IN THE COURT OF APPEALS
OF THE
STATE OF NEW MEXICO

SHANNON SPOON, individually and as Personal representative of Daniel Spoon, Deceased. Plaintiff/Appellee	§	
	§	Court of Appeals # 32,674
v.	§	
	§	Eddy County District Court
ARTURO MATA AND	§	No. CV-2012-00983
BURN CONSTRUCTION COMPANY, INC. Defendants.	§	Judge Jane Shuler-Gray
	§	
v.	§	
KORINA FLORES, as Parent, Guardian, And Next Friend of minor Noah Spoon, Intervenor/Appellant	§	

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

In Guest v. Allstate Ins. Co., 2010-NMSC-047, ¶47, 244 P.3d 342, our Supreme Court said:

> Nearly a century ago, this Court stated, "[t]he relation of attorney and client is one of the highest trust and confidence, requiring the attorney to observe the utmost good faith towards his client, and not to allow his private interests to conflict with those of his client." ... **Ever mindful that worldly pressures and changing conditions may obscure or erode this ideal, this Court, acting as the sole arbiter of a self-governing profession, must ensure that we do not lose sight of every attorney's essential function: to provide competent, diligent, and loyal representation to every client.** See Rule 16–101 NMRA; Rule 16–103 NMRA; Rule 16–107 NMRA committee cmt. [1]. These values are our lifeblood, critical to our professional survival. Without them, we put at risk the trust and respect of the public and of our clients—past, present, and future.

Appellee asks this Court to ignore those ideals and allow Appellee and Blenden to represent Noah's interests, even if there is a conflict of interest – which there is – and even against the client's will. That clearly gives in to "worldly pressures" and loses sight of the attorney's essential function to "every client!"

What is Appellee's solution? To allow Noah – a minor – to sue Appellee and her attorney when they breach their fiduciary duties, if he can afford it and prove it. That is crazy. No client should be forced to forego his right to loyal counsel in exchange for a "possible" tort claim. In Roy D. Mercer, LLC v. Reynolds, 2013-NMSC-002, ¶19, 292 P.3d 466, in fact, our Supreme Court ruled a client cannot be "**forced to go through a trial on the merits with the potential of a breach of client confidences. That potential breach is simply unacceptable.**" That is the law.

II. ARGUMENT AND AUTHORITIES

A. APPELLEE DID NOT DISPUTE MOST OF APPELLANT'S FACTS.

Notably, Appellee did not dispute most of Appellant's facts. Many of those facts are determinative, including that Blenden and Appellee disparaged Noah's consortium claims and Appellee falsified pleadings to procure appointment as the estate personal representative. To the extent Appellee sought to dispute some of the claims, Appellee's facts are unsupported in the record. For instance, she claimed "it is uncontroverted that at the time of the filing, she was the only legal heir of the deceased." (Answer, p.1). That is simply wrong. Clearly, Noah was also a legal heir at the time of filing of this suit – albeit he had not proven it to Appellee's satisfaction. Practically, however, Appellant will not spend time refuting each misstatement.[1] Appellee's misstatements are not determinative. To the contrary, Appellant's uncontested facts justify reversal herein.

B. *SPENCER* DOES CONTROL.

Appellee argues Spencer v. Barber, 2013-NMSC-010, 299 P.3d 388, does not control. (Answer, p.5). However, Appellee fails to prove why, nor to provide contrary authority on the conflicts questions. Spencer, in fact, controls this case.

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[1] One exception is the statement that Appellant's counsel has delayed discovery in this case. (Answer, p.4). That is false. Blenden pleaded below this case was ready for trial in response to the motion to intervene, long before any stay was granted.

The Spencer decision expressly considers the duties a personal representative and her lawyer owe wrongful death statutory beneficiaries. Spencer, ¶4. The Court ruled the attorney owes the statutory beneficiary duties of reasonable skill and care and that the Rules of Professional Responsibility are relevant when ascertaining the scope of those duties. Id. Admittedly, the Court did not discuss disqualification, *per se*. However, that was only because the representation was complete. The issue was not whether the attorney may proceed. The question was the attorney's duties and his liability if he continues to represent a personal representative who has conflicting interests with a beneficiary. In answering those questions, the Court created binding conflict of issue precedent.

Under Spencer, a conflict exists when "the interests of the personal representative and the beneficiaries are adverse, or become adverse...." Id. ¶27. That may arise in a number of different ways. Under the facts in Spencer, "a conflict arose when Sam, as the Personal Representative, sought to challenge Spencer's entitlement to a full share of the wrongful death proceeds in favor of Sam's receiving a larger share." Id., ¶20. That is the exact facts in this case. Appellee submitted an Affidavit to the Probate Court contesting Noah's rights as an heir. That created an irreconcilable conflict.

Spencer is more important, however, for its citation to and discussion of Home Insurance Co. v. Wynn, 493 S.E.2d 622, 626 (Ga. Ct. App. 1997). Id. ¶29. Appellant

quoted Home Insurance Co. in her Brief. The Georgia Court of Appeals ruled a party simply may not simultaneously represent the interests of the beneficiary and her own competing consortium interests. According to the Court, an agent may not **"place herself in a position in which her duty and interests conflict with those of her principal."** 493 S.E.2d at 626. In construing Home Insurance Co., the Supreme Court noted, when the personal representative has her own personal consortium claims, she has an "improper incentive" to recover more money in the personal claims than for wrongful death, which creates an inherent conflict. Spencer, ¶29.

Those are the facts in this case. The Spencer Court then held, "It is not sufficient for the attorney to simply tell the intended beneficiary that he or she needs his or her own counsel." Id., ¶32-33. The beneficiary must be put on an "equal footing," which may include "independent representation." Id.

Notably, Appellee claims it is undisputed Noah will receive half of the wrongful death proceeds. That was not always Appellee's position. Initially, rather than putting Noah on equal footing, Blenden indisputably represented to Appellant that Noah did not need representation. Luckily, Appellant ignored that advice and hired Mr. Dugan. Even after Dugan put Appellee on notice of Noah's claims, however, Appellee (by affidavit) then misrepresented to the Probate Court that Appellee was Daniel's only heir. Only after Appellant moved to intervene and provided indisputable proof of paternity, did Appellee's counsel finally concede Noah is an

heir. Even then, Blenden and Appellee continued to disparage Noah's consortium claim, alleging Daniel never acknowledged him as a child during his lifetime. That creates an irreconcilable conflict.

One cannot "un-ring" the bell. When it benefited Appellee and Blenden to contest Noah's claim, they did. Now, when it best benefits them to agree to Noah's claim (in order to solely control this suit), they claim they never contested his rights (despite contrary pleadings). That is disingenuous, at best. Regardless, Noah is entitled to be placed on "equal footing," with his own loyal counsel.

C. APPELLEE FAILED TO ADDRESS SEVERAL CONFLICTS.

Rule of Professional Conduct 16-107 provides a lawyer "**shall not**" represent a client if ...

(a) the representation of one client will be directly adverse to another client; or

(b) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client .. or a third person.

That rule applies and does not leave room for discretion.

In her Brief, Appellant identified several reasons Appellee and Blenden are conflicted under Rule 16-107. (Brief, pp.20-22,28-34). Comment 23 notes, "A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in position in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liability in question." Appellee only addressed the last conflict, the possibility of different settlements. The

failure to address the other bases (e.g., Blenden's statements to Appellant that Noah did not need his own counsel, Appellee's affidavit misrepresenting Noah's rights, Blenden disparaging Noah's consortium claim, etc.) justifies reversal.

D. COURTS LACK AUTHORITY TO WAIVE A CONFLICT AND CRAFT A REMEDY.

Without authority, Appellee encourages this Court to waive the conflict for Noah and craft a judicial remedy appointing a guardian. Appellant will prove the impropriety of that action below. Practically, however, this Court lacks authority to waive conflicts. When there is a "conflict" under the Rules of Professional Responsibility, disqualification "is mandatory." Mercer, 2013-NMSC-002, ¶19 (holding entire firm who hired conflicted attorney was disqualified).

In Mercer, the Trial Court ruled the complaining party had adequate remedies through complaints to the Disciplinary Board. Id., ¶11. On appeal, however, our Supreme Court reversed. The Court said:

> This case impacts the inviolate relationship of attorney and client and, equally important, the public perception of that relationship and the legal profession. ...
>
> ... It is this Court's responsibility to interpret and apply the Rules of Professional Conduct that govern the legal profession. ... Therefore, we take this opportunity to clarify and reinforce the provisions of our Rules of Professional Conduct....
>
> A lawyer must demonstrate undivided loyalty to a client....
>
> Importantly, once there is (a) a conflict, ... then disqualification ... is mandatory....

> **[T]he district court erred in concluding that it could balance the equities**, even after finding that Ford had played a substantial role "in the prior representation of Mercer." ... Once the district court found that Ford had access to confidential information and had played a substantial role on the other side "in the prior representation of Mercer," by its own terms Rule 16–110(C) mandated disqualification of the entire Riley firm. **The district court had no discretion in the matter.**

Id., ¶14, 16, 19, and 30. The Court rejected the "equitable discretion" of a court to trump the Rules. Id. at ¶39. The Court ruled no party may be forced to go through a trial with a potential conflicted attorney:

> [T]he judge's equitable discretion cannot trump the plain language of a rule, especially when that rule concerns the duty of loyalty. ... In failing to disqualify the Riley firm, the district court misapplied the plain language of Rule 16–110(C) mandating disqualification. **Mercer would have been forced to go through a trial on the merits with the potential of a breach of client confidences. That potential breach is simply unacceptable.**

Id.

Under Mercer, once a conflict is proven, disqualification is mandatory. Id. To allow an attorney to proceed in litigation despite a conflict and prompt objection "would be contrary to the public's expectation of undivided loyalty" and "contrary to the spirit of our Rules of Professional Conduct and traditional notions of fairness." Id.

The duty of loyalty, in fact, is so inviolate that when one attorney is conflicted, his entire firm is conflicted. Id.; N.M.R.A. 16-109(C)(2) and 110. "It is the non-delegable responsibility of this Court to see that lawyers practicing before this Court maintain the highest standards of professional conduct in the management of cases before it, and to insure that nothing, not even the appearance of impropriety, is permitted to

tarnish the judicial process or shake the confidence of the public in the integrity of the legal profession." U.S. v. Scott, 980 F.Supp. 165 (E.D.Va. 1997).

Notably, some conflicts are so serious not even the client can waive the conflict. United States v. Schwarz, 283 F.3d 76, 95 (2d Cir.2002). N.M.R.A. 16-107B(3), in fact, provides a client may not waive a conflict that involves "the assertion of a claim by one client against another client." This is just such a case. Appellee's consortium claim ultimately may weaken or lessen Noah's recovery. Whether it does or not, N.M.R.A. 16-107B clearly precludes waiver of a conflict without the client's "informed consent." Noah and his mother will not consent. The Court should not impose Appellee's will on a client unwilling to waive the conflict.

E. A TORT CAUSE OF ACTION IS NOT A PRACTICAL SOLUTION.

Even if this Court could waive the conflict (contrary to Mercer), that is not a practical solution. Appellee argues Noah's tort remedies are sufficient. However, they clearly are not. To begin with, most clients (and certainly infants like Noah) do not have the financial wherewithal to litigate against an attorney. Second, proof of a breach by Appellee and/or Blenden will be replete with difficulties. Appellant will never be able to re-create the "but for" world. We won't get the benefit of knowing how the case would have turned out if Noah would have had his own counsel. Would the argument and evidence have been different? Most certainly. But, how and with what outcome, we will never know. The law allows injunctions to maintain

the status quo when the legal remedy is difficult to prove and/or clearly inadequate. Appellee would have this court refuse an injunction and simply require Noah and his mother to "trust" Appellee. That is untenable.

Third and finally, Appellee assumes the availability of a possible tort remedy equates with recovery of all damages lost. Any seasoned lawyer knows that is not true. Most cases settle below their true value to avoid risk. Noah also would not be able to recover his attorneys' fees in pursuing Appellee and/or Blenden. Cf. In re Villanueva, 311 S.W.3d 475, 483–84 (Tex.App.-El Paso 2009, orig. proceeding) (concluding relator lacked adequate remedy where he could not recover fees in tort action). Moreover, Appellee and/or Blenden may be insolvent and/or put their assets out of a creditor's reach. The promise of a tort remedy is hollow, at best.

F. A CONFLICT EXISTS BEYOND SETTLEMENT AND REMAINS AT TRIAL.

Appellee is also incorrect that the conflict may be resolved by appointment of a guardian in the event of a settlement. What if there is not a settlement? Trial counsel "have an ethical duty to represent his client vigorously." State ex rel. Children, Youth & Families Dept. v. Steven R., 1999–NMCA–100, 992 P.2d 317 (citing Rule 16–103 NMRA 1999 cmt.). In Spencer, the court ruled the settling personal representative "had an improper incentive to allocate the settlement to claims for which she was the only beneficiary." 2013-NMSC-010, ¶29. That incentive, however, does not only exist once settlement is reached. A personal

representative presenting the case to the jury has the same incentive – to encourage the jury to place the majority of the damages on the consortium claim so that she may recover more. Similarly, if she thinks her consortium claim is large, and the wrongful death suit is minimal, she has a great incentive to not settle at all, and instead risk a jury verdict that would be more favorable to her than a settlement – which must be split 50-50. The conflict exists, not only in distribution of actual settlement sums, but also in prosecution and decisions whether and when to seek settlement.

G. APPELLEE MISCONSTRUES *LEYBA*.

Appellee cites Leyba v. Whitley, 120 N.M. 768, 907 P2d 172 (N.M. 1995), arguing there is no conflict because the Personal Representative's "sole task under the act is to distribute any recovery in strict accordance with the statute." (Answer, p. 3). However, that quote is taken out of context. The Leyba court also noted the personal representative is the statutory "agency for the prosecution of the suit" and is "vest[ed with] control over litigation decisions." Id., ¶22. The personal representative is the trustee for the entire suit, not just settlement. Leyba did not involve the litigation decisions, and was only about settlement. In that case, the representative settled and absconded with the money. The question on appeal was limited to the duty of the attorney to preserve the corpus. For obvious reasons, our Supreme

Court ruled the attorney has a duty of reasonable care to protect the beneficiaries' interests. To the extent Leyba applies, however, it supports Appellant, not Appellee.

In Leyba, our Supreme Court ruled that, if the personal representative and beneficiary have a conflict, the attorney must resolve the conflict by bringing an end to the duty to the beneficiary. Id., ¶27. In the context of that case – which had already settled -- that could be done by the attorney advising the beneficiary "that he or she cannot rely on the attorney to act for his or her benefit." Id. That disclosure would allow the beneficiary an opportunity to hire his own counsel and seek appropriate judicial relief. Such a disclosure will not work, however, in this case, where Appellee has objected to Appellant intervening to protect Noah's interests. If intervention is not permitted, Appellee and Blenden will continue to represent Noah's interests, despite their admission Noah cannot rely on them to act for his best benefit. That obviously is not a viable solution.

Under Leyba, Appellee and Blenden must bring an end to the duty to the beneficiary. The only way that can happen is if Blenden and Appellee cease representing the portion of the wrongful death estate that belongs to Noah. Accordingly, this Court should appoint Appellant co-personal representative, allowing Mr. Dugan to represent Noah's interests.

H. *MACKEY* WAS REVERSED.

Appellee cites Mackey v. Burke, 102 N.M. 294, 694 P.2d 1359 (N.M. App. 1985), for the proposition that only the [estate] "personal representative" has standing to bring a wrongful death action, and therefore "Shannon Spoon must bring the case." (Answer, pp. 2-3). Appellee even claims this court "has routinely" followed that Mackey decision. In fact, our Supreme Court promptly overruled Mackey. Chavez v. Regents of University of New Mexico, 103 N.M. 606, 711 P.2d 883, 885 (N.M. 1985). In Chavez, the Court noted, "It is merely "incidental" that a "personal representative" is named to bring a wrongful death action." Id. "Any recovery for wrongful death has no relation to the deceased's estate; the recovery does not become part of the estate assets." Id. "Although a wrongful death action in New Mexico must be prosecuted by a personal representative, ... the cases have generally broadly construed who qualifies as a personal representative under the Wrongful Death Act." Id.

In In re Estate of Sumler, 2003-NMCA-030, 62 P.3d 776, this court made clear "**appointment as the personal representative of decedent's *estate* is neither necessary nor sufficient authority** for a person to serve as a Section 41-2-3 personal representative" under the Wrongful Death Act. Accordingly, Appellee's *ex parte* appointment as "personal representative" of the estate is not controlling.[2]

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[2] On the other hand, Appellee's *ex parte* appointment and her misrepresentations to the Court create an irreconcilable conflict. Appellee failed to address that issue.

I. APPOINTMENT OF A PERSONAL REPRESENTATIVE IS NECESSARY.

Appellee claims our Supreme Court has "ruled that it is not necessary to have a formal appointment of a Personal Representative." (Answer, p. 2). Appellant cannot find any such case. To the contrary, the Supreme Court opinions cited in this Reply and Appellant's Brief show appointment of a personal representative for the wrongful death claim is required at some point. In Sumler, in fact, this Court noted appointment may occur in the actual wrongful death suit itself, assuming all necessary parties are subject to joinder in the forum. Id. fn. 1. Accordingly, this Court is vested with the duty of appointing a "non-conflicted" personal representative.

J. *DOMINGUEZ* IS DISTINGUISHABLE.

Appellee quotes Dominguez v. Rodgers, 100 N.M. 605, 673 P.2d 1338 (N.M. App. 1983), but incorrectly cites "Wasson v. Wasson, 1978, 98 NM 162, 585 P.2d 713," for that quotation. (Answer, p.4). In fact, Dominguez is distinguishable.

In Dominguez, a father sought to intervene in a wrongful death suit filed by the mother. The court denied intervention because the father's interests were "identical" to the wife's interests. Id. at 1341. Contrariwise, in this case Shannon's interests simply are not "identical" to Noah's interests. In fact, in Spencer, the court noted that in Dominguez the "would-be intervenor had 'identical' interest to [the] personal representative." Spencer, ¶8. The Spencer court proceeded, however, to rule the interests are not "identical" when the adversarial exception creates a conflict. Also,

in Dominguez, the Court noted "Appellant has not sought to remove the child's mother as personal representative by claiming that she could not fulfill her responsibilities in that role or that she is otherwise unsuited." 773 P.2d at 1341. To the contrary, Appellant has proven Appellee is disqualified.

In fact, Noah has a mandatory right to intervene under Rule 24(a)(2). New Mexico courts hold representation is not "adequate" when there is an "adversity of interest." New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶20, 975 P.2d 841. That law is controlling. Appellee has not attempted to distinguish that law because she cannot. See Brief, pp. 23-24 (citing foreign cases holding party could not serve as personal representative due to conflicts with beneficiary).

K. APPOINTMENT OF A GUARDIAN WILL NOT CURE THE CONFLICT.

Appellee's suggestion to appoint a guardian will not work. To begin with, that is not a legal cure to a lawyer's conflict. As noted above, without client consent, the only legal solution is for Blenden and Appellee to resign (or be precluded) from representing Noah's share.

Moreover, a guardian is not a practical solution. Noah needs and deserves counsel with complete prosecution, discovery, trial, and settlement authority. At this point, a guardian has nothing to do. There is no settlement offer to evaluate. And, with Appellee and her counsel in charge, there may never be a settlement offer. If Appellee decides her bystander and consortium claims are worth more than the

wrongful death claim, she may choose to "roll the dice" at trial, rather than pursue settlement at all. If she seeks a settlement, she inevitably will have to deal with the distribution to Noah. However, if she believes what her attorney wrote in his brief, she may decide the jury will not award Noah anything, but would give her millions in a consortium or bystander claim. It would be in her best interests to take the case to trial to maximize her personal recovery.

The fact is, if this Court allows Blenden and Appellee to proceed, we will probably never know. We can't create that "but for" world. Every seasoned lawyer knows the value of a case does not necessarily increase simply by increasing the number of damages lines. The differences between "consortium" and "wrongful death" damages can easily be lost on a jury. Juries often decide how much to give, and then distribute it throughout the verdict. With Blenden representing all claims, he will have a great influence on where the jury assesses damages. Mr. Blenden, representing Appellee, should have a strong incentive to encourage the jury to place the largest recovery on Appellee's personal claims. Blenden will especially have that motive, if he is concerned the jury will consider Noah's claims to be frivolous, as he represented below. Moreover, Blenden must follow his client's – Appellee's – wishes on even discussing settlement. That creates an irreconcilable conflict.

Appellee claims Home Ins. Co. sanctions the appointment of a guardian in a case like this. (Answer, p.7). That is not true. In that case, the trustee had already

settled the case. In that instance, clearly, at a minimum, a guardian should have been appointed to oversee the settlement. Practically, however, the Court began that sentence by stating, "The Trustee must avoid being placed in such a position." The court proposed the "guardian" solution, only "if she cannot avoid the conflict." 493 S.E.2d at 624. Appointment of a guardian is a last resort only when the conflict cannot be avoided. Id. Even then, the guardian should be one "to protect the unprotected interests." Id. The court noted the personal representative has the duty of "asserting, prosecuting, and settling" the claim and "to act in the utmost good faith." Id. at 625. To the extent a "guardian" is to be appointed, that guardian needs full authority to prosecute Noah's half of the wrongful death claim from start to finish. Noah's legal representative, Appellant, has already hired that person: Mr. Dugan.

L. THIS CASE WILL NOT DISRUPT NEW MEXICO LAW.

Also, allowing Korina Flores to serve as co-representative will not disrupt New Mexico law. Appellee has not disputed Appellant's briefing that a party may intervene when that interested party shows a "possibility" of inadequate representation. That rule applies to all cases, not just wrongful death actions. Under the facts of this case, there is clearly a possibility of inadequate representation.

That will not, however, be the case in every wrongful death action. In most cases, heirship will not be in dispute. When it is, separate representation may be appropriate, depending on the facts of the case. Moreover, in most cases, even

when there are separate consortium claims, the parties will not have an interest in contesting the other co-plaintiff's consortium claim. Blenden and Appellee created the conflict by their actions, including contesting Noah's claims in false pleadings and even disparaging his consortium claims. That makes this case unique.

Having said that, practically, this case is no different than other conflicts cases requiring separate counsel, including attorneys for an agent and a principal, an employee and his employer, an insured and the insurance company, or any other parties who may have conflicting interests. Ethics and the integrity of our legal profession will become a mockery if a lawyer who openly attacks a party may then represent that party against his will. This Court can easily tailor its opinion to limit its ruling to these facts. However, that is not necessary. The rule is clear: If the proposed personal representative and the beneficiary are "possibly" adverse, the court should appoint co-representatives. That solves the problem. It will not proliferate litigation and will ensure everyone with divergent interests is represented by an attorney committed solely to that party's best interests. Anything short of that solution is unjust.

M. APPELLEE STIPULATED TO INTERVENTION.

Finally, Appellee stipulated Appellant and Dugan should be allowed to intervene to assert Noah's consortium claim. (Answer, p.9-10). Accordingly, this Court should reverse and allow Appellant to assert that claim. Since Appellant and Dugan are

going to be part of the case, practically, there is no reason to not allow them to prosecute Noah's half of the wrongful death claim. Appellee has not disputed the Court's authority to appoint co-personal representatives. The court should, in fact, appoint Appellant co-representative. The only changes will be that Noah will have a representative and counsel looking out for his best interests and Blenden will not be able to claim 33% of Noah's recovery against his mother's will. Instead, each lawyer will be paid by the client they represent, for the work they do for that client. Clearly, that is the only just outcome.

III. COMPLIANCE WITH N.M.R.A. 12-213

By Microsoft Word 2008 for Mac, Version 12.2.3, processing word counter the body of this Brief contains 4,382 words in a proportionally typed space, Arial Narrow.

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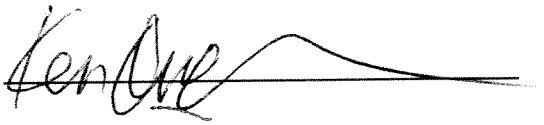
By: 

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