



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

**ANDREY ZHURBIN,** )  
 )  
 Defendant-Below, )  
 Appellant, )  
 )  
 v. ) No. 681, 2013  
 )  
 **STATE OF DELAWARE,** )  
 )  
 Plaintiff-Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

**STATE'S ANSWERING BRIEF**

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Dated: June 9, 2014

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## **NATURE AND STAGE OF THE PROCEEDINGS**

The State adopts the Nature and Stage of the Proceedings as set forth in Appellant, Andrey Zhurbin's opening brief. This is the State's answering brief.

## SUMMARY OF THE ARGUMENT

I. **Denied.** Superior Court did not commit plain error in failing to *sua sponte* grant a judgment of acquittal based on an alleged insufficiency of proof that the collision occurred on a “highway” because Del. Code Ann. tit. 21, § 4201(a) (2013) applies to collisions occurring *anywhere* in Delaware. The “highway” limitation in Del. Code Ann. tit. 21, § 4101 (2013) does not apply to section 4201 because section 4201 imposes obligations on a person *after* a collision (*i.e.*, after operation) and is not a provision “relating to the operation of vehicles.”<sup>1</sup> Moreover, the Delaware General Assembly amended section 4201(a) in 1988 to remove the limitation that post-collision obligations applied only to collisions occurring on a highway.<sup>2</sup> To the extent that the Court finds a conflict between section 4101 and section 4201, as amended by House Bill No. 220, the later-enacted, more-specific section 4201 must prevail.

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<sup>1</sup> Del. Code Ann. tit. 21, § 4101 (2013).

<sup>2</sup> *See* 66 Del. Laws ch. 238, § 1 (1988).

## STATEMENT OF FACTS

At approximately 10:45 p.m. on October 9, 2012, Zhurbin was in the table gaming area of Delaware Park. (A9-10). A security officer was called to the area because Zhurbin was “acting disorderly, intoxicated” and was arguing with the dealer. (*Id.*; A12-13). Because the security officer believed Zhurbin to be intoxicated, he offered assistance in finding Zhurbin a ride home. (A10). Zhurbin didn’t want to take a cab or call a friend to take him home. (*Id.*). A female, regular patron of Delaware Park overheard the conversation and offered to take Zhurbin home. (*Id.*). Zhurbin got into the passenger seat of the female patron’s car, and the security officer followed them as they left Delaware Park and went out to Route 7. (A10, 14).

Within about an hour, Zhurbin was back at Delaware Park driving his red Pontiac Firebird. (A14-17, A20-22, A26). Mark Anthony was driving out of the Delaware Park parking lot, when one of his two passengers said, “Watch it, watch it.” (A15). Mr. Anthony applied his brakes and watched as Zhurbin, who was “flying,” hit a median guard, “kept on going, went over another median guard, hit in the grass, like a ditch area. He kept spinning around and around and just left.” (*Id.*). Zhurbin left skid marks, 9-10 pedestrian barricades were “bent, twisted and scattered about,” and a “caution speed bump” sign was “laid over flat. (A26).

Mr. Anthony saw Zhurbin turn right out of Delaware Park past the red light, at which Mr. Anthony stopped. (*Id.*; A19). As Mr. Anthony was on the phone with 911, he continued driving, and saw Zhurbin's car parked in the Denny's parking lot on Route 273. (*Id.*). Zhurbin's Firebird was parked across three parking spots. (A27). The car

did not have a straight piece of metal or plastic on it on any side. There [were] dents, scrapes, broken glass on every single side of that vehicle. The driver's side door was caved in. The driver's side window was blown inward. The front bumper was hanging out. Two of the tires were ... flat or going flat very quickly. The driver's side rear tire was completely gone.... The rear bumper was torn back as well, too; numerous fluids [were] leaking out from underneath of it.... The interior was filled with smoke [from the rear tire]. (A22).

Mr. Anthony saw Zhurbin walk away from the car and into Denny's, where he sat at the counter. (A15-18). Mr. Anthony pointed police to Zhurbin inside Denny's. (A16).

When Delaware State Police Trooper Brian Crisman approached Zhurbin and asked if they could talk about his red Firebird, Zhurbin denied owning the car. (A21). Zhurbin had a strong odor of alcohol, glassy, bloodshot eyes, was covered with small pieces of broken glass on his left side, and had small cuts at the top of his head on his left side. (A21). When asked, Zhurbin denied having any identification. (*Id.*). After Zhurbin became disorderly in Denny's, Trooper Crisman took Zhurbin outside and patted him down, finding a wallet containing Zhurbin's identification and a car key that the officer later determined operated the



Firebird. (*Id.*). The night of his arrest, Zhurbin claimed that someone named “Bob” was driving his car. (A26). However, Zhurbin could not identify whether Bob was black or white, what kind of clothing Bob was wearing or where Bob had gone. (*Id.*).

Zhurbin admitted drinking 5 beers at Delaware Park. (A22). Zhurbin failed each field sobriety test. Zhurbin exhibited 6 out of 6 “clues” of intoxication in the horizontal gaze nystagmus test, where 4 out of 6 clues indicates intoxication at a blood alcohol concentration of .10 or higher. (A22-24). Zhurbin failed to recite the alphabet from G to P and to count backwards from 95-80 as instructed. (A24). Zhurbin exhibited 4 out of 8 “clues” of intoxication in the walk and turn test, where 2 out of 8 clues indicates intoxication at a blood alcohol concentration of .10 or higher. (A25). Zhurbin exhibited 4 out of 4 clues of intoxication on the one leg stand test. (*Id.*). Zhurbin refused to blow into the Intoxilyzer. (A26). A blood test revealed that Zhurbin’s blood alcohol concentration was .17.<sup>3</sup>

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<sup>3</sup> The State did not seek to admit evidence of the blood test result in its case-in-chief because Zhurbin’s blood was drawn without a warrant, and between the date of Zhurbin’s warrantless blood draw and trial, the United States Supreme Court issued its decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). (B1). Because Zhurbin presented no defense case, it was not admitted as impeachment evidence. However, at sentencing, the State presented the result, as well as the blood alcohol concentration results in Zhurbin’s two prior DUIs, to Superior Court. (A49).

**I. Superior Court did not commit plain error in failing to *sua sponte* grant a judgment of acquittal on Leaving the Scene of a Collision.<sup>4</sup>**

**Question Presented**

Whether Superior Court committed plain error in failing to *sua sponte* grant a judgment of acquittal based on an alleged insufficiency of proof that the collision occurred on a “highway” when the collision occurring on a “highway” is not an element of a violation of Del. Code Ann. tit. 21, § 4201(a) (2013).

**Standard and Scope of Review**

Where a defendant fails to move for a judgment of acquittal, he fails to fairly present to the court below a claim of insufficiency of the evidence.<sup>5</sup> As a result, this Court may decline to review the claim.<sup>6</sup> At most, this Court reviews the claim for plain error.<sup>7</sup> The doctrine of plain error is “limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>8</sup>

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<sup>4</sup> Appellant correctly notes that the word “accident” in the terminology of the offense in the indictment should have been “collision” because of the General Assembly’s amendment of section 4201. *See* Op. Brf. at 6, n.2. The State notes that the Sentence Order used the current “collision” terminology. *See* Ex. A to Op. Brf. As a result, the State herein uses the term “Leaving the Scene of a Collision.”

<sup>5</sup> *See, e.g., Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992).

<sup>6</sup> *Id.* (citing Del. Supr. Ct. R. 8).

<sup>7</sup> *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995); Del. Supr. Ct. R. 8.

<sup>8</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).

## Merits of the Argument

On appeal, Zhurbin does not dispute that the State presented sufficient evidence of the following elements of Del. Code Ann. tit. 21, § 4201(a): that he was involved in a collision; that the collision resulted in apparent damage to property of someone other than the Defendant; and that he failed to stop his vehicle at the scene of the collision. Zhurbin claims only that the State failed to present sufficient evidence that the collision occurred on a public highway. *See* Op. Brf. at 7. Zhurbin relies on section 4101 of title 21 to claim that section 4201 of title 21 applies only to collisions that occur on a public highway. However, as explained below, because section 4201 applies to vehicle collisions occurring *anywhere*, the State was not required to prove that the collision occurred on a public highway. To the extent this Court finds that the interests of justice require review of Zhurbin's sufficiency of the evidence claim, the interests of justice likewise dictate that this Court consider the State's argument on the proper meaning of section 4201. The proper meaning of section 4201 reveals that Superior Court did not commit plain error in failing to *sua sponte* grant a judgment of acquittal on Leaving the Scene of a Collision.

### *Rules of statutory construction*

The rules of statutory construction are well settled.<sup>9</sup> They are “designed to ascertain and give effect to the intent of the legislators, as expressed in the statute.”<sup>10</sup> The Court must first determine whether the provision at issue is ambiguous.<sup>11</sup> If it is unambiguous, no statutory construction is required, and the Court must give the words in the statute their plain meaning.<sup>12</sup> “A statute is ambiguous only if it is reasonably susceptible to different interpretations, or ‘if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.’”<sup>13</sup> “When confronting an ambiguous statute, a court should construe it ‘in a way that will promote its apparent purpose and harmonize [it] with other statutes within the statutory scheme.’”<sup>14</sup> “As this Court has frequently said in other cases, [the General Assembly’s] intent must prevail even though in doing so we must give an interpretation not consistent with the strict letter of the statute.”<sup>15</sup> Furthermore, where two statutes are irreconcilable,

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<sup>9</sup> *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).

<sup>10</sup> *Id.* (quoting *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; *Dennis v. State*, 41 A.3d 391, 393 (Del. 2012) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

<sup>13</sup> *Insurance Com’r of State of Delaware v. Sun Life Assur. Co. of Canada (U.S.)*, 21 A.3d 15, 20 (Del. 2011) (quoting *Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003) and *Chase Alexa*, 991 A.2d at 1151).

<sup>14</sup> *Id.* (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

<sup>15</sup> *Mayor and Council of Wilmington*, 157 A.2d 789, 793-94 (Del. 1960) (citation omitted).

the later enacted or more specific statute must prevail over the earlier or more general.<sup>16</sup>

*Del. Code Ann. tit. 21, § 4201*

Although commonly referred to as “Leaving the Scene of a Collision,” section 4201 is titled “Duty of driver involved in collisions resulting in property damage or injury.”<sup>17</sup> Section 4201 provides, in pertinent part:

(a) The driver of any vehicle involved in a collision resulting in apparent damage to property shall immediately stop such vehicle at the scene of the collision. Said stop should be made as close to the scene of the collision as possible without obstructing traffic more than necessary. The driver shall immediately undertake reasonable efforts to ascertain whether any person involved in the collision was injured or killed. If such collision resulted in injury or death, the driver shall comply with § 4203 of this title. If, after reasonably ascertaining that there are no injuries or deaths, and if the damaged vehicle is obstructing traffic, the driver of the vehicle must make every reasonable effort to move the vehicle or have it moved so as not to obstruct the regular flow of traffic more than necessary. If the damage resulting from such collision is to the property of the driver only, with no damage to the person, property of another, or the environment, the driver need not stay at the scene of the collision but shall immediately make a report of the damage resulting as required by § 4203 of this title.

(b) The driver shall give the driver’s name, address and the registration number of a vehicle and exhibit a driver’s license or other documentation of driving privileges to the owner of the property or the driver or occupants of any vehicle with which the driver’s vehicle collides.<sup>18</sup>

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<sup>16</sup> *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995) (citing *State ex rel. State Highway Dept. v. George F. Lang Co.*, 191 A.2d 322 (Del. 1963)).

<sup>17</sup> Del. Code Ann. tit. 21, § 4201 (2013).

<sup>18</sup> *Id.*

The plain language of section 4201 does not limit a driver's duties after a collision only to those collisions that occur on a public highway.

Zhurbin relies on section 4101 to support his claim that section 4201 applies only to collisions on a public highway. *See* Op. Brf. at 7-8. Section 4101(a) provides, in pertinent part:

The provisions of this title referring to the operation of vehicles refer exclusively to the operation of vehicles upon a highway except: (1) Where a different place is specifically referred to in a given section[;] (2) That subchapter IX of this chapter shall apply upon highways and elsewhere throughout the State[;] (3) That subchapter VIII of this chapter and § 4164 of this title shall apply upon highways and elsewhere throughout the State, except [on nonresidential, commercial property;] (4) Upon application of a majority of persons having a property interest in a private road....<sup>19</sup>

Zhurbin's reliance on section 4101 to insert a "highway" restriction on section 4201 is misplaced for two reasons. First, the highway limitation in section 4101 applies only to "provisions of this title *relating to the operation of vehicles.*"<sup>20</sup> Section 4201 specifically imposes obligations on a person *after* a collision (*i.e.*, after operation). Thus, section 4201 is not a provision "relating to the operation of vehicles," and is not restricted by the "highway" limitation in section 4101.

Second, even if section 4201 is a provision "relating to the operation of vehicles" such that the section 4101 highway limitation would seemingly apply,

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<sup>19</sup> Del. Code Ann. tit. 21, § 4101(a) (2013).

<sup>20</sup> *Id.*

the General Assembly amended section 4201 in 1988 to make the post-collision obligations apply to *all* collisions, not just those occurring on a public highway.<sup>21</sup> Prior to the enactment of House Bill 220 during the 134<sup>th</sup> General Assembly, section 4201 provided, in pertinent part: “The driver of any vehicle involved in an accident *on the public highways* resulting in apparent damage to property shall immediately stop such vehicle at the scene of the accident.”<sup>22</sup> House Bill 220 struck section 4201 in its entirety and substituted, in pertinent part: “The driver of any vehicle involved in a collision resulting in apparent damage to property shall immediately stop such vehicle at the scene of the accident.”

The Synopsis to House Bill 220 makes clear the General Assembly’s intent in omitting the term “on the public highways”:

This Act addresses changes as to required procedures in traffic accidents: 1. Drivers would be required to stop at the scene of all accidents. At the present time, drivers are not required to stop at the scene of property damage accidents on private property.<sup>23</sup>

The debate on the Senate floor also highlighted the intent to make section 4201 applicable anywhere in the State.<sup>24</sup> When questioned about the bill, a Captain of the Delaware State Police explained:

There’s one significant thing in [the bill] that’s out to protect the majority of us, and that is to require people who are involved in an

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<sup>21</sup> See 66 Del. Laws ch. 238, § 1 (1988).

<sup>22</sup> Del. Code Ann. tit. 21, § 4201(a) (1987) (emphasis added).

<sup>23</sup> See 134<sup>th</sup> Delaware General Assembly, H.B. No. 220, Synopsis (emphasis in original) (B4).

<sup>24</sup> 134<sup>th</sup> Delaware General Assembly, Senate Floor Debate on House Bill No. 220 (B6) (CD track HB 220\_134th\_Senate debate 1.mp3 at 30:25-32:17)

accident, regardless if it's on a roadway or private property, ... to stop and identify themselves. As the current law stands, ... if a [person] was to drive on a parking lot, [and] hit a parked car, he is under no obligation to stop and identify himself to the owner of that parked car. This law makes that [a requirement].<sup>25</sup>

Immediately following the officer's statement, a Senator stated, "I happen to agree very strongly [that] that's a very important and needed part of [this] legislation."<sup>26</sup>

House Bill 220's amendments to section 4203 similarly reflect that the General Assembly was intentionally choosing to impose the section 4201 post-collision obligations on drivers involved in collisions occurring anywhere, not just those occurring on public highways.<sup>27</sup> Section 4203 specifies when a driver must report collisions to the police. Section 4203, as amended by House Bill 220, specifies that, after complying with section 4201 (or 4202 in the case of collisions involving injury or death), drivers must report to police the following specified types of collisions: 1) when the collision results in death or injury to any person; 2) "when the accident occurs *on a public highway* and results in property damage to an apparent extent of \$500 or more;" or 3) when a driver's physical abilities are impaired by alcohol or drugs.<sup>28</sup> If section 4201, as amended by HB 220, included

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<sup>25</sup> *Id.* at 31:10.

<sup>26</sup> *Id.* at 31:45.

<sup>27</sup> *See* 66 Del. Laws ch. 238, § 2 (1988).

<sup>28</sup> *Id.* (emphasis added). These three types of collisions that must be reported remain the same. *See* Del. Code Ann. tit. 21, § 4203(a)(1)-(3) (2013). Prior to the 1988 amendment, section 4203 provided, in pertinent part: "The driver of any vehicle involved in an accident resulting in injury or death to any person or property damage to an apparent extent of \$250 or more shall immediately, after complying with the requirements of §§ 4201 and 4202 of this title, report such



the limitation that the collision occur on a public highway, there would be no need for the General Assembly to impose such a limitation in section 4203(a)(2)'s police report requirement for property damage collisions. The specific omission of "on a public highway" in revised section 4201(a), coupled with the inclusion of the limitation in section 4203, makes clear that the General Assembly purposefully imposed and omitted the "highway" limitation. When read as a whole, the 1988 amendment requires a driver involved in a property damage collision *anywhere* to stop, determine whether anyone is injured and provide identifying information to the property owner,<sup>29</sup> but only requires a mandatory report to the police when the property damage collision both occurred on a public highway and had apparent property damage exceeding \$500.

In amending section 4201 to remove the highway limitation, the General Assembly did not recognize that then existing section 4101 imposed a highway limitation unless a statute delineated otherwise. Thus, reading both statutes literally would result in section 4101 imposing a highway limitation onto section 4201 when the specific intent of House Bill 220 was to eliminate just such a

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accident to the nearest state police station, except that when such accident occurs within the City of Wilmington such report shall be made to the Department of Public Safety in that City." Del. Code Ann. tit. 21, § 4203(a) (1987).

<sup>29</sup> Both immediately before and after enactment of House Bill 220, as well as in 2013 when Zhurbin was involved in his collision, section 4201 mandated that the driver provide the owner of the property with which he collided, his name, address, vehicle registration number, and driver's license. *Compare* Del. Code Ann. tit. 21, § 4201(b) (2013) *with* Del. Code Ann. tit. 21, § 4201(b) (1988) *and* Del. Code Ann. tit. 21, § 4201(b) (1987).

limitation for section 4201. In keeping with rules of statutory construction, the later-enacted, more specific House Bill 220 removing the highway limitation in section 4201 must prevail over the earlier enacted, general “highway” limitation in section 4101.<sup>30</sup> Where, as here, the General Assembly’s specifically stated intent in House Bill 220 was not effectuated by the language used by the General Assembly, this Court construes the statute to effectuate the General Assembly’s intent.<sup>31</sup> Indeed, “[a]s this Court has frequently said in other cases, [the General Assembly’s] intent must prevail even though in doing so we must give an interpretation not consistent with the strict letter of the statute.”<sup>32</sup> Thus, section 4101 provides Zhurbin no support.

Likewise misplaced is Zhurbin’s claim that “[t]he State acted as the *de facto* attorney for the Delaware Park Casino ... in a tort action when it prosecuted Zhurbin for Leaving the Scene of an Accident.... As a result of Zhurbin’s conviction, the State was able to obtain a court order for him to pay restitution to the casino.” Op. Brf. at 7. It was entirely appropriate for the State to prosecute Zhurbin for his criminal acts committed in connection with the October 9, 2012 collision. Similarly, it was entirely appropriate for the court to order restitution to

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<sup>30</sup> Compare 54 Del. Laws ch. 160, § 1 (1963) and Del. Code Ann. tit. 21, § 4101 (1987) with 66 Del. Laws ch. 238, § 1 (1988).

<sup>31</sup> *Collins v State*, 420 A.2d 170 (Del. 1980) (citing *Mayor and Council of Wilmington*, 157 A.2d 789; 2A Sutherland, Statutory Construction, § 47.38 (3d ed. 1973)).

<sup>32</sup> *Mayor and Council of Wilmington*, 157 A.2d at 793-94 (citation omitted).

Delaware Park for the damage Zhurbin caused through his criminal acts.<sup>33</sup> Even if section 4201 were limited to collisions on a “highway” – which it is not – and even if this Court were to vacate Zhurbin’s conviction for the 4201 violation – which it should not – restitution to Delaware Park is appropriate. While the court below imposed restitution as a condition of the section 4201 conviction, the court could impose the exact same restitution as a condition of the Careless Driving conviction. Zhurbin does not, and cannot, appeal his conviction for Careless Driving.<sup>34</sup> Indeed, even if an appeal of the Careless Driving conviction were possible, Zhurbin could not argue that section 4101 precludes his conviction. Although Careless Driving is a provision “relating to the operation of vehicles,” it is contained within subchapter IX, which is specifically excluded from the “highway” limitation.<sup>35</sup> Consequently, Zhurbin’s implication that the award of restitution signals impropriety on the part of the State or error on the part of Superior Court is meritless.

Finally, there is no viable claim of error because Superior Court instructed the jury that it must find beyond a reasonable doubt that Zhurbin “drove a motor vehicle on a public roadway.” (A40). While including “on a public roadway” as an element of a violation of section 4201 is an incorrect statement of the law, the error

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<sup>33</sup> See Del. Code Ann. tit. 11, § 4106(a) (2013).

<sup>34</sup> Superior Court imposed a \$75 fine for Careless Driving, *see* Ex. A to Op. Brf, which does not meet this Court’s minimum jurisdictional limits. *See* Del. Const. art I, § 11(1)(b).

<sup>35</sup> *See* Del. Code Ann. tit. 21, §§ 4101(a)(2) & 4176 (2013).

was harmless. Adding an element that does not, in fact, exist could only be prejudicial to the State.

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Dated: June 9, 2014

**CERTIFICATE OF SERVICE**

I, Karen V. Sullivan, Esquire, do hereby certify that on June 9, 2014, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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**/s/ Karen V. Sullivan**  
Karen V. Sullivan (No. 3872)  
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