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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

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CECILIA TAFOYA AND
CHARLES TAFOYA,

PLAINTIFFS-APPELLANTS,

v.

CT. APP. NO. 34,465
SANTA FE COUNTY
(D-101-CV-2011-01707)

PAMELA MORRISON AND
LEON MORRISON,

DEFENDANTS-APPELLEES.

REPLY BRIEF

Civil Appeal from the First Judicial District Court, County of Santa Fe
The Honorable Raymond Z. Ortiz, District Judge

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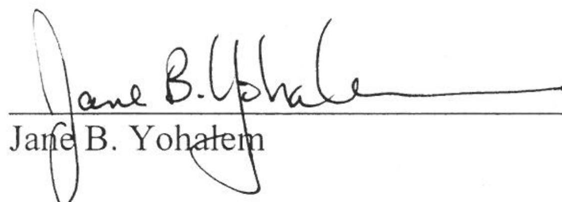
CITATIONS TO TRANSCRIPT OF PROCEEDING

Citations are to the record proper and CD's of argument on motions. They follow the format endorsed by our Supreme Court: The date of the hearing, followed by the abbreviation "**CD**" followed by the time. The record proper is cited to the volume number, followed by the abbreviation "**RP**", followed by the page number.

STATEMENT OF COMPLIANCE

The body of this *Reply Brief* exceeds the 15-page limit set forth in Rule 12-213(F)(3) NMRA.

As required by Rule 12-312(G) NMRA, I certify that this *Reply Brief* uses a proportionally spaced typeface and that the body of the *Reply Brief* contains 4,375 words, which is less than the 4,400 word maximum permitted by Rule 12-312(F)(3). This *Brief* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.



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REPLY ARGUMENT

Although the Morrisons suggest that the Tafoyas have abused the court process by repeatedly re-litigating their easement claims, the record does not show that to be the case. In fact, the record shows that the Tafoyas have not yet had a single opportunity for a decision on the merits of their claims against the Morrisons. That Mrs. Tafoya was involved in and ultimately prevailed on appeal in a hard-fought legal battle against the Estate of Alex Armijo concerning an attempt by the Estate to disinherit Mrs. Tafoya should not be held against the Tafoyas. They remain entitled to one full and fair opportunity to have their easement claims against the Morrisons heard and decided by our courts. That has not yet happened.

In this reply, the Tafoyas respond to the new arguments raised by the Morrisons at pages 19-28 of their *Answer Brief* as alternative grounds for upholding the decision of the district court. The Tafoyas also point out the many errors in the Morrisons' response to the res judicata and collateral estoppel arguments addressed in the Tafoyas' *Brief in Chief.*

I. Privity Between the Parties to the Prior Action and the Parties to the Current Action is an Essential Requirement of Res Judicata: a Requirement Which is Missing Here.

In Section I of their *Answer Brief,* the Morrisons claim that res judicata bars this action for easement over the Morrisons' land. **AB at 7.** In arguing that this action is barred by res judicata, the Morrisons unfortunately conflate the law and policy applicable to collateral estoppel with the different principles of law which govern res judicata. *City of Santa Fe v. Velarde*, 1997-NMSC-040, ¶5, 564 P.2d 1326 ([t]he doctrines of res judicata and collateral estoppel by judgment involve different and distinct principles"). Because the doctrines are governed by different principles and have different consequences, it is important to consider each separately.

A. <u>The Morrisons' Brief Confuses the Law and Policy Governing Res Judicata, Improperly Conflating Res Judicata and Defensive Collateral Estoppel.</u>

Res judicata imposes a broad bar on re-litigating not only those claims which actually were raised and resolved in a prior action, but also those claims which are so closely related that they were required to be raised in the prior action. Unlike the narrower doctrine of collateral estoppel, res judicata is strictly limited to actions between the very same parties or parties in privity with the original parties. *Silva v. State*, 1987-NMSC-107; ¶ 5, 745 P.2d 380 (res judicata depends upon the identity of

parties or privies; the capacity or character of both parties must be the same in the prior and subsequent actions).

The requirement that both parties be the same or in privity with the original parties is not an incidental requirement: it is essential to the application of res judicata. Indeed, it is the dual requirements – that the parties be the same or in privity and the causes of action be the same – that ensures that both parties had a full and fair opportunity to litigate their claims in the prior action. *City of Santa Fe v. Velarde*, 1997-NMSC-040, ¶5.

This case illustrates the wisdom of the requirement that both parties be the same or in privity. A party to a lawsuit plainly is not free to assert their claims against another party when that party is not present before the court. To bar them from raising these claims in a later action would deny them their day in court. In this case, the court recognized that the Morrisons were necessary parties, without whom the court had no authority to grant the Tafoyas an easement. **3 RP 640:1** (The district court in the Prior Action, responding to the Tafoyas' argument that the Morrisons were necessary parties who would not be bound by the court's judgment, stated: "If I'm going to rule in your favor [grant an easement], I think you're correct, the Morrisons have a right to be heard on it...."). An action against another party where it was apparent that the Tafoyas could not obtain an easement over the

Morrison's land hardly provides the necessary full and fair opportunity to a day in court required by the law of res judicata.

B. The Trial Court Correctly Found that the Morrisons Were Not in Privity with the Estate.

In their *Answer Brief*, the Morrisons concede the central point of the Tafoyas' res judicata argument: that "privity of estate ends once title to the land has transferred." **AB at 11.** Once a transfer occurs, the grantor no longer hold an interest in the land. He, therefore, is no longer in privity with the grantee and is not the proper party to litigate issues affecting that land. *See* **BC at 22-23.**

Although agreeing that privity of estate ends, the Morrisons argue that "privity of contract remains between the grantor and grantee based on the present covenants contained in the warranty deed." **AB at 11.** The Morrisons' privity of contract argument has been addressed by our Supreme Court and rejected. Our Supreme Court has held that a warranty deed makes the grantor an indemnitor of the grantee. *Bloom v. Hendricks*, 1991-NMSC-005, ¶¶ 12, 804 P.2d 1069 ([t]he general effect of a warranty covenant is that the grantor agrees to compensate the grantee for any loss suffered by reason of the failure of title which the deed purports to convey"). It is settled law that a contract of indemnity does not make the indemnitor the real party in interest. A warranty deed makes the prior landowner an insurer of title with

liability to pay after a judgment is entered. This is not the same thing as "liability to be sued." *Lopez v. Townsend*, 1933-NMSC-045, ¶¶ 31-32, 46, 25 P.2d 809 (Watson, C. J.) (on rehearing). As the trial court found, the current landowner is a necessary party to any action filed after the transfer of land.

Finally, to the extent the Morrisons are arguing that the Estate of Alex Armijo was authorized to represent them in the Prior Action, the record fails to support this claim. It is settled law that a person who purports to represent absent parties must have been properly authorized to act as their representative. A person who purports to represent nonparties without such authorization will not be recognized as the nonparties' representative for preclusion purposes. 3D Moores Federal Practice § 131.40[3][e]; *Dudley v. Meyers,* 422 F.2d 1389, 1393-94 (3rd Cir. 1970) (absent evidence that a daughter of one of the defendants represented "her relatives" in prior proceeding, judgment in that action would not be preclusive as to those relatives in the current action).

It is settled law that a warranty deed does not obviate the need for notification of the grantee and authorization by the grantee in order for the grantor to represent the grantee in a particular lawsuit. In *Bloom v. Hendricks*, our Supreme Court made clear that the grantee must be given a choice about whether to represent himself or to authorize the grantor to represent him when litigation is filed which invokes the

warranty. *Id.* ¶21. The Court stated that this is "especially true where the real estate in question involves one's own residence." *Id.* ¶19. The Court in *Bloom* acknowledges that the warrantor and the landowner have different interests and that a property owner might well choose to retain control by representing his own interests. *Id.* ¶¶19, 21. The Court states that "[w]ithout the assent of the grantee, the grantor has no authority to assume the conduct of the defense." *Id.* ¶18.

Although the Morrisons claim in their *Answer Brief* that the Estate was representing their interests, no evidence was presented in either this action or in the Prior Action to establish that this claimed representation was authorized. Generally the complaint or answer in the original action must identify the representative capacity of a party. Restatement (Second) of Judgments §36(1) & cmt. a. No such identification was made here. Moreover, when in the Prior Action the Tafoyas' counsel and the court questioned the Estate's authority to represent the Morrisons, the Estate never claimed that it had notified the Morrisons and obtained authorization to represent them. The Estate argued only its own status as a warrantor based on the deed. **3 RP 562, 639-40.**

Therefore, the essential element of privity between the parties is missing.

C. Res Judicata is Also Improper Because the Causes of Action Are Different.

The Morrisons argue that, the Estate's action under the Will to disinherit Mrs. Tafoya and the Tafoyas' claim to an easement over the Morrisons' property are a single transaction. **AB at 15.** The Morrisons are mistaken. The transactional analysis test does not require that claims as different from each other as disinheritance under a no-contest clause in a will and an easement on property already transferred out of the Estate to another party are the same cause of action and must be tried together. *See Anaya v. City of Albuquerque,* 1996-NMCA-092, ¶8, 924 P.2d 735.

Of the Estate's many claims justifying disinheritance, only one included a factual question which overlapped with the Tafoyas' claim to an easement: the claim that Mrs. Tafoya's refused to cooperate with the Estate in the sale of Lot 1. One of five or six examples of this lack of cooperation was Mrs. Tafoya's refusal to sign the Consolidation Plat. Mrs. Tafoya, in turn, argued that her refusal was justified because the Plat failed to include an easement she reasonably believed existed over the Morrison's driveway. **2 RP 394-95;** *Redman-Tafoya v. Armijo,* 2006-NMCA-011, ¶28, 126 P.3d 1200.

The other claims, each of which the court found "separately and independently" constituted a contest of the Will, had nothing to do with the Tafoyas' claim to an

easement over the Morrisons' land. These issues included: (1) Mrs. Tafoya's counterclaim to revoke the inheritance of heirs Armijo and Raquel Lopez in the Estate's quiet title lawsuit; (2) Mrs. Tafoya's efforts to prevent the sale of the Residence; (3) Mrs. Tafoya's Petition in the probate proceeding seeking the removal of the Personal Representative; (4) Mrs. Tafoya's refusal to remove the portions of her home and her fence which encroached on the Estate's five-foot easement over her land; (5) Mrs. Tafoya's rejection of reasonable accommodations which would have allowed her to keep her house intact; and (6) Mrs. Tafoya filing of a letter in the Probate action against the advice of counsel accusing the Personal Representative of acting improperly. **2 RP 394-95;** *Redman-Tafoya v. Armijo,* 2006-NMCA-011, ¶ 28, 126 P.3d 1200.

Indeed, under the principles of law adopted by this Court in *Redman-Tafoya*, Mrs. Tafoya's refusal to sign the Consolidation Plat is not relevant at all to determine whether she improperly contested the Will: the only relevant question is whether Mrs. Tafoya filed an action in court seeking to invalidate the Will or a provision of the Will. *Redman-Tafoya v. Armijo*, 2006-NMCA-011, ¶58.

Finally, to be considered part of the same transaction, the claims also must be capable of being brought in the same proceeding. As explained above, given that the Morrisons were not a party to the Prior Action, the Tafoyas could not have brought

their easement claims in the Prior Proceeding. The court in the Prior Action recognized this and ruled that it had no authority to award the Tafoyas an easement of any sort over the Morrisons' land. The court held as follows:

> The Estate no longer owns [Lot 1] and has no power to grant Tafoya's demand for an easement over the fifteen (15) foot [driveway] to access any off-street parking on Tafoya's lot.

2 RP 391, FOF 59. The Tafoyas, therefore, could not have brought their easement claims in the Prior Action.

In conclusion then, both because the Estate and the Morrisons were not in privity at the time the Prior Action was commenced and because the question of the existence of an easement over land which had been transferred to the Morrisons was not part of the same subject matter as the disinheritance claim, the Prior Action is not res judicata as to the Tafoyas' easement claims.

II. Collateral Estoppel Does Not Bar the Tafoyas' Claim for a Driveway Easement Because There Was No Final Judgment on the Merits in the Prior Action.

The Morrisons assert in their *Answer Brief* that there is no dispute in this appeal that a final judgment on the merits was entered in the Prior Action. A final judgment on the merits is a requirement of collateral estoppel. **AB at 18.** The Morrisons overlook the argument made at pages 28-29 of the *Brief in Chief,* where

the Tafoyas plainly dispute the Morrisons' claim that a final judgment on the merits was entered. They overlook, as well, the undisputed facts in this case.

For collateral estoppel to apply, an issue must be both actually litigated and incorporated into a final judgment that definitively concludes the matter on its merits. Restatement (Second) Judgments §27; *Paulos v. Janetakos*, 1942-NMSC-057, ¶14, 129 P.2d 636. Where a judgment of dismissal with prejudice is entered following a settlement, collateral estoppel does not apply. *Pope v. Gap Inc.,* 1998-NMCA-103, ¶¶25-27, 961 P.2d 1283 (a consent judgment or settlement is not a judicial determination of the issues raised in the action and, therefore, does not satisfy the requirement of collateral estoppel that the issues in the prior action be "actually decided" by the court with a judgment entered on the merits).

No final judgment on the merits of the district court's decision was entered in this case. Following the entry of an initial judgment by the district court in this case, the Tafoyas appealed. Mrs. Tafoya prevailed on her appeal to this Court. *Redman-Tafoya v. Armijo,* 2006-NMCA-011. This Court reversed and remanded for entry of judgment consistent with the opinion of this Court favoring Mrs. Tafoya. *Id.* at ¶70; Rule 1-085. Rather than litigating whether a portion of the prior district court decision remained viable and should be incorporated into the final judgment on

remand, the parties reached a settlement agreement. The court entered a stipulated judgment of dismissal of all claims with prejudice. **2 RP 400.**

The rule that collateral estoppel does not apply to preclude re-litigation of any issue arising from a prior action in which there was no judgment entered on the merits of the action is a hard and fast rule. The Estate in the Prior Action, concerned with Will contest and its loss on appeal, did not seek to argue the difficult law-of-the-case questions raised on remand. These questions include, for example: (1) whether the law-of-the-case doctrine permits the district court to enter a judgment on findings which the Court of Appeals has determined are irrelevant to the issue in the case; and (2) whether the district court can enter judgment on an easement claim when a necessary party is not before the court. The Tafoyas contend that the district court in the Prior Action did not have authority to reinstate its findings relating to an easement over the Morrisons' driveway once this Court determined that these findings were irrelevant to the issue before the court. In any event, however, the Estate decided not to seek a judgment on remand incorporating the court's findings and instead entered into a Settlement Agreement dismissing all claims with prejudice. **2 RP 412.** The net result is that there was no final judgment incorporating the district court's findings on the Tafoyas' easement claims against the Morrisons.

Finally, even if this Court were to conclude that the original findings of the district court on the Tafoyas' easement somehow remained in place despite this Court's reversal of the district court's decision, collateral estoppel still would not apply to those findings. First, the court's findings on the easement issue are plainly not necessary to the court's judgment, as set forth in the BIC at 29-32. Second, the Restatement (Second) of Judgments recognizes that a party is required to focus an appeal on the legal and factual issues central to their claim (here the Will contest). Restatement (Second) of Judgments, § 27, cmt. h. A sufficiency of the evidence challenge to a collateral finding is seldom wise. Where a party prevails on appeal on another issue without challenging the sufficiency of the evidence to support a finding collateral to the judgment, as was the case here, the Restatement concludes that it is unfair to bar re-litigation of the collateral findings: "the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation." Restatement (Second) of Judgments, § 27, cmt. h.

III. The Morrisons' Claim that the Settlement Agreement Between the Tafoyas' and the Estate Bars this Action is Not Supported by the Terms of that Agreement.

Apparently relying on the doctrine of "right for any reason", the Morrisons ask this Court to find, in the alternative, that the terms of the Settlement Agreement concluding the Prior Action between the Estate and the Tafoyas bars the Tafoyas from bringing this lawsuit. **AB at 20-23.** The district court did not agree with the Morrisons' claim.

It is undisputed that the Morrisons were not a party to the Settlement Agreement. The only parties are the Estate, Mrs. Tafoya's sister, and Mrs. Tafoya. **2 RP 400.** Recognizing this, the Morrisons claim that the Settlement Agreement covers them as "successors" to the interests of the Estate. **AB at 22.** The term successor, however, refers to parties who subsequently succeed to the interests of the party and later come to stand in that party's shoes. The Morrisons here were not in a position to succeed to the interests acquired by the Estate in the Settlement Agreement. The land the Morrisons owned, although previously owned by the Estate, had been transferred to them a year prior to the commencement of the Prior Action in November, 2002. Moreover, at the time the Settlement Agreement was entered, the Estate was aware that the district court had ruled that the Morrisons were necessary parties. Given this ruling, if the Estate intended that the Morrisons would

benefit from the Settlement Agreement, the Estate would have brought them in as a party to the Agreement or at least mentioned them by name. This was not done. **2 RP 400-411.**

The Morrisons also argue that the easement claims were intended to be barred by the language of the Settlement Agreement precluding the Tafoyas from again bringing any claim that was or could have been raised in the Prior Action. As explained above and in the *Brief in Chief*, however, the Tafoyas' claim to an easement over the Morrisons' land was neither actually litigated in the Prior Action nor could it have been litigated in that action.

Therefore, both because the Morrisons are not a party to the Settlement Agreement and because the Tafoyas' easement claims were not and could not have been litigated in the Prior Action, the Settlement Agreement does not bar this lawsuit.

IV. New Mexico Law Plainly Provides for an Easement by Necessity to Access the Backyard of the Tafoyas' Home.

In Section IV of their *Answer Brief*, the Morrisons argue that, in order to establish an easement by necessity, New Mexico law requires proof that an entire property is completely landlocked and thereby cut off from any public roadway. **AB at 23.** The Morrisons argument relies on outdated New Mexico law.

In considering the nature of implied easements by necessity, New Mexico our courts rely on the Restatement (Third) of Property: Servitudes §2.15 (2000).

Firstenberg v. Monribot, 2015-NMCA-062, ¶45, 350 P.3d 1205. According to the Restatement, an implied easement by necessity arises out of "[a] conveyance that would otherwise deprive the land conveyed to the grantee ... of rights necessary to reasonable enjoyment of the land ... unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights." *Id.* As this Court recently held, the phrase "[r]ights necessary to reasonable enjoyment of property" applies to allow "whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things." *Id.*

The property need not be entirely landlocked to meet this standard. So long as the necessity has arisen as a result of the severance of rights held formerly by a single owner, an easement by necessity can be claimed based on loss of any right reasonably necessary for the enjoyment of all or a portion of the property. *Firstenberg* 2015-NMCA-062, ¶45. In *Firstenberg*, this Court approved of an easement by necessity over a neighbor's property in order to connect to electric power without incurring great expense to install a new line. *Id.* Even before the Restatement (Third) was adopted in 2000, our courts recognized an implied easement of necessity where, following a lot split, a homeowner was left with only circuitous access to his backyard. *Sitterly v. Matthews*, 2000-NMCA-037, ¶24, 129 N.M. 134, 2 P.3d 871.

In this case, there is no dispute that the Tafoyas' Lot 2 was owned in common with Lot 1 before the Family Lot Split. The Tafoyas' affidavits and the photographs in the summary judgment record show that without an easement over the Morrisons' driveway, their access to their backyard and to the only entrance to their house which is at ground level, is completely cut-off from any access to a public roadway. **2 RP 447, 455-66, 475**. The Tafoyas' enjoyment of their backyard and their use and enjoyment of their residence is thereby severely impaired absent an easement over the Morrisons' driveway.

When the correct principles of New Mexico law are applied, these undisputed facts are sufficient under New Mexico law to allow decision on summary judgment in the Tafoyas' favor or, at a minimum, to require trial on whether there is an implied easement by necessity for ingress and egress to the Tafoyas' backyard.

V. Facts Remain in Dispute on the Prescriptive Easement Claim.

The Morrisons concede in their *Answer Brief* that the Tafoyas' prescriptive easement claim is not barred by either res judicata or collateral estoppel. **AB at 24.** They argue, instead, that the Tafoyas conceded their prescriptive easement claim by not introducing new evidence to defend against the entry of the judgment quieting title, the final judgment from which this appeal was taken. ***Id. See* BC at 38.**

This argument is not supported by the record. The Tafoyas both adopted their arguments made in the summary judgment portion of their case and also submitted additional argument and affidavits. *See* **2 Supp. RP 1052-1070; 1085-1110.** Nor is it true that the Tafoyas have waived their challenge to the quiet title judgment on appeal. They properly appealed from the quiet title judgment, which this Court previously decided was the final judgment in this matter. Their *Brief in Chief* requests that the judgment quieting title be vacated. **BC at 38.**

Next, the Morrisons argue that the proper period for a prescriptive easement runs from entry of the judgment of the district court in the Prior Action. **AB at 28; 2 Supp. RP 1074-75**. The Prior Action, however, would only interrupt and restart the prescriptive period if it quieted title in the Morrisons. *See Trigg v. Allemande*, 1980-NMCA-151, ¶ 24, 619 P.2d 573. As discussed extensively in Section I above however, the Prior Action was plainly not a quiet title action. The Morrisons were not even a party and no order quieting title was sought or entered. Moreover, even the Morrisons concede that the Prior Action "has no res judicata or collateral estoppel effect on Tafoyas' prescriptive easement claim." **AB at 24.** That being true, there is no basis for the court's decision starting the prescriptive period on the date the judgment was entered in the Prior Action. *See* **BC at 35-36.**

The dispositive factor in when the prescriptive period begins to run is the point when the use of the driveway by the Tafoyas first became adverse. The Tafoyas claimed in both their complaint and summary judgment pleadings that the prescriptive period began to run upon the death of Alex Armijo in May, 1997. **1 RP 79-80; 2 Supp. RP 1091.** It was on that date that the Estate assumed ownership and control of Lot 1. The Estate did not respond to this claim below, instead arguing that the prescriptive period could not start until after the decision in the Prior Action. **2 Supp. RP 1074-75.** Because the prior action is not res judicata or collateral estoppel as to the prescriptive easement claim, the conclusion of the court (and of the Morrisons) that the Prior Action restarted the prescriptive period is in error.

Finally, there remain disputed issues about whether the prescriptive period was interrupted. There is no affidavit or deposition testimony from either the Estate or the Morrisons in the summary judgment record which documents the easement being blocked at any time prior to the Fall of 2013. **2 RP 1074; 1077.** The Tafoyas claimed in affidavits that their use was continuous from 1997, until 2013, when the Morrisons erected a fence. **2 RP 451-52, 477; 2 Supp. RP 1091.** They asserted that a chain had been put up, but that it was left unlocked. ***Id.*** .

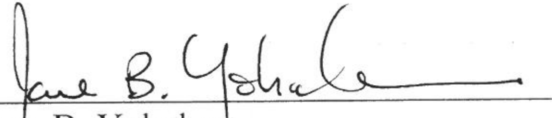
In conclusion, then, the district court erred in applying principles of res judicata to conclude that the filing of the Prior Action by the Estate stopped the running of the

prescriptive period. When the proper standard of law is applied, either summary judgment should be entered for the Tafoyas on their prescriptive easement claim, or the case should be remanded for trial.

CONCLUSION

For the reasons stated in this Reply and in the Tafoyas' *Brief in Chief*, neither res judicata nor collateral estoppel bar the Tafoyas' claims to an easement of access for ingress and egress to their backyard over the Morrisons' driveway. Neither do the Morrisons' alternative arguments support summary judgment for the Morrisons. Therefore, either summary judgment should be granted on the Tafoyas' easement by necessity or prescriptive easement claims or this case should be remanded for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this Motion to the following counsel of record by first class U.S. Mail on this, the 26th day of February, 2016:

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