

SUPERIOR COURT OF DECATUR COUNTY  
STATE OF GEORGIA

FILED IN OFFICE  
2015 Mar 19 03:47 PM  
CECILIA WILLIS  
CLERK OF SUPERIOR COURT  
DECATUR COUNTY, GEORGIA  
2015-4261

JAMES BRYAN WALDEN and  
LINDSAY NEWSOME STRICKLAND,  
Individually and  
on Behalf of the Estate of Their Deceased Son,  
REMINGTON COLE WALDEN,

Plaintiffs,

v.

CHRYSLER GROUP, L.L.C., n/k/a  
"FCA US LLC" and  
BRYAN L. HARRELL,

Defendants.

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CIVIL ACTION

FILE NO. 12-CV-472

**ORDER**

Plaintiffs have offered 24 other similar incidents ("OSIs") to introduce in this case. "In product liability actions, evidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages,<sup>1</sup> provided there is a showing of substantial similarity." *Volkswagen of Am., Inc. v. Gentry*, 254 Ga. App. 888, 895 (2002). Defendant Chrysler has objected that none of those other incidents are substantially similar—and contends there are no substantially similar incidents.

With regard to the admissibility of these OSIs, the Court has considered the parties' briefing, both with respect to Chrysler's Motion in Limine No. 2 and in the summary judgment briefing. The Court held a lengthy hearing on March 13, 2015 to consider arguments related to OSIs. The Court has considered evidence and argument regarding OSIs generally, and on each OSI specifically. That evidence and argument includes, but is not limited to, the exhibits that the parties marked and tendered as exhibits during the March 13, 2015 hearing. (Specifically, Plaintiffs tendered a notebook, and Chrysler tendered handouts.)

<sup>1</sup> Although there is no punitive damages claim in this case, Plaintiffs argue that the punitive damages standard referred to in *Gentry* is substantively equivalent to the "reckless, or wanton" standard at issue in this statute-of-repose case. See O.C.G.A. § 51-1-11(c). At oral argument on March 4, 2015, Defendant Chrysler agreed that the punitive damages standard and this statute-of-repose standard are substantively equivalent. 03/04/15 Hr'g Tr. 19:01-03 (counsel for Chrysler: "I think it's appropriate to transfer – excuse me – the case law related to punitive damages to this circumstance."). Therefore, in this case, OSIs are relevant to both notice and recklessness/wantonness.

Generally, OSIs are admissible upon a showing of “substantial similarity.” “Substantial similarity” means that the proffered OSI and the subject incident must involve (1) a common design,<sup>2</sup> (2) a common defect, and (3) common causation. *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 456 (2001); *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 89-90 (2009). The proponent of OSI evidence should also supply evidence that the manufacturer received notice of the OSI. *See Crosby*, 273 Ga. at 460 (OSIs are relevant to prove “notice”).

As to the three requirements for substantial similarity, Plaintiffs have argued as follows:

- (1) Common design. Plaintiffs argue that the Jeep Grand Cherokees, Jeep Cherokees, and Jeep Liberties with rear tanks (i.e., the platforms to which Chrysler refers as ZJ, WJ, XJ, and KJ) have common designs because they all have gasoline tanks located approximately 11 inches from the extreme rear of the vehicle and hanging approximately 6 inches below the rear structure of the vehicle. In support, Plaintiffs cite the “Subject Vehicle Measurements Data” that Chrysler submitted to NHTSA (Plaintiffs’ Ex. 6a) and photographs of these vehicles (Plaintiffs’ Ex. 74-77). Plaintiffs further cite the deposition testimony of Chrysler Chairman and CEO Sergio Marchionne, who admitted that tank-related fires with one of these Jeeps would prompt Chrysler to investigate the others. Marchionne Depo. 43:08-17. Plaintiffs also point out that NHTSA—which investigated all of these rear-tank Jeeps in a single defect investigation—defined the design in the same way that Plaintiffs ask the Court to define it, writing that “[t]he design defect is the placement of the fuel tanks in the position behind the axle and how they were positioned, including their height above the roadway.” 06/03/13 NHTSA Letter at 12. Finally, Plaintiffs rely on the deposition testimony of fuel systems expert Fred Arndt.
- (2) Common defect. Plaintiffs argue that the above-referenced rear-tank Jeeps shared a common defect in that they were vulnerable to rear impact. In support, Plaintiffs rely upon the deposition testimony of Chrysler engineer Judson Estes, who admitted that gasoline tanks located 11 inches from the rear and hanging down 6 inches are “vulnerable to rear impact.” Estes Depo. 67:02-11. Plaintiffs further point out that NHTSA defined the defect in the same way that Plaintiffs ask the Court to define it, writing that “[t]he performance defect is that the fuel tanks installed on these vehicles are subject to failure when the vehicles are struck from the rear.” 06/03/13 NHTSA

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<sup>2</sup> The Court notes that the *Crosby* case, and others citing it, technically refer to a “common design and manufacturing process.” *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 456 (2001) (emphasis added). Here, both Plaintiffs and Defendant Chrysler have focused only on the “common design” language, and have made no arguments regarding the commonality of the “manufacturing process.” That is because in this case—unlike in *Crosby*, which was a product liability tire case involving allegations of both design defects and manufacturing defects—Plaintiffs allege only design defects. Chrysler has not contended that dissimilarities in the “manufacturing process” are significant here.

Letter at 12. Finally, Plaintiffs rely on the deposition testimony of fuel systems expert Fred Arndt.

- (3) Common causation. Plaintiffs argue that the proffered OSIs share common causation because in each OSI, a rear impact caused gasoline leakage. *See Reese*, 300 Ga. App. at 90 (affirming admission of OSIs where structurally-similar seats “collapse[d] backward in rear impact collisions.”). It is undisputed that in each of the proffered OSIs, a rear impact occurred, and that a rear impact occurred in this case. Plaintiffs further point out that where the crush damage to the Jeep is mainly *behind* the rear axle, but fuel nonetheless leaked, the OSI supports Plaintiffs’ allegation that rear impacts cause fuel leakage to low-hanging rear tanks. Finally, Plaintiffs rely on the deposition testimony of fuel systems expert Fred Arndt.

The Court generally agrees with Plaintiffs regarding the three above-listed points. However, the Court is *not* ruling on the proffered OSIs “en masse”—instead, the Court rules on the OSIs individually, as set forth below. The Court does note that it is undisputed that each of the proffered OSIs involves (1) a Jeep SUV with the gas tank located approximately 11 inches from the rear of the vehicle and hanging down about 6 inches, (2) a rear impact to that Jeep, and (3) gasoline leakage or fire.

The Court notes that commonality of design does not depend on how the manufacturer branded the product, but rather on what the *designs* of the vehicles have in common. *See Reese*, 300 Ga. App. at 90 (affirming admission of OSIs involving vehicles with “the same design as the Tempo seatback at issue here”). Therefore, the Court holds that the doctrine of “substantial similarity” does *not* require that every OSI involve a 1999-2004 “Grand Cherokee,” as Chrysler has argued.

The Court holds that because “common injury” is not one of the “substantial similarity” requirements in Georgia, OSIs may be admissible in this case even if the OSI does not involve death or injury. The Court holds that because Chrysler knew that gasoline leakage could lead to fires, OSIs may be admissible if gasoline leaked from the tank, even if no spark ignited the gasoline in that wreck. The Court also holds—and Chrysler does not dispute—that pre-2013 Georgia law governs the admission of OSI evidence because the evidence code that went into effect in 2013 did not displace then-existing law regarding OSIs and substantial similarity.

A review of the extensive case law cited by Plaintiffs and Chrysler indicates that in order to be substantially similar, an OSI need only meet the three criteria from *Crosby* and its progeny. Nothing in the case law requires the Court to make detailed fact-finding determinations regarding, e.g., the degree of underride, the percentage of offset, or the geometry of the bullet vehicle. Nor does the presence of a trailer hitch render an OSI inadmissible—particularly since Chrysler has contended that a trailer hitch is the appropriate ‘remedy’ for rear-tank Jeeps. The standard is “substantial similarity,” not “exact similarity,” because the issue on which OSIs are admissible is “notice.” However, nothing in this Order prevents Chrysler from arguing to the jury that the jury should

disregard an OSI because it differs in some particular from the wreck made the basis of this Complaint.

Chrysler has objected to each and every proffered OSI. The Court's rulings on Chrysler's objections are below. The names given to each OSI and the order in which they are listed track the notebook tendered by Plaintiffs at the March 13, 2015 hearing and marked as Exhibit 1 to that hearing.

1. Adler

- a. vehicle: 2002 Jeep Liberty
- b. date of incident: June 14, 2002
- c. notice: notice shown on June 18, 2002 (Plaintiffs' Ex. 373)
- d. notes: Plaintiffs contend that gasoline leakage caused by this comparatively minor impact put Chrysler on notice of the dangers associated with rear tanks located 11 inches from the rear and hanging down 6 inches.
- e. ruling: Chrysler's objection to this evidence is:

           OVERRULED  
            SUSTAINED

2. Ascencio

- a. vehicle: 1999 Jeep Grand Cherokee
- b. date of incident: March 17, 2007
- c. notice: notice shown on December 6, 2009 (Plaintiffs' Ex. 381)
- d. notes: Plaintiffs' expert Fred Arndt has testified that "there was crush and deformation to the fuel tank." Arndt 2<sup>nd</sup> Depo. 61:11-19. Chrysler counsel has asserted that there was an engine fire. This is a factual dispute.

The Court holds that evidence of substantial similarity is sufficient to submit this OSI to the jury, and that Chrysler can argue about an engine fire to the jury if it so chooses.

- e. ruling: Chrysler's objection to this evidence is:

           OVERRULED  
            SUSTAINED

3. Belli

- a. vehicle: 1991 Jeep Cherokee
- b. date of incident: January 26, 2001
- c. notice: notice shown on May 29, 2001 (Plaintiffs' Ex. 393)

- d. notes: Plaintiffs point out that the crush damage to this vehicle was primarily behind the rear axle—demonstrating that the rear tank was less safe than a midship tank would have been. (Plaintiffs argue that this is true of every proffered OSI.) The investigating officer to the Belli wreck specifically testified in deposition that the crush damage “actually terminates at the rear axle.” Hensal Depo. 14:18-15:01.

Chrysler argues that this OSI is inadmissible because the fuel filler tube failed. Plaintiffs respond that because the fuel filler tube is connected to the rear-tank, fuel filler tubes commonly fail when rear tanks are crushed, so the distinction is meaningless.

- e. ruling: Chrysler’s objection to this evidence is:

\_\_\_\_\_ OVERRULED

✓ \_\_\_\_\_ SUSTAINED

4. Coleman

- a. vehicle: 1993 Jeep Grand Cherokee  
b. date of incident: November 29, 2000  
c. notice: notice shown on September 20, 2002 (Plaintiffs’ Ex. 412)  
d. notes: Chrysler argues that this OSI should be excluded because photographs are not available. Plaintiffs respond that Chrysler did not produce any photographs, and nothing in the case law requires that evidence of substantial similarity come in photographic form.  
e. ruling: Chrysler’s objection to this evidence is:

\_\_\_\_\_ OVERRULED

✓ \_\_\_\_\_ SUSTAINED

5. Fontenot

- a. vehicle: 1993 Jeep Cherokee  
b. date of incident: October 2, 2004  
c. notice: notice shown on September 08, 2005 (Plaintiffs’ Ex. 422)  
d. notes: Chrysler argues that this OSI is inadmissible because the fuel filler tube failed. Plaintiffs respond that because the fuel filler tube is connected to the rear-tank, fuel filler tubes commonly fail when rear tanks are crushed, so the distinction is meaningless.  
e. ruling: Chrysler’s objection to this evidence is:

\_\_\_\_\_ OVERRULED

✓ \_\_\_\_\_ SUSTAINED

6. Freel

- a. vehicle: 2007 Jeep Liberty
- b. date of incident: September 21, 2010
- c. notice: notice shown by "Summary of VOQs"
- d. notes: Chrysler argues that this OSI is inadmissible because Plaintiffs have not shown the *date* of notice to Chrysler. Plaintiffs respond that Plaintiffs asked for that information in discovery, but in response Chrysler produced only a document called a "Summary of VOQs," which is part of the notebook that Plaintiffs tendered at the hearing. That "Summary of VOQs" proves that Chrysler *did have* notice of this OSI, but it does not provide a date. Nor did Chrysler disclose, at the hearing, the date on which Chrysler learned of this OSI. Plaintiffs argue that Chrysler may not render an OSI inadmissible merely by withholding information that Chrysler has—i.e., the date it received notice. Chrysler contends that the OSI is nonetheless inadmissible.
- e. ruling: Chrysler's objection to this evidence is:

\_\_\_\_\_ OVERRULED  
✓  
\_\_\_\_\_ SUSTAINED

7. Friedman

- a. vehicle: 1998 Jeep Grand Cherokee
- b. date of incident: June 30, 2002
- c. notice: notice shown on July 9, 2002 (Plaintiffs' Ex. 443)
- d. notes: Chrysler argues that this OSI is inadmissible because Plaintiffs have adduced no evidence regarding the geometry of the bullet vehicle. Plaintiffs respond that the rules of substantial similarity do not require such evidence.
- e. ruling: Chrysler's objection to this evidence is:

✓  
\_\_\_\_\_ OVERRULED  
\_\_\_\_\_ SUSTAINED

8. Friend

- a. vehicle: 1997 Jeep Grand Cherokee
- b. date of incident: February 13, 1998
- c. notice: notice shown on February 26, 1998 (Plaintiffs' Ex. 447) (letter specifically warning about what could happen to a child strapped into a car seat)
- d. notes: Chrysler argues that this OSI is inadmissible because Plaintiffs have adduced no evidence regarding the geometry of the bullet vehicle. Plaintiffs respond that the rules of substantial similarity do not require such evidence.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

9. Geddes

- a. vehicle: 2000 Jeep Grand Cherokee
- b. date of incident: October 17, 2000
- c. notice: notice shown on October 24, 2000 (Plaintiffs' Ex. 466)
- d. notes: Chrysler argues that this OSI should be excluded because this Jeep had a trailer hitch, whereas the Jeep in which Remington Walden was riding did not. Plaintiffs respond that the presence of a trailer hitch is not determinative with regard to substantial similarity, particularly because Chrysler has contended that a trailer hitch is the 'remedy' for certain rear-tank Jeeps—and therefore cannot validly contend that trailer hitches were the cause of failure. If Chrysler elects to argue to the jury that this OSI should be disregarded because of the presence of a trailer hitch, Chrysler is free to do so.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

10. Gero

- a. vehicle: 2004 Jeep Liberty
- b. date of incident: September 30, 2005
- c. notice: notice shown on October 13, 2005 (Plaintiffs' Ex. 474)
- d. notes: Chrysler argues that this OSI should be excluded because photographs are not available. Plaintiffs respond that Chrysler did not produce any photographs, and nothing in the case law requires that evidence of substantial similarity come in photographic form.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

11. Hazleton

- a. Plaintiffs have withdrawn this OSI.

12. Hughes

- a. vehicle: 1996 Jeep Grand Cherokee
- b. date of incident: August 03, 2000
- c. notice: notice shown on August 14, 2000 (Plaintiffs' Ex. 490)

- d. notes: Plaintiffs contend that gasoline leakage caused by this comparatively minor impact put Chrysler on notice of the dangers associated with rear tanks located 11 inches from the rear and hanging down 6 inches.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

13. Jackson

- a. vehicle: 1996 Jeep Grand Cherokee
- b. date of incident: October 9, 1999
- c. notice: notice shown on October 21, 1999 (Plaintiffs' Ex. 500)
- d. notes: Chrysler argues that this OSI should be excluded because the impact occurred at 50-60 mph. Plaintiffs respond that the Walden wreck occurred at around 56 mph, as all parties have agreed.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

14. Jarmon

- a. vehicle: 1993 Jeep Grand Cherokee
- b. date of incident: February 12, 2006
- c. notice: notice shown on March 20, 2007 (Plaintiffs' Ex. 507)
- d. notes: Chrysler argues that this OSI should be excluded because this Jeep had a trailer hitch, whereas the Jeep in which Remington Walden was riding did not. Plaintiffs respond that the presence of a trailer hitch is not determinative with regard to substantial similarity, particularly because Chrysler has contended that a trailer hitch is the 'remedy' for certain rear-tank Jeeps—and therefore cannot validly contend that trailer hitches were the cause of failure. If Chrysler elects to argue to the jury that this OSI should be disregarded because of the presence of a trailer hitch, Chrysler is free to do so.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

15. Jones

- a. vehicle: 2007 Jeep Liberty
- b. date of incident: November 22, 2007
- c. notice: notice shown on November 26, 2007 (Plaintiffs' Ex. 537)



- d. notes: Plaintiffs contend that gasoline leakage caused by this comparatively minor impact put Chrysler on notice of the dangers associated with rear tanks located 11 inches from the rear and hanging down 6 inches.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

16. Martinez

- a. vehicle: 2005 Jeep Cherokee
- b. date of incident: March 1, 2011
- c. notice: notice shown on March 3, 2011 (Plaintiffs' Ex. 550)
- d. notes: Chrysler argues that this OSI is inadmissible because Plaintiffs' expert Fred Arndt disagreed with the summary document that Chrysler created to submit to NHTSA. Plaintiffs respond that the summary document that Chrysler submitted to NHTSA is not authoritative because it is a self-serving document drafted by Chrysler with the intention of avoiding a recall.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

17. Maulano

- a. vehicle: 1996 Jeep Grand Cherokee
- b. date of incident: July 12, 1999
- c. notice: notice shown on June 11, 2001 (Plaintiffs' Ex. 562)  
notes: Plaintiffs point out that the crush damage to the Grand Cherokee in this OSI was primarily behind the rear axle—demonstrating that the rear tank was less safe than a midship tank would have been. (Plaintiffs argue that this is true of every proffered OSI.) A witness to this OSI specifically testified that the crush damage was primarily behind the rear axle.  
Kujawa Depo. 16:05-14.

Plaintiffs have adduced evidence that the impact speed of this OSI was "50-plus miles an hour, 50, 55." Arndt 2<sup>nd</sup> Depo. 139:02-05. Both parties agree that the Jeep Grand Cherokee in which Remington Walden was riding was struck at around 56 miles per hour. Chrysler counsel disagrees, asserting that the speed was 63-67 miles per hour. This is a factual dispute.

The Court holds that evidence of substantial similarity is sufficient to submit this OSI to the jury, and that Chrysler can make further arguments regarding speeds to the jury if it so chooses.

d. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

18. Moriss

- a. vehicle: 2002 Jeep Liberty
- b. date of incident: July 19, 2002
- c. notice: notice shown on July 19, 2002 (Plaintiffs' Ex. 566)
- d. notes: Plaintiffs contend that gasoline leakage caused by this comparatively minor impact put Chrysler on notice of the dangers associated with rear tanks located 11 inches from the rear and hanging down 6 inches.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

19. Persinger

- a. vehicle: 2005 Jeep Liberty
- b. date of incident: September 13, 2011
- c. notice: notice shown on October 11, 2011 (Plaintiffs' Ex. 582)
- d. notes: Plaintiffs argue that this OSI aptly demonstrates that minor rear-end damage to these rear-tank Jeeps could have drastic consequences.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

20. Smith, Kenneth

- a. vehicle: 1995 Jeep Grand Cherokee
- b. date of incident: October 6, 2001
- c. notice: notice shown on March 29, 2011 (Plaintiffs' Ex. 600)
- d. notes: Chrysler argues that this OSI should be excluded because the impact occurred at around 55 mph. Plaintiffs respond that the Walden wreck occurred at around 56 mph, as all parties have agreed.
- e. ruling: Chrysler's objection to this evidence is:

\_\_\_\_\_ OVERRULED  
✓ \_\_\_\_\_ SUSTAINED

21. Smith, Susan & Thomas

- a. vehicle: 1994 Jeep Grand Cherokee
- b. date of incident: October 1, 2009
- c. notice: notice shown on August 26, 2010 (Plaintiffs' Ex. 618)
- d. notes: Chrysler argues that this OSI should be excluded because this Jeep had a trailer hitch, whereas the Jeep in which Remington Walden was riding did not. Plaintiffs respond that the presence of a trailer hitch is not determinative with regard to substantial similarity, particularly because Chrysler has contended that a trailer hitch is the 'remedy' for certain rear-tank Jeeps—and therefore cannot validly contend that trailer hitches were the cause of failure. If Chrysler elects to argue to the jury that this OSI should be disregarded because of the presence of a trailer hitch, Chrysler is free to do so.
- e. ruling: Chrysler's objection to this evidence is:

✓ \_\_\_\_\_ OVERRULED  
\_\_\_\_\_ SUSTAINED

22. Spillars

- a. vehicle: 2006 Jeep Liberty
- b. date of incident: November 11, 2006
- c. notice: notice shown on December 4, 2006 (Plaintiffs' Ex. 623)
- d. notes: Plaintiffs argue that this OSI aptly demonstrates that minor rear-end damage to these rear-tank Jeeps could have drastic consequences.
- e. ruling: Chrysler's objection to this evidence is:

✓ \_\_\_\_\_ OVERRULED  
\_\_\_\_\_ SUSTAINED

23. Turek

- a. vehicle: 2003 Jeep Liberty
- b. date of incident: July 11, 2005
- c. notice: notice shown on July 22, 2005 (Plaintiffs' Ex. 629)
- d. notes: Chrysler argues that this OSI is inadmissible because the rear-tank Jeep at issue did not have a standard "brush guard." Plaintiffs respond that the rules of substantial similarity do not require that level of exactness.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

24. Vicknair

- a. vehicle: 1995 Jeep Cherokee
- b. date of incident: March 8, 2007
- c. notice: notice shown on February 10, 2009 (Plaintiffs' Ex. 639)
- d. notes: Chrysler argues that this OSI is inadmissible because the rear-mounted tank in this OSI was made of a different material than the rear-mounted tank in the Jeep in which Remington Walden died. Plaintiffs respond that the rules of substantial similarity do not require that level of exactness.
- e. ruling: Chrysler's objection to this evidence is:


OVERRULED  
 SUSTAINED

25. Wolf

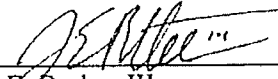
- a. vehicle: 1999 Grand Cherokee
- b. date of incident: August 14, 2001
- c. notice: notice shown on December 17, 2002 (Plaintiffs' Ex. 395)
- d. notes: Plaintiffs contend that gasoline leakage caused by this comparatively minor impact put Chrysler on notice of the dangers associated with rear tanks located 11 inches from the rear and hanging down 6 inches.
- e. ruling: Chrysler's objection to this evidence is:

OVERRULED  
 SUSTAINED

SO ORDERED this 19<sup>th</sup> day of March, 2015.

  
\_\_\_\_\_  
J. Kevin Chason, Judge  
Superior Court of Decatur County

Proposed Order prepared by Plaintiffs' counsel.

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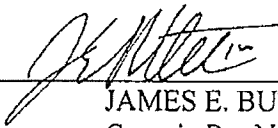
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BUTLER TOBIN LLC

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