 301 Kan 832, 839-40, 348 P3d 570, 575 (2015) (concluding that the trial court did not err in awarding restitution to reimburse the murder victim’s mother (and defendant’s mother-in-law) for attorney fees incurred to represent her interests in child in need of care and adoption proceedings; and finding that defendant’s “killing of his wife, who was also the mother of his children, set in motion a foreseeable chain reaction regarding the children’s placement”).



that someone in the victim’s position could reasonably incur damages of the same general kind that the victim incurred.” 358 Or at 455. The attorney fees at issue in this case easily pass this test.

A crime victim’s potential need to retain an attorney to help with the full exercise of his or her legal rights is a foreseeable consequence of a defendant’s criminal actions. Indeed, Oregon case and statutory law has long contemplated that a crime victim may retain counsel to assist her in the criminal justice system. *See, e.g.*, ORS 137.013 (1987 law entitling the victim to appear and be heard personally or through counsel at sentencing); *State v. Mahoney*, 115 Or App 440, 838 P2d 1100 (1992), *modified on recons*, 118 Or App 1, 846 P2d 413, *rev den*, 316 Or 142 (1993) (affirming restitution for attorney fees incurred to help victim stop defendant’s sexual harassment and work toward an indictment and criminal prosecution); *see also* ORS 147.502(1) (entitling crime victims to assert claims for rights violations “personally, through an attorney or through an authorized prosecuting attorney”).

Oregon law also contemplates that a victim of abuse may retain counsel to assist her in obtaining a Family Abuse Prevention Act restraining order. ORS 107.716(3) (authorizing attorney fees in FAPA proceedings).<sup>6</sup>

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<sup>6</sup> Additionally, Oregon law provides for the recovery of attorney fees in domestic relations proceedings. ORS 107.105(1)(j); ORS 107.445.

In this case, the defendant was the victim's husband and the father of their two children. A reasonable person in his position would foresee that attacking and choking his wife in the presence of their children could lead to his wife's retention of counsel in order to: (1) have him held accountable in the criminal justice system; (2) prevent future assaults by him; and (3) protect herself and their children from either witnessing or being the subject of his violence in the future.

Moreover, the victim's retention of counsel was consistent with the "fair balance \* \* \* between the rights of crime victims and the rights of criminal defendants" that was contemplated by the voters when they constitutionalized the rights of crime victims. Or Const, Art I, § 42(1). The United States Supreme Court acknowledged more than 50 years ago "the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 US 335, 344, 83 S Ct 792, 9 L Ed 2d 799 (1963). *See also Powell v. Alabama*, 287 US 45, 71-72, 53 S Ct 55, 65, 77 L Ed 158 (1932) (concluding that the constitutional right to be heard by counsel is meaningless unless defendant is in fact represented by counsel).

To domestic violence victims, counsel may mean the difference between protection from her assailant and no protection. *See, e.g., Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L Rev 801, 812 (1993) (explaining

that domestic violence victims “who appear in court with legal representation are much more likely to receive civil protection orders than those [victims] who appear pro se, and those orders are much more likely to contain more effective and complete remedies”); Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 Wyo L Rev 271, 308-09 (2004) (stating that “the single strongest predictor of whether a woman will return to court to seek assistance from domestic violence is whether she has an attorney”).<sup>7</sup>

In this case, restitution for the victim’s attorney fees is particularly appropriate, because the fees were incurred to secure a myriad of victim’s constitutional rights; most specifically, as they relate to the Court of Appeals’ decision, to secure the victim’s right to reasonable protection from her assailant. Or Const, Art I, § 43(1)(a) (crime victims have the “right to be reasonably protected from the criminal defendant \* \* \* throughout the criminal justice process[.]”).<sup>8</sup> As noted by Judge Egan in his dissent in the decision on review:

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<sup>7</sup> Cf. 18 USC § 2264(b)(3)(E) (requiring restitution in “the full amount of the victim’s losses” for victims of interstate domestic violence and stalking; and defining the “full amount of the victim’s losses” to include “any costs incurred by the victim for . . . attorneys’ fees, plus any costs incurred in obtaining a civil protection order”).

<sup>8</sup> Requiring the victimizer to pay the victim’s expenses for taking protective measures is an appropriate and common use of restitution. See, e.g., *Pumphrey*, 266 Or App at 734-36 (affirming an award of restitution for the costs of changing the stalking victim’s locks and phone number, of missing work on the day her locks were changed, and for her temporary residence); *In re Isaiah F.*,

A victim of domestic violence may take considerable personal risk in reporting an abuser's actions to police. That report is risky because the abuser abused the victim, not simply because he violated a no-contact order. A Family Abuse Prevention Act (FAPA) order helps protect victims from that risk. The law, as it stood, encouraged victims of domestic violence, like the victim here, to seek the protection of a FAPA order. We should not weaken that policy.

*Gerhardt*, 273 Or App at 600 (Egan, J., dissenting). *See also Gerhardt*, 273 Or App at 605 (Flynn, J., dissenting) (“Assuming that we have correctly taken the path of including some private attorney fees within the scope of permitted restitution, I am unwilling to hold that the path stops short of allowing victims

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No A108434, 2005 WL 3047954 (Cal Ct App Nov. 15, 2005) (affirming restitution order including, *inter alia*, expenses associated with the purchase of a guard dog and enrollment in a self-defense course); *People v. Quevedo*, No. F049371, 2007 WL 520333 (Cal Ct App Feb. 21, 2007) (affirming restitution order for installation of a block fence around the home where the murder victim's children live); *United States v. Estep*, 378 F Supp 2d 763 (ED Ky 2005) (affirming restitution order for, *inter alia*, expenses associated with driving a minor victim to and from a new elementary school not served by the bus system and expenses associated with divorcing defendant); *People v. T.R.*, No. D055049, 2010 WL 2332934 (Cal Ct App June 10, 2010) (affirming restitution order covering the cost of a home security system); *People v. Bryant*, 122 P3d 1026 (Colo App 2005) (affirming restitution order for the victim's moving expenses, the charges incurred for the victim's early termination of his lease, and the victim's lost wages, where there was a specific outstanding threat against the victim); *Santiago v. State*, 669 So 2d 334 (Fla Dist Ct App 1996) (affirming restitution order for expenses incurred by victim to move her daughter out-of-state for safekeeping); *State v. Jaqua*, No. A008-1281, 2009 WL 3172133 (Minn Ct App Oct. 6, 2009) (affirming restitution order for victim's and victim's son's travel and stay out-of-state, following death threats from defendant).

of domestic violence to recover attorney fees necessary to secure protection from contact by the abuser.” )

It can hardly be disputed that it is reasonably foreseeable that a crime victim—and particularly a domestic violence victim with a need and obligation to protect her children—would seek to retain an attorney. Oregon law should not set a bar so high for crime victims that such a direct and natural consequence of a defendant’s actions would be deemed “too attenuated” for purposes of restitution.

### CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the State’s Brief on Review, *amici curiae* request that the Court reverse the ruling of the Court of Appeals, and reinstate the trial court’s restitution award.

Date: July 1, 2016.

Respectfully submitted,

s/ Erin K. Olson

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS**

**Brief length**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,014 words.

**Type size**

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

**NOTICE OF FILING AND PROOF OF SERVICE**

I hereby certify that on July 1, 2016, I directed the foregoing BRIEF OF *AMICI CURIAE* S.G. (CRIME VICTIM), NATIONAL CRIME VICTIM LAW INSTITUTE, AND OREGON CRIME VICTIMS LAW CENTER to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that I electronically served the document, using the court's eFiling system pursuant to Rule 16.45, upon the following persons:

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