

1997

McKay v. Smith\'s Food Store : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEPHANIE MCKAY,	:	
	:	Appellate No. 970312-CA
Plaintiff/Appellant,	:	
	:	First District Court
vs.	:	Civil No. 94-025-PI
	:	
SMITH'S FOOD STORE, ET AL.,	:	Priority No. 15
	:	
Defendant/Respondent.	:	

REPLY BRIEF OF APPELLANT

Appeal from an Order Granting
Summary Judgment to Defendants
The Honorable Gordon J. Low

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ARGUMENT I

SMITH'S MISINTERPRETS THE HOLDING OF SCHNUPHASE V. STOREHOUSE MARKETS, 918 P.2d 476 (Utah 1996).

Smith's argues that "the issue is still before the Court as to whether the unsafe condition was known, or should have been known, by exercise of reasonable care on the part of Defendant Smith's..." (Brief of Appellee Smith's - p. 16).

Smith's then argues that there is no evidence that it knew, or should have known, of the defect giving rise to Mrs. McKay's injury and no evidence that Smith's could have foreseen the danger. Plaintiff McKay suggests that Smith's has misunderstood the holding of the Court in Schnuphase, and that there was adequate evidence of foreseeability presented to the Court.

Both Canfield and Schnuphase support Plaintiff's position that the evidence presented creates an adequate question of fact as to the foreseeability of the danger posed by Smith's behavior, and the injury growing from the choices made by Smith's. The Court has asserted in Canfield that liability:

"...usually requires that the store owner, its agents, or employees, actually create the condition or defect that results in an injury to a patron." Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah App. 1992) p. 1225.

The Supreme Court in Schnuphase v. Storehouse Markets, 918 P.2d 476 (Utah 1996) determined that a predicate to application of the Canfield doctrine requires that there must be "...foreseeability of an inherently dangerous condition" and "...that foreseeability and inherent danger are key elements of a negligence action

under the second theory of liability." Schnuphase 918 P.2d at 479.

In Canfield and Schnuphase, both fact situations arose from a dangerous condition of a temporary nature. The Utah Supreme Court made clear that situations involving unsafe conditions of a permanent nature had different applications:

"The second class of cases involves some unsafe conditions of a permanent nature, such as: in the structure of the building...which was created or chosen by the defendant (or his agents), or for which he is responsible. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary." Schnuphase, 918 P.2d at 478.

That is precisely the condition which confronts Smith's. In this instance, Smith's created the hazard by building the store, or rather, by hiring agents which built the store on its behalf and at its behest. Actual notice of the defective condition is, therefore, not required under either Canfield or Schnuphase. However, foreseeability of the dangerous condition is required. The Trial Court, therefore, should have used the second prong of reasoning when it selected the standard used under Canfield and Schnuphase. The Trial Court erroneously applied the standard requiring knowledge of the defect causing the injury with no prior notice of the defect required.

"The issue is still before the Court as to whether the unsafe condition was not known or should have been known by exercise of reasonable care on the part of Defendant Smith's..." (See, TR 829 - Memorandum Decision, p. 5, attached as Addendum #1).

The Trial Court should properly have used the standard

identified in Schnuphase - that being foreseeability of an inherently dangerous condition.

Multiple instances of the foreseeability of the instrumentality of Mrs. McKay's injury were addressed to the Trial Court and referenced in her Brief, summarized as follows:

1. Smith's provided the specifications for an interior door to be utilized in an exterior application. See, TR at 1360. The chief engineer of the manufacturer of the door stated in his deposition that it would be "misuse" to have installed the U.S. Aluminum "interior use only" door in an exterior setting. See, TR at 1304. It is foreseeable that an injury might occur if Smith's installed a door in a Northern Utah store taken from specifications for a store in Central Arizona. (See, p. 5, para. 9 of Smith's Brief).

2. Smith's failed to investigate why its Architect or his predecessor had designated an interior-use only door for an exterior setting. Had it done so, it might have discovered that water drainage, frost wedges, and weights in excess of two hundred fifty (250) pounds might cause a failure in that particular door. It is again foreseeable that Smith's failure to require the installation of the proper door could result in an injury when those factors play some role in the failure of that door. (See, TR at 730, Affidavit of Dr. McEntyre).

3. Smith's has admitted that it had no policies, rules, standards and/or guidelines in effect at the time of the injury relative to maintenance, cleaning or upkeep of the door. (See, TR

at 693, 737-738). It is foreseeable that failure to clean, maintain, and/or provide upkeep on the door by Smith's could cause a door to fail leading to injury of its customers. It is likewise foreseeable that if store employees and co-workers were never instructed to clean the grating and never cleaned the grooves of the tracts of the threshold, that the accumulation of such debris could lead to a failure in the door mechanism. (See, TR at 730 and 733).

That agents for Smith's may have failed to notify Smith's of its obligations to implement an appropriate cleaning and maintenance program is a burden that Smith's must resolve by crossclaim with its agents as provided by the Schnuphase standard.

4. In that same vein, if Co-Defendant/Appellee Crittenden Paint and Glass Company misled the general contractor, misled the architect, and misled Smith's itself by cropping off crucial warning language, the foreseeability of injuries growing from the deception must remain the responsibility of the principal, to be resolved through third party complaints and crossclaims. (See, TR at 1678-1679).

5. If the architect which Smith's hired failed to apprehend the danger of installing an interior use-only door from Central Arizona into an exterior setting in Northern Utah, the responsibility for that failure must rest between Smith's and its agents, without holding the injured victim hostage to any agency failures. Unrebutted evidence was presented that the door was not fit for the purpose intended. (See, Affidavit of Architect, Anthony Wegener,

TR at 454-5). That created a question of fact precluding summary judgment.

6. The same may be said for the failure of the general contractor to detect the dangers of the installation of the wrong door, as well as the failure of the manufacturer of the door to appropriately warn its potential customers of weight-bearing limitations and maintenance requirements. (See, TR at 1250-1251). In no instance can it be said to fairly impose upon Mrs. McKay the obligation to have been alerted to the failures by Smith's and its agents.

7. Evidence was presented at the Trial Court regarding the negligence of each of the other co-defendants as follows:

(a) U.S. Aluminum warned potential purchasers that the door in question was limited to interior-use only. However, it is a question of fact as to whether it properly warned such purchasers that the stainless steel cap was susceptible to deformation if not properly cleaned and maintained, whether weight in excess of two hundred fifty (250) pounds might cause deformation of the track and, therefore, lead to injury (See, TR at 1240), or whether exposure in a high-altitude, Northern Utah setting, might cause a frost wedge to work the stainless steel cap off the track, leading to a hazardous situation. See, TR at 1240 and 1241.

(b) Crittenden Paint and Glass, intentionally or otherwise, cropped the warning words "for interior applications only" off each page submitted to the architect and the general contractor. See, TR at 1678 and 1679. It is a question of fact as

to whether or not supplying that warning to both the architect and the general contractor would have made any difference in those defendants issuing a warning to Smith's - even though Smith's may be presumed to have understood the warning in light of its prior approval of the door in question.

(c) Defendant Chamberlin should have known that it would be inappropriate to have allowed the installation of an "interior-use only" door at an exterior site. See, TR at 730. It becomes a question of fact as to whether his Nuremburg-type defense "I was only doing what I was told" would overcome his obligation as the General Architect ultimately responsible for the whole project. See, TR at 1375 and 1376.

(d) R&O Construction hired Crittenden Paint and Glass, and should be responsible for the negligent or intentional conduct of its subcontractors. See, TR at 1599. Any allocation of liability for the omissions of R&O Construction is within the province of the trier of fact.

The Schnuphase Court recognized the ultimate responsibility of the store owner in such cases when it observed:

"[The] essential element in method of operation claims is that the condition created by the defendant is of such a character that the defendant has or should have notice of an inherently dangerous condition." (See, Randall v. Allen, 862 P.2d 1329, 1336 (Utah 1993)).

When Appellee Smith's chose the wrong door for Logan, Utah, when it failed to investigate the risks of using the wrong door in Logan, Utah, and failed to clean and maintain the door, it was

certainly foreseeable that the door might fail and create an inherently dangerous situation for its patrons. Responsibility must, therefore, lie with Appellee Smith's and its agents. Otherwise, every merchant throughout the State will attempt to create immunity for itself by making poor decisions, remaining intentionally ignorant of the risks of its poor decisions, and have no incentive to avoid sloppy maintenance and cleaning policies. All such behavior would constitute insulation for the merchant from the injuries which its poor practices might cause. Application of such a doctrine would result in immunity from any liability whatsoever. Judge Low accepted that dangerous premise when he observed:

"Under the facts here shown, Smith's had no reason to know of the existence of a steel cap, much less that it might fail under conditions of dirt, ice, debris or heavy loads." (See TR 831-832 - Memorandum Decision, p. 7-8).

What the Judge failed to recall was the evidence and admissions by Smith's itself that Smith's chose the door containing the steel cap, Smith's chose the Architect which approved the door having the steel cap, Smith's hired the General Contractor which allowed the installation of the wrong door which had a steel cap, and Smith's consented to the hiring of the subcontractor which cropped off the evidence that the door was inappropriate for an exterior application. It is inappropriate to insulate Smith's from the consequences of its choices by asserting that it had no reason to know of the existence of a steel cap which ultimately injured Mrs. McKay. Further, constructive knowledge of the defect in the

door could reasonably be inferred from Smith's faulty cleaning practices. (See, Austin v. Shoney's, Inc., 486 S.E. 2d 285 (VA 1997)).

ARGUMENT II

JUDGE LOW MISAPPLIED THE CANFIELD-SCHNUPHASE STANDARD.

In his Memorandum Decision dated May 7, 1996, Judge Low consistently misapplies the appropriate standard established by the Court in Canfield and reaffirmed in Schnuphase. In the second line of cases established by the Canfield decision, notice is unnecessary if:

"...the store owner, its agents, or employees actually create the condition or defect that results in an injury to a patron [or] where the store owner's method of operation creates a situation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect." Canfield, p. 1225.

In such a circumstance where a store owner chooses such a method of operation, the injured party "...need not prove either actual or constructive knowledge of the specific condition." Notice is satisfied as a matter of law because the store owner is deemed to be informed of the dangerous condition since it adopted the method of operation.

The Court indicated:

"The second class of cases involves some unsafe condition of a **permanent** nature, such as: in the structure of the building...which was created or chosen by the defendant (**or his agents**), or for which he is responsible. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary."

Schnuphase 918 P.2d at 479. [emphasis added]

Throughout his entire Memorandum Decision, Judge Low misapprehends that standard and seeks to impose on Mrs. McKay the obligation of proving that Smith's knew of the underlying defect in the door that it chose:

1. "...There is no showing that Smith's was aware...that the door was not designated for outdoor use..." See, TR at 827 - Memorandum Decision of Judge Low, p. 3. [Emphasis added.]

2. "There was nothing to show [that defendant knew or should have known] that the raising of the stainless steel cap was caused by an ice wedge..." See, TR at 827 - Memorandum Decision of Judge Low, p. 3. [Emphasis added.]

3. "There is no showing that [the defendant knew or should have known that] the track was raised as a result of dirt or heavy use." See TR at 827-828 - Memorandum Decision of Judge Low, p. 3-4. [Emphasis added.]

4. "The landowner is liable for damages resulting in physical harm caused to invitees by a condition of the land **only if he knows...of the condition** and realizes it would involve unreasonable risk or harm to invitees." See TR at 828-829 - Memorandum Decision of Judge Low, p. 4-5. [emphasis added]

5. "The issue is still before the Court as to whether the unsafe condition **was known or should have been known** by... Smith's..." See, TR at 829 - Memorandum Decision of Judge Low, p. 5. [emphasis added]

6. "What is at issue is whether defendant Smith's had an

obligation to do anything other than what it did in order to **be aware** of or remedy the situation." See, TR at 830 - Memorandum Decision of Judge Low, p. 6. [emphasis added]

7. "There simply is **no evidence that...Smith's knew...**that installing such [an interior] door in an exterior location would involve unreasonable risk of harm to invitees." See, TR at 831 - Memorandum Decision of Judge Low, p. 7. [emphasis added]

8. "That dirt, ice or other contaminants '...may be the underlying cause of the door's failure, there is **no showing that Smith's was...aware of...that risk'**". See, TR at 831 - Memorandum Decision of Judge Low, p. 7. [emphasis added]

9. "**No warning was provided** to Smith's...that ice, dirt, debris or heavy loads would cause...the type of damage to the door which occurred." See, TR at 831 - Memorandum Decision of Judge Low, p. 7. [emphasis added]

10. "**Smith's had no reason to know** [that the steel cap] might fail..." See, TR at 833 - Memorandum Decision of Judge Low, p. 9. [emphasis added]

11. "Liability can only be imposed **when...defendant knew or should have known** of the condition..." See, TR at 833 - Memorandum Decision of Judge Low, p. 9. [emphasis added]

12. "Because there is **no evidence that Smith's knew** of the cap coming free...summary judgment for Smith's is appropriate." See, TR at 833 - Memorandum Decision of Judge Low, p. 9. [emphasis added]

Those citations from the Memorandum Decision make it

abundantly clear that Judge Low simply misapplied the Canfield and Schnuphase prong adopted by this Court - which prong wholly and completely eliminates the obligation for notice to the merchant or knowledge of the merchant in those select circumstances where the merchant is in control of the dangerous instrumentality:

"We, therefore, reiterate the rule set forth in De Weese, that where the store owner chooses a method of operation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition, an injured party need not prove either actual or constructive knowledge of the specific condition." Id. at 901. Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah Ct. App. 1992 at 1225).

Judge Low also commented on the evidence presented:

"The testimony is uncontested that [Smith's] did have a cleaning and maintenance program, though not specifically focused on the track of the door..." See TR at 828 - Memorandum Decision of Judge Low, p. 4.

Smith's cleaning and maintenance policy for the rest of the store is immaterial. It was uncontested that there was no maintenance, cleaning or upkeep policy whatsoever by Smith's relative to the door itself. See, Record at 693, 695, 696, 737 and 738. Whatever other maintenance and cleaning program might have been used in the rest of the store is not central to the issues before this Court.

Judge Low acknowledges:"...that the door in question was under the control of the defendant." Memorandum Decision of Judge Low at p. 5, further acknowledges the possibility that dirt, ice, or other contaminants "...may be the underlying cause of the door's failure. There is not a showing that Smith's was ...aware of...that risk."

See, TR at 831 - Memorandum Decision of Judge Low, p. 7.

By acknowledging that the control of the door was Smith's responsibility, that the original purchase and installation of the door was under the control of Smith's, and that the various factors giving rise to the failure of the steel cap such as cleaning and maintaining of the track were under the control of Smith's or its agents, the Court should have correctly applied the applicable standard set forth in Canfield and Schnuphase. The Court failed to apply that standard to the facts of the present case. By applying the wrong standard, prejudicial error was committed.

**REPLY AS TO U.S. ALUMINUM,
CRITTENDEN PAINT AND GLASS,
CHAMBERLIN, AND R&O CONSTRUCTION**

SMITH'S IS LIABLE FOR THE NEGLIGENCE OF ITS AGENTS

In the ten page Memorandum Decision issued by Judge Low on May 7, 1996, two sentences are devoted collectively to the motions for summary judgment filed by Crittenden Paint and Glass Company and R&O Construction. U.S. Aluminum received one sentence and Chamberlin was dismissed summarily several months later. Virtually the entire basis for granting summary judgment for these defendants is focused on Smith's and its knowledge and behavior. One can conclude that the Court felt that if Smith's was entitled to summary judgment, then the other defendants were likewise entitled. In fact, that is precisely what the Court said: "Largely for the reasons above stated [the prior nine and a half pages] and for the reason set forth in [the Memoranda submitted by the other defendants], the same are granted." See, TR at 834 - Memorandum

Decision of Judge Low, pp. 10.

The Trial Court believed that if Mrs. McKay had no claim against Smith's, then she had no claim against parties with whom she had no connection, claim, or interest. However, if this Court of Appeals reverses and remands the matter for trial to the District Court as to Smith's it should likewise reverse and remand as to all other defendants, inasmuch as the other defendants were each acting as agents for Smith's. The proportionate share of liability those defendants owed to Mrs. McKay through the principal, Smith's, is an issue more appropriately determined by a trier of fact at trial.

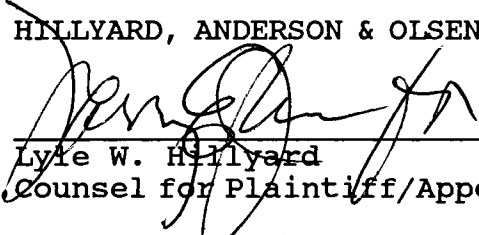
CONCLUSION

It is simply unreasonable to require a Plaintiff to visually inspect each foot fall and to look continuously at the floor for defects. Mrs. McKay was entitled to assume that Smith's and its agents had exercised reasonable care to make the premises safe for her to return two videos rented from the store. So long as she exercised the prudence that an ordinarily careful person would use in a like situation, she should be entitled to recompense for her injuries. There is a reasonable question of fact based upon the un rebutted Affidavits submitted by Plaintiff, and the admissions by Smith's and its agents. The Trial Court utilized the standard established in the first prong of cases described in Canfield and Schnuphase when it should have used the second prong dealing with foreseeability of an inherently dangerous condition. That foreseeability issue is amply addressed in the trial record. The


decision of the Trial Court should be reversed and remanded.

Respectfully submitted

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MCKAY v. SMITH'S FOOD STORE et al
#940000025

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing REPLY BRIEF, Stephanie McKay v. Smith's Food Store and Drug Centers Inc., et al, Case No. 940000025, postage prepaid, this 30^E day of January, 1998, to the following:

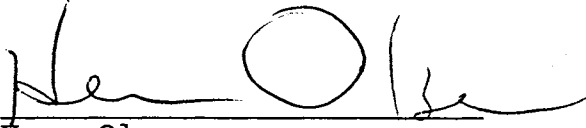
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IN THE FIRST DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE AND DRUG
CENTERS INC., et al

Defendant.

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MEMORANDUM DECISION

Case No. 940000025

THIS MATTER IS BEFORE THE COURT upon a Motion for Summary Judgment. The hearing was conducted on March 25, 1996, and the Court allowed additional time for filing of supplemental memoranda and affidavits. However, the Court forgot that additional time was allowed for such filing and had taken the matter under advisement and issued a Memorandum Decision prior to Plaintiff's counsel having the opportunity to supplement the record. Upon realizing the error, the Memorandum Decision then was set aside and the matter thereafter reviewed afresh considering the supplemental memoranda, affidavits, and documents supplied by the parties. Having done so, the Court now reaffirms its earlier Memorandum Decision.

In order to block a Motion for Summary Judgment, the party against whom the Motion is brought must show that there exists

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May 7, 1996

[Signature]

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There is no showing from the Plaintiff that in Smith's ordering and installing of the door, even though it was perhaps not specifically designed by the manufacturer for outdoor use, contributed to the injury. More specifically, there is no showing that Smith's was aware or had any reason to become aware of the fact that the door was not designated for outdoor use or more importantly, that its use in the location in the store was a breach of duty to the Plaintiff. What the Plaintiff has shown by expert opinion is the mechanism by which, or how, the door track failed and why it failed.

The Plaintiff has suggested that the Defendant had a duty of ordinary care toward her in selecting, installing, and maintaining the door track in question. That is true, but there is nothing to indicate that ordering and installing a door, even if it was designed for inside use only, was in fact a negligent act. It must be shown that the duty was one that could or should have been known to the Defendant and that the duty was breached. There is nothing herein to indicate that the Defendant should have known that the door was an inappropriate door or even if Defendant did, that it was subject to the type of problems experienced. There was nothing to show if in fact the raising of the stainless steel cap was caused by an ice wedge and that the Defendant knew or should have known that would result. There is no showing that, if in fact the

by the exercise of reasonable care would discover the condition and realizes that it involves unreasonable risk or harm to invitees. The undisputed facts contain no evidence that the Defendant knew, should have known, or by reasonable care could have discovered the condition which apparently caused the injury to the Plaintiff.

The Defendant has cited both English v. Kienke 848 P.2d 153 (Utah 1993) and Laws v. Blanding City, 893 P.2d 1083 (Utah Ct. App. 1995) (cited?). It is settled that the Defendant, though it may have a high duty of care to invitees, is not strictly liable to injuries occurring to the invitee. Additionally, Plaintiff distinguishes slip and fall cases such as related to food or things of that nature on a floor caused by third parties as opposed to dangerous conditions under the exclusive control of, or caused or created by, the Defendant as to the issue of negligence and the standard to be applied. Here, there is no question that the door in question was under the control of the Defendant. That does not, however, indicate in and of itself, that in fact a dangerous condition came into existence for which the Defendant is liable. Strict liability is not the standard for possessors or owners of land in Utah. The issue is still before the Court as to whether the unsafe condition was known or should have been known by exercise of reasonable care on the part of Defendant Smith's and

been anticipated and was a contributing factor in its failure", is insufficient to refer the matter to a jury. That, if the Defendant did not carefully keep the tracks or grooves of the doors clean at all times which may have allowed rocks, ice, and debris to interact with the traffic of the doors resulting in deformation of the product, does not demonstrate negligence. Plaintiff must show that failure to do so should have suggested to Smith's that the same involved unreasonable risk and harm to the invitees. There simply is no evidence that if the door was designed for interior use only that Smith's knew of that fact or that installing such door in an exterior location would involve unreasonable risk or harm to invitees.

More specifically, with respect to whether the door failed as a result of dirt, ice or other contaminants, though that may be the underlying cause of the door's failure, there is not a showing that Smith's was or could have been reasonably aware of, or reasonably foreseen, that risk. No warning was provided to Smith's nor has there been any reason shown that a reasonable person should understand that ice, dirt, debris or heavy loads would cause the type of damage to the door which occurred. Under the facts here shown, Smith's had no reason to know of the existence of a steel cap much less that it might fail under conditions of dirt, ice, debris or heavy loads. Again, the burden is on the Plaintiff to

become loose and cause a hazard to the Plaintiff. The Court can only conclude that accepting the Plaintiff's theory in this matter would seek to hold the Defendant liable for any defect on the premise regardless whether Smith's had any reason to know of the actual hazard or that its activity may contribute to the hazard and would in fact require the store owner to be strictly liable and place the store owner in a position of insurer. That is not the standard. If it were the standard, then Plaintiff would be entitled to summary judgment in her favor on the issue of liability and there would be no issue except for damages for the trier of fact. Plaintiff is not entitled under the case law to a summary judgment because this is not a strict liability case, it is one of negligence and the Plaintiff is unable to show that her injuries, as severe as they may be, were caused by negligent acts of the Defendant. Liability can only be imposed when there is some evidence that the Defendant knew or should have known of the condition and realized that it posed an unreasonable risk of harm to its patrons. Because there is no evidence that Smith's knew of the cap coming free or it should have known of the dangers of the cap coming free, summary judgment for Smith's is appropriate. As pointed out by the Defendant's Memorandum, to submit this matter to the jury would require the jury to speculate that the Defendant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Stephanie McKay v. Smith's Food Store and Drug Centers Inc., et al, Case No. 940000025, postage prepaid, this 7 day of May, 1996, to the following:

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