To be Argued by:
Brian M. Quinn, Esq.
(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division - Third Department

TIMOTHY J. DERUSHA,

Plaintiff-Appellant,

- against -

ROBERT G. SELLIG, M.D.,

Defendant-Respondent;

-and-

DOUGLAS M. PETROSKI, M.D.; ALFRED E. KRISTENSEN, M.D., F.A.C.S.; ADIRONDACK ORTHOPEDIC PHYSICIANS AND SURGEONS, P.C.; DOUGLAS M. PETROSKI, M.D., ALFRED E. KRISTENSEN, M.D., F.A.C.S. and CAROL S. FISHER, M.D., F.A.C.S.C. individually and as co-partners of the partnership doing business under the firm name and style of ADIRONDACK ORTHOPEDIC PHYSICIANS AND SURGEONS, P.C. a/k/a ADIRONDACK ORTHOPEDIC PHYSICIANS & SURGEONS; RICHARD A. SAUNDERS, M.D.; and NORTH COUNTRY SPORTS MEDICINE, PLLC,

Defendants.

BRIEF FOR PLAINTIFF

Warren County Index No.: 051309/2008

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QUESTION PRESENTED

Did Supreme Court err in granting summary judgment to Defendant Sellig? Yes.

PRELIMINARY STATEMENT

In this action, Plaintiff Timothy J. DeRusha sought medical care and treatment from Defendant Adirondack Orthopedic Physicians and Surgeons, P.C ("Adirondack") and its specialists, including Defendant Robert G. Sellig, M.D. During the initial visit, Defendant Sellig misdiagnosed Plaintiff as having a torn meniscus and recommended unnecessary surgery to be performed by another specialist of Adirondack. Thereafter, Plaintiff underwent the first of several unnecessary surgeries, which ultimately led to the amputation of his leg.

On appeal, Plaintiff submits that Supreme Court erred in granting summary judgment to Defendant Sellig. First, in support of the motion, Defendant Sellig relied upon conclusory statements, his own, which failed to address numerous issues raised by the complaint and bill of particulars. Such statements were insufficient for Defendant Sellig to meet his initial burden.

Second, in opposition to the motion, Plaintiff submitted a lengthy and detailed affidavit from his expert, who controverted all of the essentials of Defendant Sellig's statements and even disputed the standard of care as opined by Defendant Sellig. Under Third Department case law, this affidavit should have been sufficient to raise an issue of fact.

Third, Supreme Court based its decision on an erroneous premise that Defendant Sellig was merely a referring physician. Defendant Sellig treated Plaintiff, misdiagnosed his condition, and placed his misdiagnosis in his report. In fact, Defendant Sellig even recommended his co-physician to perform the initial surgery and requested funding for it. Defendant Sellig's relative responsibility and fault, as specified by Plaintiff's expert, should be an issue for trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about August 28, 2001, Plaintiff suffered a left knee injury [84-85, 570-571].[1] Plaintiff initially received medical care from the office of his primary care physician, Dr. Foote [572-573, 872, 881]. Plaintiff was also examined the following day by his employer's doctor, Dr. Kandora, who referred him to Adirondack for orthopedic care and treatment [84, 576-577, 580-581, 801].

At Adirondack, Defendant Sellig performed a limited physical examination of Plaintiff, which consisted of Defendant Sellig physically touching Plaintiff's leg [82, 84, 239, 354, 457-458, 583-584, 802-839, 883-884]. Defendant Sellig also reviewed the results of an X-ray taken at Adirondack [84, 822-823, 884, 977]. The X-ray results were normal [823, 884, 977].

Based on the physical examination and X-ray, Defendant Sellig diagnosed Plaintiff as having a torn medial meniscus and recommended a medial meniscectomy [84, 239, 354, 457-458, 883-884, 976-979]. By letter dated September 5, 2001, Defendant Sellig requested authorization from the State Insurance Fund (Workers' Compensation) for surgery to be performed by his co-physician at Adirondack, namely, Defendant Douglas M. Petroski, M.D. [84, 884].

Defendant Petroski subsequently examined Plaintiff, diagnosed him with a torn medial meniscus, and recommended arthroscopic surgery and a medial meniscectomy [85-91]. On November 26, 2001, Plaintiff underwent surgery performed by Defendant Petroski [87, 91, 978-979]. Specifically, in the operating room, Plaintiff was given anesthesia and an arthroscope was inserted into Plaintiff's body [87, 978]. "The arthroscopy revealed that [Plaintiff] did not have a medial meniscus tear of his left knee" [978-979; See also 87 ("In the

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1 All page references are to the consecutively paginated three volumes of the appendix.

medial joint, the meniscus was probed and found to be normal")]. A subsequent MRI conducted in 2002 also indicated that Plaintiff's medial and lateral menisci were intact [395, 979]. Needless to say, the surgery did not alleviate Plaintiff's symptoms and complaints [587-588]. In fact, Plaintiff's pain and swelling increased after the surgery and his condition worsened [587-588].

Over the next several years, Plaintiff received care and treatment from Adirondack, primarily through Defendant Petroski, who performed numerous additional surgeries on Plaintiff's left knee [94-535, 589-652, 979-981]. The surgeries did not alleviate Plaintiff's condition [82-535, 589-652, 979-981]. Ultimately, on December 28, 2006, another physician of Adirondack performed an above the knee amputation of Plaintiff's left leg [195, 203-204, 224-227, 650-653, 981].

In September 2008, Plaintiff commenced this action seeking to recover for medical malpractice and negligence for the care and treatment he received at Adirondack [26-44]. The complaint, bill of particulars, and expert response alleged, among other things, that Defendant Sellig deviated and departed from good and accepted medical practices by performing a deficient and limited physical examination, failing to perform proper testing prior to recommending surgery, failing to order an MRI, and failing to recommend conservative treatment prior to diagnosing and recommending surgery [32-33, 57-63, 77, 928-929].

After discovery, Defendant Sellig sought summary judgment dismissing the complaint as against him [17-18]. In support, Defendant Sellig submitted, among other things, medical records, the parties' examination before trial ("EBT") transcripts, and his own affidavit [17-892].

In opposition, Plaintiff submitted, among other things, an affidavit from an orthopedic surgeon, Lawrence D. Weis, M.D. [974-982], who reviewed Plaintiff's medical records and

Defendant Sellig's affidavit and deposition testimony [975]. Based on his review of these materials, Dr. Weis concluded that Defendant Sellig deviated and departed from good and accepted medical practice by, among other things, (1) performing a deficient and limited physical examination, (2) failing to perform indicated and required tests prior to recommending surgery, (3) failing to order and obtain the results from an MRI, (4) failing to recommend less invasive and more conservative treatment options prior to recommending surgery, and (5) failing to properly diagnose Plaintiff's left knee condition [974-982]. Dr. Weis opined that Defendant Sellig misdiagnosed Plaintiff's condition and that the misdiagnosis caused or contributed to the injuries, including the unnecessary arthroscopic surgery performed by Defendant Petroski in November 2001 [974-982].

Supreme Court, Warren County (Krogmann, J.), granted Defendant Sellig's motion and dismissed the complaint as against him [11-16]. The court held that Defendant Sellig met his initial burden on summary judgment and that Plaintiff failed to raise a triable issue of fact [11-16]. The court held:

> "Sellig, an [orthopedic] surgeon with thirty years of experience, made a preliminary diagnosis of the problem using a physical examination of the knee which he found to be conclusive, as well as a review of an x-ray and the plaintiff's medical history. Sellig's recommendation for medial meniscectomy was no more than a recommendation until subsequently followed by an examination by Petroski, who ultimately concurred with the diagnosis and course of treatment. It is mere speculation to assert that the plaintiff should have undergone an MRI or physical therapy in the first instance of treatment. Furthermore, as Sellig testified at his deposition, insofar as he had diagnosed the plaintiff with a torn medial meniscus, it would be inconsistent for the doctor to order physical therapy for a patient with a torn meniscus" [15 (emphasis added)].

Plaintiff now appeals [3].

ARGUMENT

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT

The court below should have denied Defendant Sellig's summary judgment motion because he did not meet his burden of establishing entitlement to summary judgment. Alternatively, if this Court determines that Defendant Sellig met his burden, the Court should still reverse the Order because Plaintiff provided sufficient evidence to establish an issue of fact on both the appropriate standard of care and Defendant Sellig's deviation from the standard, as well as the causal link between Defendant Sellig's acts and omissions and Plaintiff's injuries. These differences of material fact, established through conflicting expert opinions, preclude the granting of summary judgment.

The applicable summary judgment standard is well established in New York. Specifically:

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986] [internal citations omitted]).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage" (Rebozo v Wilen, 41 AD3d 457, 458 [2d Dept 2007]; see Adams v Anderson, 84 AD3d 1522, 1523 [3d Dept 2011]). Thus, "a defendant physician moving for summary judgment in a medical malpractice action has the initial burden of establishing, prima facie,

either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries" (Thurston v Interfaith Medical Center, 66 AD3d 999, 1001 [2d Dept 2009]; see Hickey v Arnot-Ogden Medical Center, 79 AD3d 1400, 1401-1402 [3d Dept 2010]; Torns v Samaritan Hospital, 305 AD2d 965, 965 [3d Dept 2003]). "Only when a defendant refutes by specific factual reference the allegations of malpractice made by plaintiff does the burden of going forward with the proof shift to the plaintiff to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (Ritt v Lenox Hill Hospital, 182 AD2d 560, 562 [1st Dept 1992] [internal quotation marks and citations omitted]; see Hickey, 79 AD3d at 1401-1402; Hutchinson v Bernstein, 22 AD3d 527, 527 [2d Dept 2005]; see also Douglass v Gibson, 218 AD2d 856, 856-857 [3d Dept 1995]).

Further, "once a defendant . . . satisfies his or her burden of demonstrating entitlement to summary judgment, [it has been held that a] plaintiff must adequately rebut defendant's prima facie showing by establishing a departure from accepted medical practice, as well as a nexus between the alleged malpractice and plaintiff's injury" (Rossi v Arnot Ogden Medical Center, 268 AD2d 916, 917 [3d Dept 2000]; see Caulkins v Vicinanzo, 71 AD3d 1224, 1226 [3d Dept 2010]; but see Stukas v Streiter, 83 AD3d 18, 24 [2d Dept 2011] [clarifying that to defeat summary judgment in medical malpractice actions, "the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing"]).

"In order to meet [this] burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged" unless the causal relationship is

readily apparent (Roques v Noble, 73 AD3d 204, 207 [1st Dept 2010]; see Horth v Mansur, 243 AD2d 1041, 1042 [3d Dept 1997]; but see Stukas v Streiter, 83 AD3d at 18). All facts and evidence presented on a motion for summary judgment must be viewed in a light most favorable to the non-moving party (see Gallagher v New York Post, 14 NY3d 83, 89 [2010]; Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d 200, 202 n [2008]; Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P., 7 NY3d 96, 105-106 [2006]).

"Summary judgment [moreover] is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (Wexelbaum v Jean, 80 AD3d 756, 758 [2d Dept 2011] [internal quotation marks and citations omitted]; see also Berger v Hale, 81 AD3d 766, 766 [2d Dept 2011]; Deutsch v Chaglassian, 71 AD3d 718, 719 [2d Dept 2010]).

A. Defendant Sellig Did Not Meet His Initial Burden

As stated above, "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v NYU Medical Center, 64 NY2d 851, 853 [1985]). A defendant's failure to make such a showing "requires denial of the motion" (id.). In such cases, "it is unnecessary to consider whether the [plaintiff's] papers in opposition [are] sufficient to raise a triable issue of fact" (Johnson v Ladin, 18 AD3d 439, 439-440 [2d Dept 2005]; see Winegrad, 64 NY2d at 853).

Although the "affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment[,]" it must be "detailed, specific and factual in nature" (Suib v Keller, 6 AD3d 805, 806 [3d Dept 2004] [internal quotation marks and citations omitted]). A defendant physician cannot meet his or her burden by merely asserting "in simple

conclusory form that the physician acted within the accepted standards of medical care" (id. [internal quotation marks and citations omitted]; see Toomey v Adirondack Surgical Associates, P.C., 280 AD2d 754, 755 [3d Dept 2001]; Machac v Anderson, 261 AD2d 811, 812-813 [3d Dept 1999] ["affidavits which do no more than simply state, in conclusory fashion, that the physician has acted in conformity with the appropriate standard of care or bare conclusory assertions that the physician did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle the movant to summary judgment" (internal quotation marks and citations omitted)]).

Here, Plaintiff, in the complaint, verified bill of particulars, and expert response, alleged that Defendant Sellig deviated and departed from good and accepted medical practices in numerous ways. Specifically, Plaintiff alleged that Defendant Sellig performed a deficient and limited physical examination, failed to perform indicated and required tests prior to recommending surgery, failed to order an MRI, and failed to recommend conservative treatment prior to diagnosing and recommending surgery [33, 56-63, 928-929].

Defendant Sellig failed to address these "essential factual allegations" and therefore "fail[ed] to establish prima facie entitlement to summary judgment as a matter of law" (Roques, 73 AD3d at 206). Regarding the standard of care, Defendant Sellig submitted nothing more than a bare and generic statement that in his "professional medical opinion, to a reasonable degree of medical certainty ... [his] treatment of Plaintiff was consistent with the standard of care" [884]. These empty and "bare conclusory assertions" by Defendant Sellig that he "did not deviate from good and accepted medical practices" failed to "establish that the cause of action

has no merit so as to entitle [him] to summary judgment" (Winegrad, 64 NY2d at 853; see Slazak v Capozzi, 284 AD2d 1005, 1005 [4th Dept 2001]; Machac, 261 AD2d at 812-813).

Similarly, Defendant Sellig states, in the most conclusory of fashions, that "in [his] professional medical opinion, to a reasonable degree of medical certainty and in [his] best medical judgment, no act or omission by [him] caused or contributed to any injury that [Plaintiff] is alleging in this lawsuit" [884]. This bare-bone conclusion was insufficient to require any response from Plaintiff or his expert regarding causation (see Olivetto v Salevitz, 8 AD3d 645, 646 [2d Dept 2004]; see also Stukas, 83 AD3d at 18).

Accordingly, the court below erroneously concluded that Defendant Sellig met his initial burden.

B. Issues Of Fact Exist That Preclude Summary Judgment

Further, even if Defendant Sellig met his initial burden, the court below nevertheless erroneously concluded that Plaintiff failed to raise a triable issue of fact. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (Wexelbaum, 80 AD3d at 758 [internal quotation marks and citations omitted]; see Berger, 81 AD3d at 766; Deutsch, 71 AD3d at 719). Here, conflicting opinions exist with respect to the standard of care and the proximate cause of Plaintiff's injuries. Because of these conflicting opinions, summary judgment should not have been granted.

1. *Applicable Standard of Care*

Defendant Sellig avers that the appropriate standard of care "was to take a history from the patient, perform a physical examination, have x-rays done if necessary and then make a recommendation on the basis of the findings" [884]. Plaintiff's expert, Dr. Weis, avers that the

applicable standard of care was to perform not only those tasks done by Defendant Sellig, but also to consult Plaintiff's patient history and any examination notes provided by Plaintiff's primary care physician, to perform certain tests of Plaintiff's knee beyond those performed by Defendant Sellig, to order an MRI, and/or to prescribe a conservative course of treatment prior to recommending surgery [974-982].

As opined by Dr. Weis, Defendant Sellig grossly deviated from the standard of care. Specifically, Dr. Weis opined that Defendant Sellig deviated from the standard of care based, among other things, on the following:

> "Dr. Sellig failed to adequately examine [Plaintiff's] knee by not performing stability tests for Plaintiff's collateral and cruciate ligaments, not testing Plaintiff's quadriceps and triceps muscle strength, not evaluating Plaintiff's patella stability and looking for patellofemoral joint findings, not evaluating Plaintiff's knee for the presence of effusion, swelling, ecchymosis, erythema or local tenderness, not examining Plaintiff's ipsilateral hip joint and not observing Plaintiff's gait pattern" [976-977].
>
> "The standard of care required that the diagnosis of Plaintiff's torn medial meniscus be based upon more than a limited and inadequate physical examination performed by Dr. Sellig . . . . [Plaintiff] did not exhibit any of the mechanical symptoms that would have caused a reasonably prudent orthopedic surgeon to conclude that [Plaintiff] had a torn medial meniscus" [977-978].
>
> "[Defendant Sellig failed] to obtain and confirm the diagnosis of Plaintiff's torn medial meniscus by an MRI in view of the absence of any significant clinical findings. . . . On August 30, 2001, Defendant [Sellig] deviated and departed from good and accepted practice in failing to order and review an MRI . . . before referring [Plaintiff] for surgical treatment. . . . An MRI of Plaintiff's left knee would have clearly demonstrated that the diagnosis of torn meniscus was incorrect and that [such] surgery . . . was unindicated" [978-979].

In short, these expert affidavits are in direct conflict with each other [883-885, 974-982]. The appropriate standard of care cannot be established without a determination of the credibility of each witness. Therefore, summary judgment should not have been granted.

2. *Proximate Cause of Plaintiff's Injuries*

As mentioned above, Defendant Sellig relied upon a bare-bone conclusion on the issue of proximate causation, which should have been insufficient to require any response from Plaintiff or his expert [884] (see Stukas, 83 AD3d at 30 ["in a medical malpractice action, a plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing"]).

In any event, Dr. Weis nevertheless addressed causation. Dr. Weis opined that Defendant Sellig was responsible for Plaintiff's injuries, including but not limited to, pain, stiffness, and unnecessary surgery [974-982]. According to Dr. Weis, these injuries resulted from Defendant Sellig's deficient examination, misdiagnosis, and negligent and hasty recommendation that Plaintiff undergo surgery [982].

Further, Defendant Petroski's care and treatment of Plaintiff did not absolve Defendant Sellig of any and all liability. While it "is generally true that the mere referral of a patient by one physician to another, without more, does not render the referring doctor vicariously liable for the negligence of the treating physician," this rule does not apply where evidence exists that the referring doctor was "independently negligent in diagnosing . . . plaintiff's condition, and that this mis-diagnosis constituted a proximate cause of plaintiff's injuries" (Datiz v Shoob, 71 NY2d 867, 868 [1988] [citations omitted]; see Brown v Speaker, 33 AD3d 446, 446-447 [1st Dept 2006]). In such cases, the referring doctor, "as the initial wrongdoer, cannot escape liability merely by showing that the subsequent treating physician to whom plaintiff was referred was also negligent" (Datiz, 71 NY2d at 869; see Mandel v New York County Pub. Adm'r, 29 AD3d 869, 871 [2d Dept 2006] ["joint liability may be imposed where the referring physician was

involved in decisions regarding diagnosis and treatment to such an extent as to make them his or her own negligent acts"]).

As recognized by Dr. Weis, Defendant Sellig's role in plaintiff's initial care and treatment extended far beyond providing collegial advice to embracing a physician-patient relationship involving primary care and treatment [974-982]. For example, Defendant Sellig cared for and treated Plaintiff's injury, diagnosed him, requested funding for the surgery, and chose the physician who ultimately performed the surgery [82, 84, 239, 354, 457-458, 583-584, 802-839, 883-884, 974-982]. As such, the record establishes that Defendant Sellig actively participated in Plaintiff's diagnosis and treatment such as to render him liable for a proportional share of Plaintiff's injuries from the unnecessary surgery (see Datiz, 71 NY2d at 868-869; Lloyd v St. Vincent's Manhattan Hosp., 83 AD3d 440, 440-441 [1st Dept 2011] [co-physician found liable]; Rogers v Maloney, 77 AD3d 1427, 1428-1429 [4th Dept 2010] [consulting physician "had more than an informal interest and involvement in plaintiff's condition" so as to create an issue of fact regarding his liability]; Mandel, 29 AD3d at 871; Walker v Zdanowitz, 265 AD2d 404, 404-405 [2d Dept 1999]; Cogswell by Cogswell v Chapman, 249 AD2d 865, 866-867 [3d Dept 1998]; Bienz v Central Suffolk Hosp., 163 AD2d 269, 269 [2d Dept 1990] ["A medical malpractice cause of action may be based on allegations that a physician negligently gave advice to his patient as to what course of treatment to pursue"]).

Similarly, as a general rule, "[p]hysicians employed together by the patient, and diagnosing or treating the case together . . . owe the same duty and are jointly liable for any negligence" (see Graddy v New York Med. Coll., 19 AD2d 426, 429 [1st Dept 1963] [internal quotation marks and citations omitted]). Where physicians jointly participate in diagnosis and recommend the same unnecessary surgery, they should each incur a liability for such

malpractice, regardless of who performs the actual surgery (see Graddy, 19 AD2d at 429; see also Datiz, 71 NY2d at 868-869).

Here, questions of fact exist regarding Defendant Sellig's joint participation in Plaintiff's care and treatment with Adirondack and Defendant Petroski (see Mandel, 29 AD3d at 869-871; see also Graddy, 19 AD2d at 429). With Defendant Sellig's consent, Adirondack established a system of care that provided Plaintiff and his insurance companies (or Workers' Compensation) with two expert opinions to rely upon when opting for surgery rather than a more conservative approach [84-85]. Defendant Sellig performed the initial examination and requested the initial payment authorization for the surgery while Defendant Petroski re-promoted the need for surgery and actually performed it [84-91, 239, 354]. These physicians indisputably engaged in the joint care and treatment of Plaintiff and should share joint responsibility for their conduct.

Moreover, Defendant Sellig, who holds himself out as a specialist and maintains his name on Adirondack's stationary, knowingly participated in this system of care, intending for his patients and others to rely upon his expert recommendations and advice [84, 239, 354]. This system, although set up in such a way that does not require Defendant Sellig to perform actual surgeries, nevertheless required Defendant Sellig to non-negligently diagnose and treat patients [795-796]. Had Defendant Sellig not wanted his patients or others to rely on his recommendations, he should have expressly disclaimed his status as an orthopedic and treating physician. Having failed to do so, Defendant Sellig should be precluded from arguing that no questions of fact exist regarding his apportioned share of Plaintiff's injuries [84, 239, 354, 788].

Accordingly, Defendant Sellig's relative responsibility and fault, as specified by Plaintiff's expert, should be an issue for trial.

CONCLUSION

For the reasons stated above, it is respectfully requested that this Court should reverse the order appealed from and deny Defendant Sellig's summary judgment motion, together with such other and further relief as this Court deems just and proper.

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Albany, New York

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