September 2019

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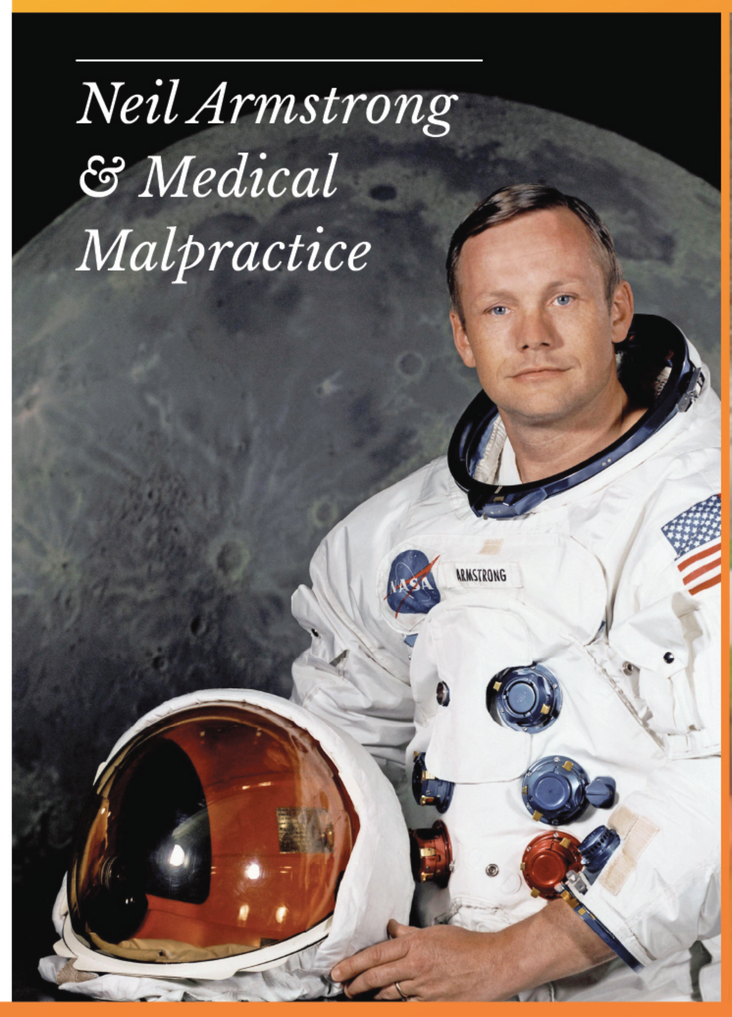
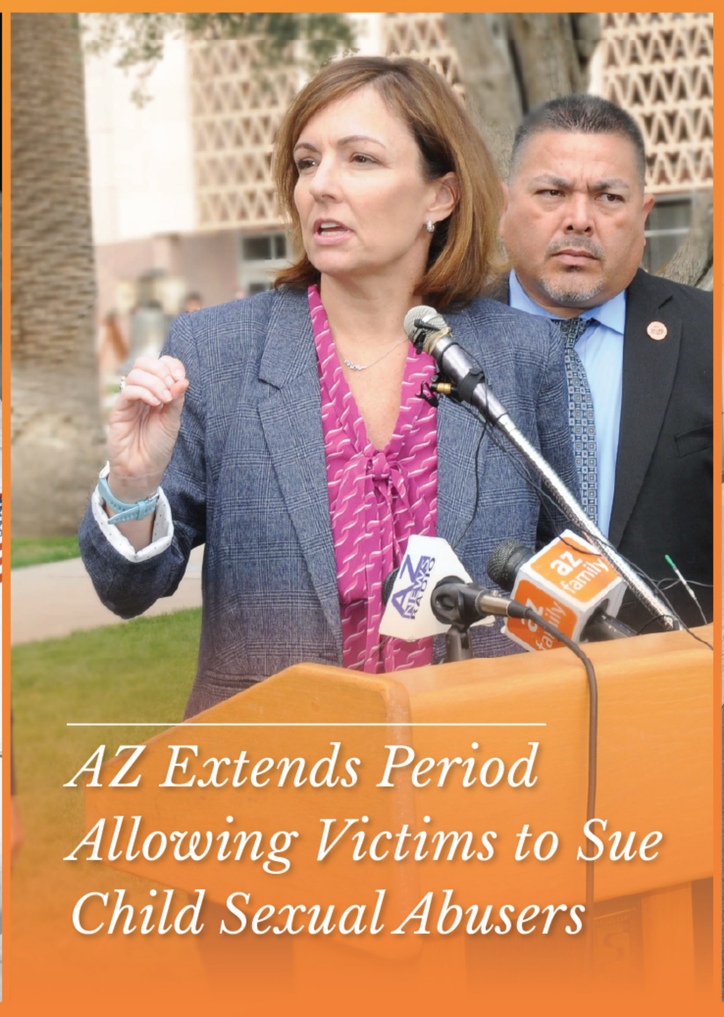
Connecting our Community with Current Issues

Ride-hailing for Kids, Super Convienent or Über Dangerous?

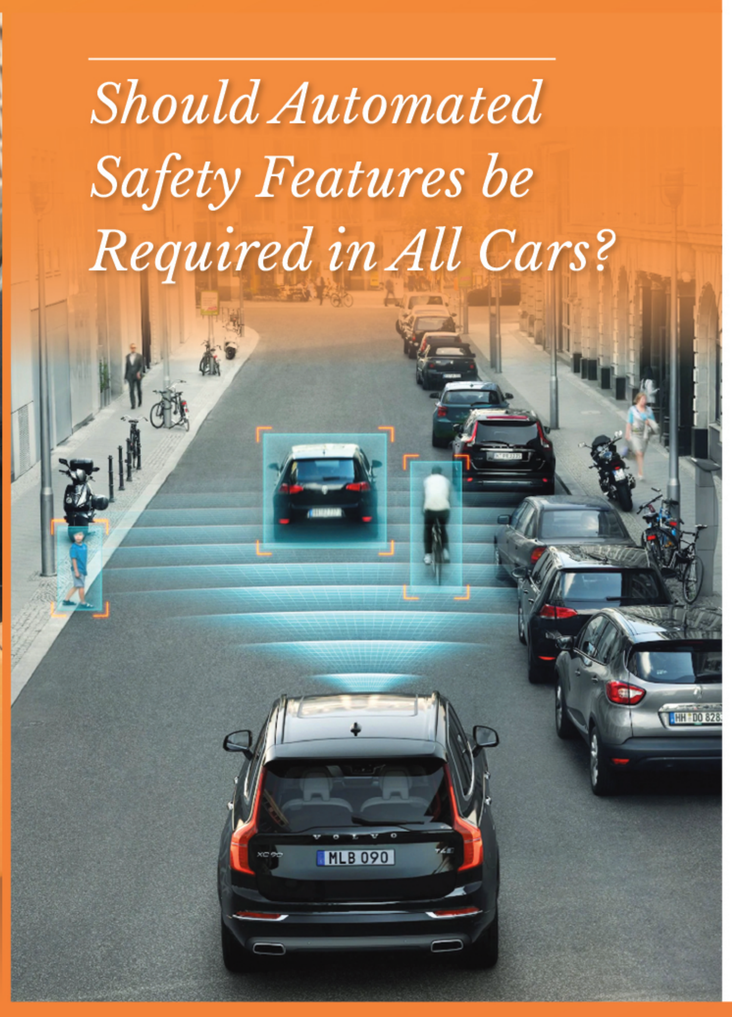
Neil Armstrong & Medical Malpractice



AZ Extends Period Allowing Victims to Sue Child Sexual Abusers



Should Automated Safety Features be Required in All Cars?



Happenings

On August 13, 2019 Schmidt, Sethi & Akmajian were honored by the ***Sunnyside High School Board*** *for purchasing Arizona State Championship Rings for the* ***Sunnyside High School Boys Soccer Team and Wrestling Team.*** *SS&A has purchased Championship Rings for the* ***Palo Verde High School State Championship Football Team, Santa Rita State Championship Basketball Team, Sunnyside Girls Softball State Championship Team*** *and the* ***Pima College Men's Soccer National Championship Team.***

Congratulations to Kelly Pierce who coached the FC Tucson Women's side to a share of the WPSL regional championship and the title of Franchise of the Year. Kelly, herself, was honored as Coach of the Year.

Ted Schmidt has been appointed to the International Academy of Trial Lawyers [IATL] Board of Directors. Fellowship in the IATL is by invitation only and while IATL fellows represent some 30 countries, only the top 500 trial lawyers in the entire United States are included in membership.

Peter Akmajian has been nominated to the Board of Regents of the American College of Trial Lawyers for Region One, Southern California, Arizona and Hawaii. The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

Matt Schmidt's non-profit, the Engage Foundation, has grown into quite a success. With a year-round schedule and over 80 kids registered, Engage 2019 is bigger and bolder, having hosted monthly rugby clinics, worked with University of Arizona's nationally ranked Men's Rugby Team, implemented kindness strategies with Ben's Bells, and working with black belt experts at Sunrise Taekwondo on anti-bullying techniques. Engage's Touch Rugby League this year will be longer and include balls, bags, water bottles, photos and real jerseys, all at no cost to the kids.

Ride-hailing for Kids?
Super Convienent or Über Dangerous?

by Dev Sethi

It's not an easy call. Plus, there are rules.

Ride-hailing apps have disrupted the transportation game. I can't recall ever calling a cab in the 30 years I have lived in Tucson. But I am a heavy user of Uber and Lyft. It's convenient, fairly inexpensive, and takes the hassle out of driving. The question becomes - can we Uber our kids to practice? If it takes the hassle out of driving ourselves, imagine the load it would lighten if we could summon one for the kids.

I conducted a very unscientific survey of friends, asking the broad question, "Do you/would you allow your teenage kids to ride Uber/Lyft alone?" I got close to 150 responses - they came from married and single parents of teenagers. On the surface, it was roughly a 60/40 split against allowing teenagers to ride share without an adult. There were folks who had no concerns, and others who were an adamant, "no." But there were many in the middle. And that's the crucible today's parents are in.

We are trying to balance time and safety - sometimes, frankly, the demands of work and life may leave no other viable option. What was clear in the responses I got - lots of individual circumstances equals lots of approaches. One parent wrote that it's hard to balance work, a schedule and a teenager's activities, plus hiring a driver is too expensive, so a tracked ride makes sense. Another gave me a succinct - "NO WAY."

On the surface, it was roughly a 60/40 split against allowing teenagers to ride-hail without an adult.

Three themes emerged. The sample size is small and limited by folks I know and who responded, but these seem to make some universal sense. First, even parents who had not allowed a teenager to use Uber alone appreciated the availability in case of an emergency - maybe getting a kid out of a bad situation. Second, there is pretty solid consensus among those in the "yes" camp that it's more tolerable/acceptable/comfortable with a group of kids riding vs. a single teenager. Third, there remains a gender gap. Parents of both sexes seem to be more open to their teenage sons ridesharing than their daughters.

Uber and Lyft have rules around this.

The Terms of Use of both Uber and Lyft forbid minors to ride without a parent.

Uber's rule says, "A rider must be at least 18 years of age to have an Uber account and request rides. Anyone under 18 must be accompanied by someone 18 years or older on any ride."

Lyft is similar, "Unaccompanied minors are prohibited from travelling."

Importantly, both services say they will cancel the account of someone ordering rides for a minor. So if you jealously guard your 4.93 user rating, beware.

Both services give their drivers a little wiggle room. While they do allow their drivers to ask for ID to confirm age, both instruct their drivers to cancel trips of unaccompanied minors without penalty to the driver if they feel (Uber) or believe (Lyft) the passengers are underage. Of course, feeling and believing are subjective and leave lots of room for fair interpretation.

Whether it's the difference in what passengers are told and what drivers are told or something else - it's clear that there is a gap between what the companies say is happening and what is happening in the real world. It's probably a hard decision, too, for a driver who shows up to pick up kids after dark. If the car leaves, what's the next best option for the kids? That is a tough moral dilemma for a gig-economy driver.

So, what are some takeaways? If you are in the allow camp, despite the stated rules, it looks like you can keep on keeping on -- for now at least. If you are in the no camp, the Terms of Service give you something more than "Because I said so" when explaining to your child why you are so unreasonable. Most importantly, though, like so much in life - this is a new topic that you should talk to your kids about. Maybe for your family an Uber in a pinch, with a group is okay and maybe it's not -- but our kids are having to confront these decisions, and as parents we need to give them some guidance.

Finally, there appear to be some upstart ride sharing companies - HopSkipDrive, Kango, Zemcar, Zum, and Bubbl - that are trying to claim the Uber for Kids mantle. Vetted drivers ferrying kids around town. In fact, HopSkipDrive is launching in Phoenix this month. *-DS*

AZ Extends Statute of Limitations to Bring Civil Actions for Childhood Sexual Abuse

by Peter Akmajian

After much acrimonious debate and intense procedural wrangling, the Arizona Legislature passed and the Governor signed HB 2466, extending the time to sue for childhood sexual abuse from age 20 to age 30. This law effectively creates a 12-year statute of limitations from age 18 for civil claims related to childhood sexual abuse. Previously, the limit was 2 years, from age 18 to 20.

Proponents of this bill argued that young people often have difficulty facing their abusers and that the two-year limitation period was unjust. Opponents worried about false claims being brought many years after alleged acts.

© Capitol Media Services photo by Howard Fischer

Joelle Casteix, a survivor of childhood sexual assault by a staffer at a Catholic school, explains why she believes Arizona needs to give more time for victims to file civil suits.

It appeared that as the legislative session was closing, the opponents would prevail and that HB 2466 was dead. However, proponents threatened to block passage of the state budget. This move forced the bill to a vote, and while more debate followed, the bill ultimately passed easily.

Another provision of the law allows previously time-barred claims to be brought until December 31, 2020 so long as the plaintiff is 30 or younger. However, in these revived claims, the plaintiff faces an elevated burden of proof and cannot seek or obtain punitive damages.

The winning side has vowed to continue efforts to extend the limitation period and views this victory as a starting point. They promise future efforts to allow claims within a certain number of years after the victim of childhood sexual abuse first remembers the abuse. Given what happened this year, more legislative battles over this issue appear certain.

One state representative advocating for the bill summed up his position: "these types of crimes that happen to children who grow to be damaged adults have a legacy that goes on for decades. Often the only redress they have is to go to the civil courts where their stories will be heard. Their pain will be acknowledged and they will be believed." *-PA*

Anyone who has been the victim of childhood sexual abuse and who is under the age of 31 should consider whether legal action is appropriate. Schmidt, Sethi & Akmajian can help analyze such a situation.

Some Lienholders Taking Hard Line Approach to Reduction

by Matt Schmidt

The majority of our cases involve health liens that have to be paid back to medical or insurance providers out of any monetary recovery we are able to obtain for our clients. Because some of the damages we claim are health bills or lost wages that someone else paid for (e.g. insurance, hospitals, workman's compensation), some providers have a legal and/or contractual right to be reimbursed what they paid in the event that the client receives a settlement or judgement from a third party wrongdoer.

When a settlement or judgement does occur, many lienholders have been willing to reduce their lien because of the common fund doctrine, or the idea that lienholders should pitch in for the legal costs and fees the client is responsible for and that are associated with getting a result that allows them to get paid back to begin with; without the hard work of attorneys pursuing the claim, protecting the lienholders' interests, and getting a result, the lienholders would not be reimbursed anything. In other words, most lienholders recognize that reductions are the right thing to do considering that they get to piggy-back their way to a final result while the risks, burdens and work are taken on by others.

Due to changing laws and tighter contractual language, however, some lienholders with greater legal protections are not budging or considering the common fund doctrine when it comes time to negotiate a reduction. In some cases with large liens, this can make settlement significantly harder to achieve. In cases where a lien reduction could significantly increase the prospects of settlement, many of these lienholders state they want to see the settlement first before considering a reduction, knowing that once the settlement is locked in, they don't have to negotiate anything. In response, attorneys state they won't settle before seeing a reduction, leading to an exhausting Catch 22 that can put the whole case in jeopardy.

Without the hard work of attorneys pursuing the claim and getting a result, lienholders would not be reimbursed anything.

In addition to this aggressive approach, workman's compensation lienholders also apply a credit to settlement funds for any future medical care or lost wages related to the claim. In other words, clients must use the settlement or judgement funds they received to pay for related future medical care or lost wages and exhaust those funds out of pocket before workman's compensation will kick in again.

This hard line strategy could have unintended consequences for these lienholders in obtaining recovery in the long run. Due to this trend, this is becoming an increasingly concerning topic of discussion among plaintiffs' attorneys everywhere. Attorneys will progressively become—and are already becoming—skeptical of taking these cases at all due to the high risk that a client could receive little or nothing after large liens, costs and fees deplete most of if not all of what's available. In the cases that aren't taken, lienholders will receive nothing instead of receiving it all. *-MS*

Neil Armstrong & Medical Malpractice

By Peter Akmajian

Many of us remember Neil Armstrong's historic moon walk back in 1969. I recall where I was at the time—with my parents and brother at a motel in Yuma on a stopover on the way to our summer vacation in California.

After this astounding achievement, Mr. Armstrong faded from public view by his own volition. He was an extraordinarily private person with no interest in fame. He died in 2012 at the age of 82. Given his age and the fact he apparently had some heart problems, there was no hint of anything awry.

However, this past July, around the 50th anniversary of the moon landing, an anonymous envelope arrived at the offices of the New York Times divulging that Mr. Armstrong's death allegedly resulted from medical malpractice. *"Neil Armstrong's Death, and a Stormy, Secret $6 Million Settlement", New York Times, July 23, 2019.*

This coverage highlighted several realities of medical malpractice claims. First, such cases are hotly disputed by the defense. The family had experts highly critical of the decision to take Mr. Armstrong to heart bypass surgery in the first place and of how the medical team responded to Mr. Armstrong's post-surgical bleeding. In particular, the family's experts asserted that once Mr. Armstrong exhibited bleeding, he should have been taken immediately back to the operating room to address the bleed. That did not happen. Instead, he was taken to the catheterization lab, where the bleed could not be stopped.

The defense, however, matched up the family's experts and disputed each point, arguing that the medical team made valid judgments under difficult circumstances and that Mr. Armstrong's death was an unfortunate risk. These expert battles are not just interesting and challenging aspects of these cases, they drive up the costs tremendously due to expert witness charges often exceeding $500 per hour.

The Times' coverage featured interviews with expert physicians who weighed in on both sides of the dispute. On the issue of whether to take Mr. Armstrong back to the OR to address the bleed, one expert was quoted as saying the decision not to take Mr. Armstrong to the OR was risky, but it was a reasonable judgment call. This "judgment" defense is frequently heard in medical malpractice cases.

One of the more interesting aspects of the case was that the surgery was done at a community hospital instead of a major heart center. One has to wonder whether the doctors at this hospital fully discussed with Mr. Armstrong and his family the option of transfer to a more specialized center.

This case also featured family disputes. Some members of the family did not want to go forward with this case, and Mr. Armstrong's widow pointedly stated she had no part of the case. These disputes often cause difficulties in prosecuting medical malpractice cases. There are in fact times when the disputes are so serious that individual family members retain separate lawyers.

The article made clear that certain members of the Armstrong family used his fame to leverage the settlement. Most people do not have this advantage. The defendants feared public exposure and thus entered into what was intended to be a confidential settlement. Both the amount and the fact of settlement was supposed to remain secret. It only came to light because someone sent the Times sealed documents from a probate proceeding relating to Mr. Armstrong's estate. But for this "whistleblower", no one would have ever known of the detailed circumstances of Mr. Armstrong's death.

The family had experts highly critical of the decision to take Mr. Armstrong to heart bypass surgery in the first place

The truth is, whether the people involved in medical malpractice cases are famous or not, the majority of medical malpractice cases result in settlement, and most of those settlements are confidential. Defendants want confidentiality to protect their reputations and usually condition settlement on confidentiality. Plaintiffs go along if the settlement is fair, and they may also benefit from confidentiality to keep discrete the amount of money they receive.

Whether such agreements serve the public interest is a matter of great debate, but private parties to litigation (as opposed to the government when it is a party) are generally free to enter into such agreements.

Surely, the last thing Neil Armstrong would have wanted is publicity about his medical treatment. However, the facts relating to this case improve understanding of the complex and controversial facets of medical malpractice cases. Further, one at least hopes that the analysis of the medical issues involved may improve medical care in the future. *-PA*

Auto Manufacturers Not Required to Include Automated Safety Features in All Cars

by Ted Schmidt

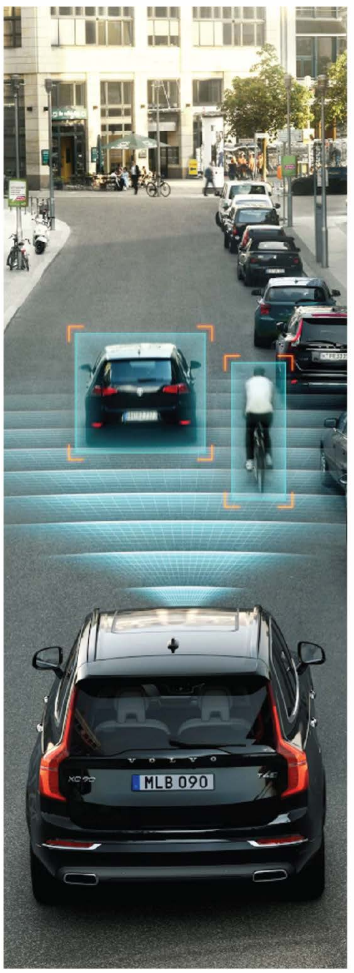
Some of us are old enough to remember when not all cars had seatbelts. Beginning in the 1960s some auto manufacturers offered this safety feature as an option you could purchase. That all changed on January 1, 1968 when the Federal Motor Vehicle Safety Act was implemented requiring seat belts be included for all seats in all new cars.

Flash forward to 2019 where we see the advent of fully automated cars and more and more cars equipped with very sophisticated computer safety features such as automatic emergency braking [AEB], forward collision warning [FCW] and crash imminent braking [CIB]. All of these sophisticated safety technologies are designed to protect against human driver error and avoid accidents.

Should auto manufactures be required to include these life-saving and injury-preventing technologies in all of their cars just as they are required to include seat belts? On June 13 of this year our Arizona Court of Appeals said no.

Follow this link to read Dashi v. Nissan
bit.ly/Dashi-v-Nissan

In *Dashi v. Nissan N.A., Inc, No. 1 CA-CV 18-0389 (App. Div. I, June 13 2019) (J. Weinzweig)* the plaintiff while driving her Honda Accord, suffered serious head injuries in a head on collision with a 2008 Nissan Rogue. She claimed that in 2008 Nissan had the knowledge and ability to install AEB, FCW and CIB in its cars and should have included these safety features in the Rogue as a matter of course just as it does seat belts.



Nissan argued that the National Highway Traffic Safety Administration classified these technologies as merely options, not mandatory and as such federal law preempted any state law product liability claims.

The Arizona Court of Appeals found that while NHTSA has encouraged the development of advanced automatic braking technology it expressly rejected a formal petition by consumer advocates to require it in January 2017. NHTSA's primary reason for its continued refusal to do so is its desire to give auto manufacturers the freedom to develop these technologies with the flexibility to innovate and adapt alternative, cheaper and safer applications for different vehicle designs. A specific rule requiring a specific technology runs contrary to this purpose.

The Department of Transportation further discouraged states from imposing automated vehicle technology requirements because Congress had given NHTSA exclusive responsibility for regulating "safety designing and performance aspects of motor vehicles while states are primarily responsible for regulating the human driver and vehicle operations." It warned that allowing states to impose its laws on the design of automated vehicles would "create confusion, introduce barriers, and present compliance challenges."

In short, the court of appeals found that allowing plaintiff's product liability action to go forward, if successful, would thwart NHTSA's thoughtful and studied approach and intent while creating a jury-imposed requirement that vehicles passing through Arizona have a technology not required anywhere else.

Unless the Arizona Supreme Court accepts review and views the case differently, it will take an act of Congress or the National Highway Safety Commission to make these life-saving technologies as standard as seat belts in all our new cars. -*TS*

Schmidt, Sethi & Akmajian
ATTORNEYS

1790 East River Road, Suite 300
Tucson, Arizona 85718

Our Attorneys:

Dev Sethi, Matt Schmidt,
Ted Schmidt & Peter Akmajian

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