THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3667 (Filed July 21, 2003.
Withdrawn, Substituted and Re-filed October 17, 2003)

Karl Albert Overcash III, ... Appellant

v.

South Carolina Electric & Gas Co., ... Respondents

PETITIONER'S BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent Overcash appealed the lower court's order granting the Petitioner SCE&G's 12(b)(6) Motion to Dismiss. The Complaint before the lower court alleged several causes of action including nuisance, negligence, strict liability, and conspiracy. (R. p. 9). Respondent alleges that he suffered personal injuries as a result of a collision between a boat he was operating and a dock connecting the shoreline to a small island in Lake Murray. (R. p. 9). The basis for the nuisance allegation was that the dock in question formed a barrier across the navigable waters of Lake Murray.

Following a hearing before the Honorable G. Thomas Cooper, Jr., the lower court issued its Order dismissing the nuisance cause of action and this appeal followed. (R. p. 1-8). The Court of Appeals ruled that South Carolina recognized a right of action for purely personal injuries caused by a public nuisance as well as ruling that a private right of action existed under S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987). Overcash v. South Carolina Electric and Gas, 356 S.C. 165, 588 S.E.2d 116 (Ct. App. 2003). This Court granted Petitioner SCE&G's Petition for Certiorari.

STANDARD OF REVIEW

Under Rule 12 (b)(6), SCRCP, the trial court should only consider the allegations set forth on the face of the complaint and a 12 (b)(6) motion should not be granted if the facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief on the theory of the particular cause of action alleged. See Gentry v. Younce, 337 S.C. 1, 522 S.E.2d 137 (1999). If in the light most favorable to the Plaintiff with every doubt resolved in his behalf the cause of action states a separate valid claim for relief, it cannot be dismissed. Id. See also Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Based upon this standard, both the lower court and the Court of Appeals accepted the allegation that the dock in question was both a public nuisance and was in violation of S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987). The Court of Appeals improperly ruled that both such allegations support a cause of action for personal injuries in South Carolina.

I. THE DECISION OF THE COURT OF APPEALS TO SANCTION A PRIVATE RIGHT OF ACTION BEFORE PERSONAL INJURIES BASED UPON A PUBLIC NUISANCE REPRESENTS A FUNDAMENTAL SHIFT IN THE LAW OF SOUTH CAROLINA NEITHER REQUIRED BY PUBLIC POLICY NOR DICTATED BY PRECEDENT.

In adopting a cause of action based upon a public nuisance for purely personal injuries, the Court of Appeals has pushed South Carolina down a path which it admits is an "impenetrable jungle." Overcash, 356 S.C. at 171, 588 S.E.2d at 119 (Ct. App. 2003). Since there is no justification to follow this path and become entangled in the jungle surrounding an action for purely personal injuries arising from an alleged public nuisance, this Court should reverse the Court of Appeals.

South Carolina recognizes a distinction between a private and a public nuisance. Under

South Carolina law, a plaintiff is not entitled to damages for an injury resulting from a public nuisance unless his injury is not only different in degree but different in kind from that suffered by the public generally. See City of Rock Hill v. Cochran, 209 S.C. 357, 40 S.E.2d 239 (1946). Thus, a claim arising from a public nuisance is based upon an interference with a right or privilege common to the public at large. A private nuisance is, on the other hand, "that class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, personal or real." Peden v. Furman University, 155 S.C. 1, 151 S.E. 907, 912 (1930). An action for a private nuisance is premised upon the idea that "[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property." Id.; see also Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993). Public nuisances are indictable and private nuisances are actionable, either for their abatement or for damages. See Home Sales, Inc. v. City of N. Myrtle Beach, 299 S.C. 70, 382 S.E.2d 463 (Ct. App. 1989). Prior to the decision of the Court of Appeals, no reported South Carolina case allowed a cause of action based upon a public nuisance for purely personal injuries. The lack of such a reported decision should speak volumes about the utility and wisdom of opening pandora's box by allowing such an action.

The Court of Appeals correctly noted that almost any harm or injury can be classified as a nuisance. Overcash 356 S.C. 171, 588 S.E.2d 119. Thus, from this point forward, every tort claim which involves an alleged violation of a statute or ordinance, be it parking in the street, obstructing the view of the highway, or building a dock on a lake or at the ocean, can be sounded in nuisance. Additionally, every dock presently existing or to be built on this State's inland lakes, rivers, tidal creeks, and sounds, whether in daylight or darkness, and in fair or inclement weather,

will support a nuisance claim if anyone were to be injured by it. The myriad of problems and uncertainties noted universally in such actions will need to be addressed, particularly at the appellate level. Neither the historical background of public nuisance nor South Carolina precedent dictate the result reached by the Court of Appeals.

A. Historical development of an action based upon public nuisance.

As noted by this Court, the law of nuisance originated "as an action to recover for interference with the use or enjoyment of rights in land." Teague v. Cherokee County Memorial Hospital, 272 S.C. 403, 252 S.E.2d 296, 297 (1979). The Court of Appeals has cited a body of law that has developed over time to allow a suit by a private individual for purely personal injuries which result from a public nuisance. The historical roots of this body of law is important. This development was an attempt to address instances in which a particular citizen suffered special damage from what was normally a wrong actionable only by the sovereign. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966). Without a general theory of negligence[1] to rely upon, a tortfeasor was able to assert the defense that his acts constituted a public nuisance actionable only by the sovereign, thus depriving an injured party of any remedy. This was the very defense asserted successfully by the defendant in the case cited by scholars as originating the right of a private action for personal injuries caused by a public nuisance. See William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1004-1005 (1966) (discussing the 1536 anonymous case in which the special injury

[1]Negligence is properly seen as a product of the Industrial Revolution and the Nineteenth Century. 57A Am Jur 2d Section 2 (1989).

exception was first enumerated as an exception to the defense that a public nuisance was not actionable by a private individual). The reaction to this decision was the right to sue for a public nuisance which produced a special injury to the complaining party. Thus, it was the dissenting view which was adopted and followed. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966); Overcash, 356 S.C. at 173, 588 S.E.2d at 120-121. With the emergence of negligence, the action remained largely forgotten in precedent until the mid 1800s. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 1011-1012 (1966). Commentators and courts have complained about and ridiculed the doctrine. See Teague v. Cherokee County Memorial Hospital, 272 S.C. 403, 252 S.E.2d 296 (1979); Untangling the Nuisance Knot, 26 B.C. Envtl. Aff. L. Rev. 89 (1998). Prosser himself notes that it has been regretted that an action for personal injuries for a public nuisance, long silent in precedent, was revived in the mid 1800s. William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 1011-1012 (1966).

B. South Carolina precedent universally involves property damage.

South Carolina, to this date, has escaped the judicial quagmire surrounding personal injuries for a public nuisance by adhering to the traditional concept and purpose surrounding nuisance law -- the protection of property. For the protection of the person, South Carolina has a well developed body of law concerning negligence, gross negligence, negligence per se, and other tort based doctrines. Many of those doctrines may apply in the present case to provide a right of action to the Appellant. There is simply no need or justification for adopting a flawed theory of recovery whose basic justification, to avoid the defense that a wrong is actionable only

by the sovereign, no longer exists.

The rationale limiting a nuisance cause of action, be it public or private, to injuries involving property is clearly demonstrated by this Court in Teague v. Cherokee County Memorial Hospital, 272 S.C. 403, 252 S.E.2d 296 (1979). The direct question addressed by this Court in Teague was whether a cause of action for personal injuries based upon a public nuisance could be maintained in South Carolina against an entity protected by governmental immunity. The majority view in other jurisdictions, as in the present case, held such an action was appropriate and that governmental immunity did not extend to actions based upon nuisance. South Carolina authority existed holding the same view, but always in the area of damage to property. See Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930). In rejecting the view that a purely personal injury action was viable, this Court noted the advantages gained in avoiding the "confusion and inconsistency resulting in jurisdictions which have allowed tort actions for personal injuries cased by a public nuisance." Teague at 405.

The decision of the Court of Appeals opens the gates for the dangers feared in Teague. One should not ignore the fact that the Plaintiff in Teague was without a remedy due to governmental immunity against negligence. Despite the apparent harshness of the result and the availability of the majority rule to ameliorate the result, this Court refused to extend an action for public nuisance for purely personal injuries. This was done not to maintain governmental immunity, which this Court acknowledged was already overturned by Legislative enactment, but to avoid the very problems and pitfalls of an action based upon a public nuisance for purely personal injuries. Teague itself was overruled by this Court by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985), not on the basis of its analysis of public nuisance, but on the defense of

sovereign immunity.

The cases from South Carolina concerning a private action for a public nuisance all involve an alleged damage to an individual's property as the "special injury" required to maintain the action. See Huggin v. Gaffney Dev. Co., 229 S.C. 340, 92 S.E.2d 883 (1956)(tract of land); Gray & Shealy v. Railway Co., 81 S.C. 370, 62 S.E.2d 442 (1908)(abutting property); Bethel M.E. Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947)(access to property); McMeekin v. Power Co., 80 S.C. 512, 61 S.E. 1020 (1908)(condemnation proceedings of property); Burrell v. Kirkland, 242 S.C. 201, 130 S.E.2d 470 (1963)(abutting property owner); Woods v. Fertilizer Co, 102 S.C. 442, 86 S.E. 817 (1915)(damage to plaintiff's residence)(stated that when special injures are pled from a public nuisance it becomes a private nuisance to the Plaintiff); City of Rock Hill v. Cochran, 209 S.C. 357, 40 S.E.2d 239 (1946)(abutting property owner); Gray v. S.C. Dept. of Highways and Public Transp., 311 S.C. 144, 427 S.E.2d 899 (1992)(inverse condemnation of property); Belton v. Wateree Power Co, 123 S.C. 291, 115 S.E. 587 (1922)(injury to plaintiff's land); Crosby v. Southern RY. Co., 221 S.C. 135, 69 S.E.2d 209 (1952)(depreciated property). Though some of the cases recite the example from the 1536 anonymous case in which the special injury exception was first enumerated which included a personal injury, none of the cases involve personal injuries and none address the need for an extension of the law of nuisance in light of the existence of negligence and other causes of action to redress personal injuries and torts. The only case in this state which analyzed the wisdom and need for such an extension of the law of public nuisance prior to the decision of the Court of Appeals in this matter was Teague which declined to extend the doctrine into the area of personal injuries.

Instead of following the Teague reasoning and acknowledging the property basis of all South Carolina precedent, the Court of Appeals rested its decision in large part on the majority rule and the dicta contained in some South Carolina cases which recite this rule. This is clearly the case in the Carey v. Brooks, 19 S.C.L. 365 (Ct. App. 1833) decision, one of the authorities cited by the Court of Appeals in the present matter. In Carey, the Court of Appeals faced the question of whether or not an individual was entitled to consequential damages he sustained due to the blocking of a stream. The Court of Appeals granted a non-suit in favor of the defendant on the ground that an action for damages based upon a nuisance on the highway arises only in cases of direct damage. Though the Carey court recited the general illustration regarding corporeal hurt to the individual as noted above, it was not a case concerning personal injury and in fact limited the right of recovery for a public nuisance by not allowing consequential damages to be recovered. Thus, the Court of Appeals' interpretation of Teague and reliance upon the dicta in other reported cases such as Carey and Drews v. E.P. Burton & Co., 76 S.C. 362, 57 S.E. 176 (1907) is misplaced.

The Drews decision deserves special mention. The Court of Appeals could "discern no meaningful distinction between the essential reasoning in Drews and the reasoning applicable to the facts and circumstances as alleged in this case." Overcash, 356 S.C. at 178, 588 S.E.2d at 123 (Ct. App. 2003). Of course, courts have always noted differences between actions based upon invasions of property rights and those based upon personal rights. Though there is a tremendous overlap in the area of negligence, distinctions are still recognized and followed. One needs to look no further than Teague for an example. This Court noted in Teague that governmental immunity was lost when the action was based upon property damage, but denied

the same result when the action was based upon personal injury. This was based in large part on this Court's acknowledgment that the law of nuisance originated as an action for interference with the use and enjoyment of land, not the protection of the person.

Thus, South Carolina to date has not extended the doctrine of public nuisance to cover a cause of action for purely personal injuries. Such actions have been treated as torts with a well developed theory of negligence and tort law to redress such wrongs.

C. Purely personal injuries are not the required "special injury" needed to support a cause of action for public nuisance in South Carolina.

As noted by the lower court, the threat of harm posed by the alleged public nuisance, personal injury, is no different in kind from the risk faced by the public at large. See Hill v. Rieth-riley Const. Co., Inc., 670 N.E.2d 940 (Ind. App. 1996). Hill involved a claim that a defective guardrail on a highway supported a claim for a personal injury action based upon public nuisance. The Court of Appeals for Indiana rejected the claim, noting that the danger the "guardrail posed to the general public was that other vehicles striking the guardrail as Kathryn did might be vaulted onto their sides, causing personal injuries to the occupants. Kathryn's injury, therefore, was not different in kind, but only in degree from that threatened to the general public." Id. at 944. The harm in the present matter, personal injuries from a collision with the dock, is the same type of harm posed to the public at large. As such, it does not fall within the meaning of the term "special damage" as that term is defined in nuisance law.[2] As noted above

[2]As noted by the lower court, the term "special damage" does not equate to special damages in a tort action.

and as acknowledged by the Court of Appeals, all South Carolina cases dealing with public nuisance actions involve damage to property, real or personal, as the "special injury" required to support a private right of action. When the "special injury" is to ones property, the public nuisance has become a private nuisance to that individual. When the alleged "special injury" is to one's person, the threat of such harm is appropriately seen as the same for all those exposed to the alleged public nuisance. Since the alleged public nuisance is not also a private nuisance (since there is not damage or injury to property), the personal injury is thus not different in kind from that posed to all the public.

This reasoning has been followed in other jurisdictions. In Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. App. 1971), California reviewed an action by citizens stemming from foul air generated by the Defendant's plant. The California Court of Appeals acknowledged the special injury rule and declared, in so far as a personal injury allegations from the nuisance was concerned, the fact that the general public was allegedly exposed to the same threat of harm (respiratory distress due to fumes) was the same as that alleged to have been suffered by the Plaintiffs, only to a greater degree. Id. at 125. Importantly, the Venuto Court was faced with a Plaintiff who did assert medical expenses and loss of companionship. Id. at 121 n. 1. The California Court of Appeals ruled that the plaintiffs had alleged "nothing more than that the health of the general public and that of plaintiffs, as members of the public, is being injured because of defendant's activity, but that the health of each plaintiff is being injured to a greater degree. Plaintiffs' alleged damage is, therefore, not different in kind but only in degree from that shared by the general public." Id. at 125. Likewise, Florida has reviewed cases in which the alleged "special damage" resulted from the same risk as posed to the public generally. In Page v.

Niagara Chemical Division, Etc., 68 So.2d 382 (Fla. 1953), the Florida Supreme Court reviewed the propriety of an action by railroad workers stemming from fumes and gases given off by the defendant's plant. The Court, in denying any relief, noted that the "same fumes, dust and gases which the plaintiffs allege are objectionable to them, would also affect the members of the general public in that area, the pedestrians and motorists traveling in the district, and many other employees who spend their working hours in the area." Id. at 384. The Niagra decision relied in part on this Court's decision in Woods v. Fertilizer Co, supra, which held that when special injures are pled from a public nuisance it becomes a private nuisance to the Plaintiff and involved damage to the Plaintiff's real property.

As noted by the lower court, the "extent of the injury [to the Plaintiff] is not important to this determination. . . All who forcefully collide with an obstruction face the prospect of personal injury whether the obstruction is on a public highway or a navigable stream." (R. p. 5). Since the Plaintiff has not alleged an injury that is different in kind as well as degree as that faced by the public generally, the lower court properly ruled that South Carolina does not recognize a right of action for purely personal injuries under a public nuisance theory.

D. Other authorities recognize the overlap of public and private nuisance.

Other jurisdictions also recognize this overlap of public and private nuisance actions. In Trinkle v. California State Lottery, 84 Cal Rptr.2d 496 (Cal. App.3. Dist. 1999), the California Court of Appeals reviewed an action to abate an alleged public nuisance. In regard to the standing of the plaintiff, the Court noted a "private person cannot recover damages for a public nuisance unless it also constitutes a private nuisance as to him" and that a private nuisance

required a property right in the "use and enjoyment of land." Id. at 500. Again, in Friends of H St. v. City of Sacramento, 24 Cal. Rptr.2d 607 (Cal. App.3. Dist. 1993) the California Court of Appeals noted that a "Private person has no direct remedy to abate a public nuisance unless public nuisance is private nuisance as to that person." Id. at 611. Finally, in Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. App. 1971), the California Court of Appeals again referred back to property rights in reviewing the propriety of an action for purely personal injuries. The Court noted the following:

> The essence of a private nuisance is an interference with the use and enjoyment of land and '. . . without it, the fact of personal injury, or of interference with some purely personal right, is not enough for such a nuisance.' (Prosser on Torts (3d ed.) p. 611 and fn. 91 at p. 611; Lind v. City of San Luis Obispo, supra, 109 Cal. 340, 344.) As observed in Lind, 'The injury which may entitle a private person to maintain an action to abate a public nuisance must be an injury to plaintiff's private property, or to a private right incidental to such private property . . .'

Venuto at 356.

These cases represent an acknowledgment of the origins of nuisance actions as invasions of property rights. When such an invasion occurs, an action properly lies. When the invasion is, on the other hand, purely a personal injury, the nuisance doctrine should not be manipulated and distorted so as to afford a remedy when other, traditional, avenues are readily available for the redress of such wrongs.

II THERE IS NO PRIVATE RIGHT OF ACTION FOR AN ALLEGED VIOLATION OF S.C. CODE ANN. SEC. 49-1-10 (LAW. CO-OP. 1987).

The Court of Appeals held that a violation of S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) is not merely evidence of negligence but in fact supports a private right of action in and of

itself for nuisance. In its decision, the Court of Appeals relied upon the Drews, supra, decision as controlling precedent on this issue. This represents a misreading of the Drews decision. In Drews, this Court was faced with a negligence claim arising from damages to a vessel caused by a log in a navigable stream. The Defendant in Drews appealed the verdict and challenged, among other matters, the sufficiency of the evidence of negligence. In dicta, the Drews Court noted that an action would lie for a public nuisance due to a violation of the Code of Laws as well as at common law and that the Plaintiff's complaint could be viewed as stating a cause of action in both negligence and nuisance. It thus held that the trial court's charge and the evidence of negligence was sufficient.

Drews is therefore appropriately viewed as a negligence case and is not authority for the proposition that S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) provides for a private right of action for damages. See Free v. Parr Shoals Power Co., 111 S.C. 192, 97 S.E. 243 (1918)(noting that in Drews "[t]he question whether the plaintiff's damages arose from a public or private nuisance is not involved, as the plaintiff's action is based solely upon negligence."). The issue of a private right of action under the statute, in so far as the predecessor to S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) is concerned, was not before the Court in Drews and is not addressed by its decision.

Since Drews does not control this issue outright, this Court must determine whether or not a private right of action is to be recognized under S.C. Code Ann. Sec. 49-1-10 (Law Co-op. 1987). As noted in Whitworth v. Fast Fare Markets of S.C. Inc., 289 S.C. 418, 338 S.E.2d 155, 156 (1985), "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject

to a construction establishing a civil liability." Thus, there is no private right of action for a violation of a statute for the general welfare of the citizens of South Carolina absent clear legislative intent.

South Carolina Code Ann Sec. 49-1-10 (Law. Co-op. 1987) is found within the section of the Code denominated as Waters, Water Resources, and Drainage. The section contains criminal penalties and allows for abatement of the nuisance. S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987); S.C. Code Ann. Sec.49-1-40 (Law. Co-op. 1987). At no point does the statute mention an ability to recover for personal injuries or bring a private right of action. Since the statute is primarily for the benefit and protection of the public generally, no private right of action exists for its violation. See Dorman v. Aiken Communications, 303 S.C. 63, 398 S.E.2d 687 (1990).

Moreover, S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) provides for a specific remedy for a violation in the form of an abatement of the nuisance. The Legislature, had it desired a private right of action for such a violation, could have easily outlined same in the statute. As noted by the lower court, the absence of this express authorization is evidence that no independent cause of action was contemplated. Penna Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Any action solely pursuant to S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) is thus limited to the remedies set forth in the statute, abatement, and cannot support a private cause of action for personal injuries.

The lower court properly ruled that S.C. Code Ann. Sec. 49-1-10 (Law. Co-op. 1987) does not afford Appellant a private right of action. At most, like the statutory scheme governing travel on the highways of the State of South Carolina, its violation is evidence in support of a properly pleaded cause of action. A contrary result would open the door to suits in nuisance for

every violation of the motor vehicle code. The intoxicated driver who recklessly operates his vehicle so as to collide with a stalled vehicle on the public highway could, under the reasoning of the Appellant, bring an action for nuisance based upon a violation of S.C. Code Ann. Sec. 56-5-2510 (Law. Co-op. 1987). The defendant in such an action, despite the statute being a criminal violation, being silent on a private right of action, and not specifically allowing a private right of action, would be faced with a decision based upon the Drews dicta sanctioning just such an action for violation of the mirror image of the statutory prohibition for travel on the State's waterways.

CONCLUSION

The true impact of the decision of the Court of Appeals, in the absence of binding authority dictating the result and in light of the known problems such a result will create, should be considered. The decision represents a fundamental shift in personal injury actions in South Carolina. In every tort action filed in this State in which comparative fault may be an issue, every effort will be made to characterize the alleged tort as a public nuisance. The traditional framework of nuisance, based in large part on strict liability, will either be eroded or extended into areas heretofore governed by the law of negligence. The end result will be one set of nuisance rules when property damage is involved and another set when personal injury is involved, or a migration of the concepts of negligence into nuisance actions, or a migration of strict liability into tort litigation. This "impenetrable jungle" can be avoided by leaving nuisance actions to property cases, as this Court did in Teague. In addition, the sanctioning of a private right of action based upon a violation of a statute for the general welfare of the State's citizens

opens the gates for private causes of action based upon alleged public nuisances for every violation of a statute, from the laws governing travel on the public highways to the laws governing disposal of trash and litter. Since neither result is desirable or dictated by the law of this State, Respondent respectfully requests that this Court reverse the decision of the Court of Appeals and affirm the ruling of the lower court.

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