

1980

# Ralph L. Conk v. Wallace L. Chambers, M.D., and Granger Medical Clinic, A Corporation : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

RALPH L. CONK,

Plaintiff-  
Appellant,

vs.

WALLACE L. CHAMBERS, M.D.,  
and GRANGER MEDICAL CLINIC,  
a corporation,

Defendants-  
Respondents.

Case Number 16227

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT ON JURY VERDICT  
THIRD DISTRICT COURT FOR  
SALT LAKE COUNTY  
STATE OF UTAH

HONORABLE STEWART M. HANSEN, JR., JUDGE

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FILED

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OF THE STATE OF UTAH

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Plaintiff-	:	
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REPLY BRIEF OF APPELLANT

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ARGUMENT

POINT I

THE 'TWO ISSUE RULE' URGED BY THE RESPONDENT SHOULD  
NOT BE ADOPTED BY THIS COURT AND IF ADOPTED,  
SHOULD NOT APPLY TO THE CASE AT BAR.

Respondent's first assertion in his brief is that if any error is found in the trial court's conduct of the trial it is harmless error because other issues were error free. This theory has been referred to as the "two issue rule." It is urged that this court should adopt that rule. (Respondent's Brief pp. 11-20).

Appellant takes the position that the "two issue rule" is not the rule in Utah, has never been the rule in Utah, does not fit the structure of Utah law, is not a just rule, and should not be adopted by the Court. Nonetheless, even under the premises of the "two issue rule" the errors claimed by appellant constitute prejudicial error.

As a first step toward the analysis of the two issue rule in the case at bar appellant asserts that the allegations error in his brief are in fact error as briefed earlier. Certain of those allegations will be discussed again later in reply to respondent's arguments in this reply brief.

Of major importance, however, in addition to the authorities cited in appellant's brief is the undeniable error committed in Instruction Numbers 24 and 25 (R. 163 & 164), and the Court's failure to direct a verdict in appellant's favor on the issue of the statute of limitations, and failure to grant appellant's motion for a new trial. Subsequent to the filing of appellant's brief the Supreme Court of Utah announced its decision in the case of Foil v. Ballinger, 601 P.2d 144 (1979). Therein the Court was confronted with one of the identical issues presented in Point I(A-D) pages 5-29 in Appellant's Brief concerning whether the statute of limitations (§79-14-4 U.C.A., 1953) commences to run from the date of injury or from the date an injured person knows or should know that a known injury was caused by what is alleged to be a negligent act. Citing most of the same authorities as those cited in appellant's brief the Court held, " . . . that the statute begins to run when an injured person knows or should know that he has suffered a legal injury," and further, ". . . the two year provision does not commence to run until the injured person knew or should have known that he had sustained an injury and the injury was caused by negligent action." The instructions were erroneous and the evidence as cited previously can only lead to the conclusion that it



was indeed error of major proportion to submit the issue to the jury at all.

The error(s) at the trial court level having been established we next confront the "two issue rule." One thing is patently clear from all of the cases in favor of and opposed to the "two issue rule"; it is no more and no less than a method to determine when an error is prejudicial. In Utah that determination is governed by Rule 61 of the Utah Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. . . .  
(emphasis added)

Therefore, in determining whether an error is "inconsistent with substantial justice," we must look to the Court's decisions. In Joseph v. L.D.S. Hospital, 7 Utah 2d 39, 318 P.2d 330 (1957), the Court reversed the trial court to allow plaintiff to read and argue to the jury notations by defendant on hospital records that were already placed in evidence. Defendant urged that if it was error, it was harmless error. The court found the error to be prejudicial over defendant's protestations:

Neither this statutory [Rule 61, *supra*.] mandate, nor the policy we follow thereunder, goes so far as to require that we ignore errors that may have a substantial effect upon the outcome of the trial.

It is not always easy to tell when an error should be regarded as prejudicial . . . . It is necessary to survey all of the facts and circumstances disclosed by the record and if, in so doing, the error appears to be of such a nature that it can be said with assurance that it was of no material consequence in its effect upon the trial because reasonable minds would have

arrived at the same result, regardless of such error, it would be harmless and the granting of a new trial would not be warranted. On the other hand, it it appears to be of sufficient moment that there is a reasonable likelihood that in the absence of such error a different result would have eventuated, the error should be regarded as prejudicial and relief should be granted. Measured by such considerations we assay the possible effect of the error complained of, realizing of course that it is now quite impossible to tell definitely whether the verdict would have been different. (318 P.2d at 333) (emphasis added)

See also, Startin v. Madsen, 120 U. 631, 237 P.2d 834 (1951); Boyd v. San Pedro, L.A.&S.L.R. Co., 45 U.449, 146 P.2d 282 (1915); Hillyard v. Utah By-Products, 1 U2d 143, 263 P.2d 287 (1953).

The alleged errors before this court taken singly and/or collectively show a "reasonable likelihood that in the absence of such error(s) a different result would have eventuated."

The Joseph, supra, case is law in Utah on what constitutes harmless or harmful error. Respondent would take the just discretion from the hands of the court by means of an artificial rule that has at best received mixed reviews and that would not allow the court to review each case by looking into the entirety of the law and evidence in determining whether a given error is "inconsistent with substantial justice." Rule 61, supra.

The Supreme Court of the United States has taken the position in a Federal Antitrust action under the Clayton Act (15 USC Section 17) which is governed by Rule 61 of the Federal Rules of Civil Procedure after which Utah Rule 61 is patterned in pertinent part that a general verdict cannot be upheld if

error was committed upon any one issue either in the admission of evidence of in the charge of the court. The Court stated its position as follows:

Since we hold erroneous one theory of liability upon which the general verdict may have rested-- a conspiracy among petitioner and Exchange Lemon-- it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in Maryland use of Markley v. Baldwin, 112 U.S. 490, 493, 28 L.ed. 822, 823, 5 Sup.Ct. 278 (1884), "[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld. . ."

Sunkist Growers, Inc., et al. v. Winckler & Smith Citrus Products Co. et al., 370 U.S. 19, 8 L.ed.2d 305, 82 Sup.Ct. 1130, reh den 370 U.S. 965, 8 L.ed.2d 834, 82 Sup.Ct. 1577 (1962).

The position of the Supreme Court in the Sunkist, supra, case has been followed in a large number of jurisdictions. Such jurisdictions uniformly base their decisions on the proposition that where error is committed and where justice requires reversal of a case in order to insure a a litigant a fair trial, prejudice will be presumed. They acknowledge that there is a split in opinion among various jurisdictions on the "two issue rule", but have determined that their policy is the better reasoned, more just and in the majority. See, e.g., Bredouw v. Jones, 431 P.2d 413 (Okla. 1967) and the cases cited therein; Burrows v. Hawaiian Trust Co., 417 P.2d 816 (Haw. 1966) and the cases cited therein; Maccia v. Tynes, 120 A.2d 263 (N.J. 1956) and the cases cited therein.

Similarly, this Court long ago in an analagous situation involving inconsistent instructions to a jury held that it is reversible error to so instruct a jury because the court cannot tell whether the jury followed the correct or incorrect instruction. Konold v. D.&R.G.W. Ry. Co., 21 Utah 379, 60 P. 1201 (1900).

Likewise, in the case at bar, it is impossible for the Court to determine whether the jury made its decision based upon error in a given instruction or on an error free instruction. The law in Konold, supra, has not changed since that time and should not at this late date.

The "two issue rule" proposed by respondent is supposedly designed to simplify the work of trial courts and to limit the scope of the proceedings on review. Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1978). That certainly is a calous concept of the "substantial justice" of Rule 61, supra. Convenience of the trial and appellate courts should never be an impediment to a fair trial of the issues between parties litigant.

The "two issue rule" places the burden on the appellant to have prepared and submitted special interrogatories to the jury if the respondents can affirmatively demonstrate on appeal that there are at least two distinct dispositive issues one or more of which is error free and supported by substantial evidence. Royal Homes, Inc. v. Dalene Hardwood Flooring Co., supra.

199 A.2d 698 (Conn. 1964); Colonial Stores, Inc. v. Scarborough, supra. The opposing line of cases previously cited would place the burden of the special interrogatories on the respondents.

Respondent in proposing the "two issue rule" to the court represents that the appellant in this case has waived his right to claim the errors asserted in his brief because he did not request that the trial court submit the issues upon special interrogatories. The appellant should not be penalized in this action for following the admonition of this Court not to submit special interrogatories to juries in negligence actions between two parties:

A majority of the members of the court are of the opinion that in cases such as this . . . it would be better practice to submit the case to the jury upon a general verdict. It appears that the best efforts of trial judges to make interrogatories simple, concise and understandable still result in juries misunderstanding what was intended. Barton v. Jensen, 19 U.2d 196, 429 P.2d 44, 46 (1967).

The law of Barton, supra vitiates against the adoption of the respondent's proposed rule. There is structurally no way that a party, whether he be defendant or plaintiff, can ever know whether or not a given error which, on its face is prejudicial, was the determinative factor in the case. If the burden were placed on Conk to present special interrogatories in order to claim that such a patent error is prejudicial it would be a burden never recognized as such by this Honorable Court. Furthermore, it would be unfair. Let us carry this point out one step further. Conk is admonished

by this Supreme Court not to confuse the jury with special interrogatories and then is told that because he didn't submit special interrogatories his appeal fails for not sustain the burden of showing that a patent critical error in the instructions was in fact prejudicial. Such a proposition is ludicrous. More importantly it is simply not the law of this State.

Respondent claims at page 20 of his brief that he, "advanced three separate and distinct defenses at the time of trial: First, that the defendants were not negligent; second, that any negligence was not the proximate cause of the plaintiff's renal failure; and third, that the plaintiff's claims were barred by the statute of limitations." A medical malpractice action such as this involves difficult scientific issues that are unavoidably enmeshed with the legal issues. This creates a situation where in the "two issue rule" simply cannot be applied. The "distinct determinative issue requirement" cannot be met. Consider for example the matters that must be resolved in determining when the statute of limitations would begin to run as in the case at bar if, arguendo, the facts supported its submission to the jury which appellant continues to deny.

1. At what point in time an injury, if any, occurred?
2. At what point in time an injury, if any, occurred to a legally protected right?
3. Who caused the invasion of the legally protected right?
4. At what point in time the "injury" was or should have been discovered by the injured individual?

5. Whether or not certain acts of the offending individual would act to conceal the above from the injured party?

6. Whether or not the offending individual fulfilled his duty to disclose relevant material information?

7. What information was relevant and material?

8. Whether the injured individual acted prudently during the course of his treatment and thereafter in making reasonable inquiry to discover the above?

Each of the above issues contains some elements of proximate cause and negligence. The net effect is that if there is error in any one of the three major defenses asserted by defendant, it poisons the other issues and the entire proceeding.

Where, as is alleged by appellant, there exists multiple errors in failing to grant a directed verdict on specific issues, coupled with failure to properly instruct the jury on those issues the error has even greater impact on the intertwined defenses. The fallacy of the contention that the issues are distinct and not interrelated is most apparent.

In summary, the "two issue rule" is not the law in Utah and has never been the law. Under the framework of Utah law and the better reasoned authority it should not be adopted. Even if it is adopted, it should not apply to the issues of this case as the submission of written interrogatories to perfect the record for appeal was specifically discouraged by this Court at all times prior to this particular appeal and appellant was adhering to that policy and should not now



be punished for said adherence to Court mandate. Even if the "two issue rule" is adopted by the Court it does not fit a medical malpractice case involving the issue of the statute of limitations because the issues once submitted to the jury are so intertwined that they are no longer "distinct issues", as contemplated by the "rule".

## POINT II

### THE COURT SHOULD HAVE DIRECTED THE VERDICT FOR THE PLAINTIFF ON THE ISSUE OF INFORMED CONSENT

Only brief mention need be made on the issue of respondent's failure to obtain informed consent from appellant. That issue has been fully covered in the brief of appellant. But respondent's brief requires further comment.

Respondent now wishes this Court to believe that the procedure was not experimental. It appears that the procedure is "experimental" or "not experimental" at the "convenience" of the respondent. In proceedings in another case that predated the matter currently before the Court the procedure was "experimental" and he did so inform the patient because it was important to do so. (R. 787-788). Then at his deposition in the present matter the operation was "not experimental" and therefore he did not inform Mr. Conk of that fact. (R. 258 and R. 788-789). Then at the time of trial, knowing that he would be confronted with previous testimony it became convenient for the procedure to be experimental again. (R. 787-788) Only at trial for the first time was it "inconvenient" for him not to have informed



his patient that the operation was "experimental" so he  
". . . believe(s). . . 'or' . . . thinks. . .", but he is not  
sure that he revealed that critical fact to his patient. (R. 788-  
789). Now, on appeal respondent has chosen again to flip flop  
on his own admission and say that procedure was "not experimental"  
(Respondent's Brief at 22-23). That, certainly, is an incred-  
ible performance that places the doctor's testimony clearly  
in the status of being so internally inconsistent as to refute  
itself and not worthy as a defense in light of appellant's  
unequivocal denial of being informed that the operation was  
experimental (R. 435-436). The trial court erred in not directing  
the jury's verdict on informed consent as moved by appellant  
(R. 1370-1372) Respondent's testimony cannot support a verdict  
in his favor on that issue. See, e.g., State v. Pratt, 25 U.2d  
76, 475 P.2d 1013 (1970); Alvarado v. Tucker, 2 U.2d 16, 268  
P.2d 986 (1954).

Respondent further seems to imply that he did not owe a  
duty to inform this patient that the operation was experimental  
because the risk of the type of kidney damage suffered by the  
appellant was unknown to the profession at that time. (Res-  
pondent's Brief Point II). In addition, respondent contends that  
because the risk of kidney damage was unknown at that time,  
no liability should attach because there was no failure to inform  
of a known risk.

That is a circuitous argument of no merit when one considers

an "experimental" procedure. By its very definition, "experimental" means that the procedure is not merely new, but so new that all of the potential serious risks cannot be known. If a patient is to be a guinea pig he should be entitled to know that fact. If he is not so informed and he is caused physical or mental damage as a result of the experiment from any unknown risk, he should prevail. The unknown risk is what makes the procedure experimental. The unknown risk is what caused the damage. (It should be kept in mind that appellant does not concede that the potential for kidney damage was an unknown risk. See Appellant's Brief Point II pages 37-58).

An early Utah case not cited previously very aptly states the burden on a physician to give adequate information to his patient so that he can make intelligent decisions as to his own choice of medical care and treatment. In Everts v. Worrell, 58 U 238, 197 P 1043 (1921), the defendant injected the plaintiff with serum designed to resolve an "acne" problem. Within a relatively short time the plaintiff was paralyzed from the waist down. Defendant alleged that he had given the plaintiff certain instructions that were not followed. The Court stated that the instructions were insufficient in that they "... were merely perfunctory and in no way enlightening to plaintiff respecting his condition." (58 U at 249-250). The Court went on to state the law regarding what a physician should inform his patient:

It is incumbent on a physician to give such instructions as are proper and necessary to enable the patient or his nurses and attendants to act intelligently in the further treatment of the case, and failure to do so is negligence which will render him liable for injury resulting therefrom. (58 Utah at 250) (emphasis added)

A Federal Tort Claims Act case interpreting New Mexico law in which a Veterans Administration doctor administered massive radiation therapy for treatment of cancer in a patient without informing him of the drastic and experimental nature of the procedure is enlightening on the legal obligation of a physician.

. . . our legal system requires that the treatment to be administered must be within the bounds of recognized medical standards in order to overcome legal challenges such as that presented in this case. Accordingly, in order for a physician to avoid liability by engaging in drastic or experimental treatment which exceeds the bounds of established medical standards his patient must be fully informed of the experimental nature of the treatment and of the foreseeable consequences of the treatment. (emphasis added)

Ahern v. Veterans Administration, 537 F.2d 1098, 1102 (10th Cir. 1976). See also, Gatson v. Hunter, 588 P.2d 326, 350-351 (Ariz. 1978).

In this case, as a matter of law, the evidence leads to but one conclusion, the appellant was not given adequate information upon which to give an informed consent to the operation performed on him.

The challenged Instruction Numbers 15 and 16 are prejudicial error as argued in Point II of Appellant's Brief at pages 54-58.

However, respondent at pages 26 and 27 of his brief, again implies the circuitous argument that a physician cannot be held accountable for his failure to inform a patient that an operation is "experimental" because the risks are unknown. That cannot be left unchallenged, as the argument suggests the proper resolution for the doctor; simply to inform the patient that the risks attendant to the procedure are not known. The respondent failed to make such a disclosure on an item of great significance to his patient and even under his own theory should be liable for the damages caused by his omission to obtain his patient's informed consent.

### POINT III

#### THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF THE STATUTE OF LIMITATIONS TO THE JURY AND COMPOUNDED THAT PREJUDICIAL ERROR BY SUBMITTING THE ISSUE UNDER IMPROPER INSTRUCTIONS

Respondent makes an attempt in his brief to mask his own failure to present any evidence to support his affirmative defense that the appellant's cause of action should be barred by the statute of limitations. (See Appellant's Brief pages 10-11) At Point IV of his brief, pages 37 to 41, he states that ". . . the plaintiff's objections to instruction nos. 24 and 25 are raised for the first time on appeal and need not be considered. That simply is not true. The trial court's attention was

directed to the issue of when the appellant discovered " . . .  
or through the use of reasonable diligence, should have discovered  
the injury. . . ." [Section 78-12-28 (3) U.C.A.] in appellant's  
motion for directed verdict (R. 1370-1373), in his exceptions to  
the instructions (R. 1338-1339) and again in his motion for  
new trial and supporting brief (R. 225-227). At each such point  
in time the trial court was cited authority on the issue of  
when the cause of action would accrue so that the two year period  
of the statute would begin running. The cases cited by respondent  
stand for the proposition that the purpose of taking exceptions  
is to bring to the attention of the trial court errors so that  
they might in the interests of justice be corrected. Those  
errors were brought to the attention of the trial judge and he  
failed to remedy them on three different occasions prior to  
this appeal.

At the time of trial, the case of Foil v. Ballinger,  
supra, had not yet been decided by this Court. Therein, as  
the Court will recall, is precise support for the position asserted  
by the appellant. As to those errors in instruction numbers 24  
and 25, respondent has by his silence conceded the point. The  
fact that the trial court could not be appraised of a decision  
not yet made by the Supreme Court does not in any manner diminish  
the damaging and prejudicial effect of those errors upon  
the rights of Conk at the trial.

Let us assume for the sake of argument only that there was a true issue of fact on the statute of limitations and that the trial court was not advised in sufficient detail of its errors as asserted by respondent. This Court should still reverse the judgment in this case and remand this matter to the trial court in the interest of justice. Rule 51 of the Utah Rules of Civil Procedure states in pertinent part:

. . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction. (emphasis added)

Most, if not all, courts have declared that they have the authority to relax the strict requirements of a rule of procedure in order to avoid surprise or a serious miscarriage of justice or to otherwise aid in fulfilling the purposes of their appellate jurisdiction. See, e.g. McCarrey v. Commissioner of Resources, 526 P.2d 1353 (Ala. 1974); Moore v. Burdman, 526 P.2d 893 (Wash. 1974).

This Court has long stated that Rule 51, supra, must govern procedure and ". . . [is] to be followed unless some persuasive reason to the contrary invokes the discretion of the Court to extricate a person from a situation where some gross injustice or inequity would otherwise result." McCall v. Hendrick, 2 U. 364, 274 P.2d 962 (1954). See also State v. Cobo, 60 P.2d 952 (Utah 1936); State v. Schoenfeld, 545 P.2d 193 (Utah 1976)

wherein at 545 P.2d at 196 footnote 6, the Court stated, ". . . this court may . . . notice errors if it is convinced that an injustice has resulted. . ."

Continuing with the assumption for argument's sake that no exceptions at all were made to the instructions at issue in this argument point, there could never be a clearer case of injustice than the one presented by this case. At the time of trial neither the trial court nor the parties had the benefit of this Court's decision in Foil, supra. It would be a gross miscarriage of justice to deny an appellant the right to raise such an acutely prejudicial misstatement of the law as is contained in the trial court's instructions. If this situation does not fit the exception of Rule 51, no civil case could ever fit within its parameters. The exception would constitute an empty gesture of fairness and justice without substance.

Nonetheless, this Court should never reach the necessity of making that decision in the case at bar. The issues were properly raised in the trial court. More important than that, however, is the basic merit to the proposition that the issue of the statute of limitations should never have been presented to the jury. On any "discovery" theory, the record is devoid of affirmative facts to support the defense. (See Appellant's Brief pp. 30-37).

## CONCLUSION

Respondent in his statement of facts has chosen to go we beyond any reasonable inference that the facts of this case w support. Therefore, appellant will stand by his statement of the relevant facts as stated in various parts of his briefs.

Respondent has conceded that the instructions on the sta of limitations given to the jury by the trial court are in er However, respondent claims that the exceptions taken by appell were not sufficient to preserve the issue for appeal. The tr was fully appraised of the problem areas of its instructions at the time of the motion for directed verdict, the exception to the instructions, and at the motion for new trial. Even if no exceptions at all were taken the Foil decision coming a the case at bar was already on appeal would dictate a reversal Otherwise, a grave injustice would result which would fit directly into the exception stated in Rule 51 of the Utah Rule of Civil Procedure.

Whether the exceptions taken at the time of trial were sufficient is moot in any event. The evidence and all reason able inferences taken therefrom dictate that appellant's moti for a directed verdict on both the issue of the statute of limitations and informed consent should have been granted. Any instructions given to the jury on those issues would be prejudicial error. Only the issues of causation and damages should have gone to the jury.



Respondent has advanced to this court that it should adopt the "two issue rule." That "rule" has never been the rule in Utah. Its basic tenets are contrary to the framework of past Utah law including, but not limited to the definitions of prejudicial error, and the policy not to look behind the jury's decision to determine whether the verdict is based upon a proper instruction or upon an instruction with prejudicial error contained in it. The "two issue rule" is further contrary to the better reasoned authority and is not the majority rule.

Additionally, if the court were to adopt the "two issue rule" and apply it to this case, it would punish this appellant for following the Court's prior admonition not to confuse juries with special interrogatories. Such a retro-active application of the "rule" should not be made.


Further, when the trial court chose to submit the issue of the statute of limitations in this case, the other issues became so interrelated with it that they were no longer distinct determinative issues as is required in the "two issue rule." The case at bar would not fit into that category of cases that could be resolved by the "two issue rule." This is especially true when the multiple errors committed in this case are viewed as they relate to one another and the other issues.

Appellant refers the Court to his conclusion in his brief in chief as an outline of wherein error has been committed

in the areas discussed in this Reply Brief as well as the other of error from which relief is requested. It is respectfully submitted to this Court that this appeal is meritorious on all points raised by the appellant. The judgment should be reversed and the case remanded for a new trial.

DATED this 4th day of March, 1980.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, postage prepaid this 3 day of March, 1980 to the following:

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