

**IN THE SUPREME COURT OF OHIO**

THE CINCINNATI INSURANCE )  
COMPANY )  
) )  
Defendant-Appellant, )  
) )  
vs. )  
) )  
PEGGY SPAETH, et al. )  
) )  
Plaintiff-Appellee. )

CASE NO. 12-1866  
  
On Appeal from the  
Court of Appeals,  
Eighth Appellate District,  
Court of Appeals Case No.: 97715  
Cuyahoga County Common Pleas

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**MEMORANDUM IN OPPOSITION TO JURISDICTION OF  
APPELLEE-ASSIGNEE PEGGY SPAETH**

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**EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC  
OR GREAT GENERAL INTEREST**

This case is not one of public or great general interest. It has no application beyond the unique facts of this case as applied to Ohio's well-established legal and statutory standards for changing one's domicile, or the unusual insurance policy language at issue here.

It is well-settled that judgments of the Courts of Appeals of this state shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or general interest. *Williamson v. Rubick* (1960), 171 Ohio St. 253, 253-254, 168 N.E. 2d 876. Except in these special circumstances, a party to litigation has a right to but one appellate review of his cause. *Id.* No constitutional questions are alleged by Cincinnati Insurance. Instead, it claims this is a case of public or great general interest, yet fails to meet its burden of showing how. The sole issue for determination by this Court is whether this case presents a question of public or great general interest, as distinguished from questions of interest primarily to the parties. *Id.*

This is a declaratory judgment action in which a well-respected and unanimous Court of Appeals' panel wrote a 22-page opinion declaring the parties' rights under an Ohio policy containing unique policy language that isn't recognized in the insurance industry or used by other Ohio insurers. The Court of Appeals also carefully limited its decision to the specific facts of this case—one in which the Ohio named insured's testimony and actions show that he failed to meet either the common law or statutory tests for changing his lifelong Ohio domicile. Instead, his personal and professional contacts remain in Ohio and, as he concedes, he intends to remain

here for half of each month to run his Ohio business located near his Ohio residence—for the rest of his life.

In its narrow decision, the Court of Appeals applied the undisputed factual record to this Court's well-established test for determining when one has changed his or her domicile from Ohio. It also separately applied and followed the statutory test for changing one's Ohio domicile. But Cincinnati Insurance fails to cite, let alone discuss, either controlling authority in its Memorandum in Support of Jurisdiction.

This case involves a clear and unambiguous Ohio contract entered into by private parties. Cincinnati Insurance issued an Ohio insurance policy to James Schill. The Ohio policy identifies and insures him as an Ohio named insured. He lives with his son Robert Schill at the Ohio home that was insured under the policy at issue. They have shared an Ohio home their entire lives.

The Ohio home James and Robert Schill share on a continuous and ongoing basis is the only domicile or residence identified in the policy. James Schill was living there with Robert on the day of the underlying fatal crash giving rise to this lawsuit. The Ohio policy contains only Ohio-specific charges, endorsements and coverages, including express Ohio automobile liability coverage for James and his resident relatives who share his same "legal residence of domicile." The Ohio policy contains no Florida coverages or endorsements.

Most policies only use the term "resident" instead of Cincinnati's term, "legal residence of domicile," in defining who is an insured under a policy. Cincinnati Insurance's unique policy language is not generally used in the insurance industry and doesn't appear in any policies apart from the one at issue here. (Affidavit and Expert Report of Charles M. Miller, ¶19, attached to Spaeth's Motion for Summary Judgment). This is but one reason why the Court of Appeals' decision is limited in scope to this case only and cannot fairly be characterized as a case of

public or great general interest.<sup>11</sup> More significantly, however, the Court of Appeals also expressly limited the scope of its opinion to the case-specific factual record before it as applied to controlling Ohio statutory and Supreme Court case law – the same controlling authority Cincinnati Insurance now simply chooses to ignore and not address at all in its Memorandum.

Instead, as its asserted basis for jurisdiction, Cincinnati Insurance claims that this Court hasn't addressed the concept of domicile since its 1878 decision in *Sturgeon v. Korte* (1878), 34 Ohio St. 525. (Memorandum, 1). But that is simply untrue. Conspicuously absent from its Memorandum is any mention of this Court's controlling decision in *In re Estate of Hutson* (1956), 165 Ohio St. 115, 133 N.E. 2d 347 – the very case the Court of Appeals relied on when rendering its decision. (Opinion, ¶¶25-26, 39). In *Hutson*, this Court not only directly addressed the concept of domicile, but also the *exact* legal issue and standard involved in this case – to wit, the test that applies when determining whether one has changed his domicile from Ohio to elsewhere.

In *Hutson*, this Court held that “to effect a change in domicile from one locality, country, or state to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it.” *Hutson*, at 119; Opinion, at ¶¶25-26. Contrary to Cincinnati's position that one's “subjective intent” is alone determinative, this Court rejected that notion in *Hutson* and held that one's intent to acquire a new domicile must actually correspond with his actions. *Id.*

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<sup>1</sup> Cincinnati Insurance's attempt to analogize this case to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 660 is misplaced. Unlike the unique policy language involved here, the *Scott-Pontzer* Court addressed a provision that was used in nearly every commercial policy in the industry.

The Court of Appeals also did not improperly weigh the evidence. Instead, it applied a case specific factual record not in dispute to the controlling legal and statutory standards for changing one's domicile. The Court of Appeals properly reviewed the trial court decision *de novo* "because the interpretation of a clear and unambiguous insurance contract is a matter of law." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St. 3d 107, 652 N.E. 2d 684 (cited by Court of appeals at Opinion, ¶42). In short, it followed the law and properly ruled that James' Schill's actions and testimony failed to demonstrate that he had abandoned his Ohio domicile. (Opinion, ¶¶33-39).

Apart from failing to satisfy the legal standard set forth in *Hutson*, the Court of Appeals also properly held that James, by his own admission, never met Ohio's statutory requirements for changing his lifelong Ohio domicile. (Opinion, ¶¶36-37). *See* R.C. 5747.24(B)(1). As a result, Ohio remains James's presumed domicile, even if he also lives part time in Florida. But just like Cincinnati Insurance chose not to address *Hutson* in its Memorandum, it likewise makes no mention of that controlling statute.

Moreover, instead of realistically articulating how this case could ever be deemed one of public or great general interest, Cincinnati Insurance devotes the bulk of its Memorandum to trying to convince this Court to accept jurisdiction on the purported basis that the Court of Appeals erred in failing to rule that a jury issue exists on James's domicile under its policy. (Memorandum, p.14; *Id.*, pp. 5-6, 12-15). In the Court of Appeals' proceedings, however, Cincinnati argued that the opposite was true. It claimed that James's domicile presented a "question of law" solely for the court to decide, not a material issue of fact for a jury's determination. It admonished the Court that submitting this issue to a jury would be "wholly misplaced" and constitute error. (Cincinnati's Appellate Brief, p. 18). The Court of Appeals

decided James's domicile as a question of law, just like Cincinnati Insurance asked it to do. Under the invited error doctrine, Cincinnati is precluded from claiming any error in a ruling it requested the Court to make.

Any other ruling would permit losing litigants to obtain jurisdiction in a reviewing court simply by arguing the opposite of what they've already relied on and lost in the lower court. Such a precedent would lead this Court and other appellate courts to be flooded with a never ending barrage of appeals that would prevent finality in litigation.

Moreover, granting Cincinnati Insurance's requested relief of remanding the issue of James's domicile as an issue of fact for a jury to decide would create bad precedent and have a chilling effect on the ability of Ohio courts to decide declaratory judgment actions. Ohio's Declaratory Judgment Act, R.C. 2721.01 et. seq, expressly authorizes *courts* to declare the parties' rights in insurance coverage disputes. Under Cincinnati Insurance's approach, anytime a party claimed a "subjective intent" that differs from the parties' intent as expressed in the contract language, an issue of fact would exist for a jury to decide. That approach is contrary to the Act and would effectively nullify it.

### **STATEMENT OF THE CASE AND FACTS**

James Schill is a lifelong Ohioan. He intends to keep working at his Ohio business and living at the Ohio home he shares with his son Robert—the only domicile or residence identified in Cincinnati Insurance's Ohio policy—indefinitely. James and Robert have lived together at the Ohio home on a continuous and ongoing basis without interruption. Neither intends on changing that now or in the future. (Opinion, ¶38).

James Schill was born here, grew up here, married here, raised his own family here, and has worked here his entire life. He is a wealthy business owner from Geauga County, Ohio who

owns and runs a successful company near the Ohio home he shares with his son Robert. James Schill also runs an Ohio Family Limited Partnership out of the Ohio home—and uses the Ohio home as its mailing address and for tax filings. James pays the insurance, mortgage, real estate taxes, utilities, phone bill and operating expenses for his Ohio home. James Schill has accounts with Ohio businesses that send invoices in his name to the Ohio home. He keeps clothes, food, furniture and items needed for his daily living at the Ohio home, where he maintains a permanent bedroom. (Id.). He also “domiciles” a car there.

James Schill’s professional and personal contacts remain largely in Ohio, where they have been his entire life. Three of his four children live in Ohio. His accountant for his personal taxes, his Ohio business, and his Ohio family partnership is in Ohio. His investment firm and account managers are in Ohio. His attorneys who handle his estate plan, and who handle legal issues for his Ohio business and family partnership are in Ohio. His insurance agent who obtained coverage for him and his resident relatives, including the Ohio policy at issue here, is also in Ohio. (Id.).

James Schill admits he has no present or future intention not to return to Ohio whenever he leaves the state. To the contrary, his stated intention is to return to and remain in Ohio for half of each month to live with his son and run his Ohio business. As James Schill admits, although he initially hoped to retire to Florida, he “flunked retirement” and is “trying to beat J.C. Penney’s record of [working until age] 99.” (Id., at ¶¶35, 38). James Schill is an Ohio CPA aware of the statutory requirements for changing one’s domicile from Ohio. He admits he has never filed any documents with the Ohio tax authorities required to change his Ohio domicile. (Id., at ¶¶36-38). In addition, James owns no property outside of Ohio.

Through his lifelong Ohio friend and insurance agent, James Schill obtained insurance for his Ohio home. The Ohio agent also obtained excess coverage, including excess Ohio automobile liability coverage, for James as an Ohio named insured and for his resident relatives. The Ohio policy identifies James as an Ohio named insured living at the Ohio home he shares with his son Robert. The Ohio home is the only domicile or residence insured under the Ohio policy. All of the policy's coverages, endorsements and charges are specific to Ohio only. None relate to Florida. Ohio automobile liability coverage is the only such coverage expressly afforded by the Ohio policy. The policy provides Ohio automobile liability coverage to James and his "resident relatives," which the policy defines as blood relatives who share his "legal residence of domicile" under the policy.

On August 16, 2008, James Schill's resident son Robert hit and killed a bicyclist with his SUV while completing a task James instructed him to do so improvements could be made to their Ohio home. Robert was the primary defendant in the underlying consolidated wrongful death case filed by the family of 58-year-old Dr. Miles Coburn, a popular John Carroll University biology professor. Dr. Coburn was survived by his wife of 26 years, Peggy Spaeth, and their two children. Economic damages alone were alleged to be nearly \$2 million dollars. Robert had insufficient insurance for this claim and faced substantial personal exposure without coverage under the Ohio policy.

Cincinnati Insurance denied coverage to Robert under the Ohio policy. Despite insuring his father James as an Ohio named insured under an Ohio policy containing only Ohio endorsements and coverages, Cincinnati claimed that James's domicile under its Ohio policy was *Florida*, not Ohio. And despite the fact that James and Robert shared the only domicile or residence insured under its Ohio policy, including on the day of the fatal crash, Cincinnati

Insurance claimed that Robert was not James's "resident relative" under the Ohio policy. Significantly, Cincinnati Insurance's claims are contrary to the Ohio-specific intent contained in the policy's language.

Robert filed a Declaratory Judgment Action under R.C. Chapter 2721 seeking a declaration that he was an insured under the Ohio policy. Cincinnati Insurance agreed that this coverage issue was the proper subject of a declaratory judgment ruling and filed its own dispositive motion seeking a declaration that Robert wasn't insured under the policy. It argued in the trial court that the issue of James Schill's domicile presented a "question of law" for the court to decide, not a material issue of fact for a jury. (Cincinnati's Mot. Sum. J., pp. 1, 17, 35).

The trial court ignored this Court's legal standard in *Hutson* for changing one's domicile and also misapplied Ohio's statutory requirements for changing one's domicile. Despite James's admission that he never complied with the statute's requirements, which creates the presumption that he is domiciled in Ohio, the trial court erred by applying the opposite presumption.

Robert Schill assigned his coverage claim to decedent's spouse Peggy Spaeth as part of a global confidential settlement agreement, and Spaeth appealed the trial court's ruling. On appeal, Cincinnati Insurance argued once again that the issue of James's domicile was a "question of law" for the court to decide. It further cautioned the Court of Appeals that remanding this issue for a jury's determination would lead to reversible error. (Cincinnati's Appellate Brief, p. 18).

In its *de novo* review, the Court of Appeals applied this Court's well-established standard from *Hutson* to the case-specific undisputed factual record and declared the parties' rights under the Ohio policy, as R.C. Chapter 2721.01 et seq. authorizes it to do. It decided the issue of James's domicile as a question of law, just as Cincinnati Insurance requested to avoid error. The

Court of Appeals held that under the unique facts and policy language in this case, James Schill failed to meet both Ohio's common law and statutory requirements for changing his lifelong Ohio domicile. The Court of Appeals was meticulous in its analysis and made clear that its decision was limited to the unique factual record before it. In its narrowly drafted opinion, the Court distinguished this case from one involving the usual retiree or "typical 'snowbird' who retires to Florida for the winter." (Opinion, ¶39).

Cincinnati Insurance is now trying to obtain jurisdiction by doing two things. First, it completely ignores this Court's *Hutson* standard for changing one's domicile and instead advocates for a standard where a person's subjective intent alone controls regardless of whether his actions coincide with his claimed intent. Additionally, Cincinnati Insurance now seeks jurisdiction by claiming that the issue of domicile should never have been decided by the Court of Appeals—and instead could *only* be decided by a jury—a result that it previously argued would be in error. Neither of those arguments are a proper basis for obtaining jurisdiction in this Court, and Cincinnati Insurance is precluded from obtaining the relief it requests under the invited error doctrine.

## RESPONSES TO APPELLANT'S PROPOSITIONS OF LAW

**CINCINNATI INSURANCE COMPANY'S PROPOSITION OF LAW NO. 1:** *"A person has only one domicile: Where the person resides and has the intent to remain permanently and return to away when away temporarily. (Sturgeon v. Korte, 34 Ohio St. 525 (1878), affirmed and restated)."*

Cincinnati Insurance relies solely on the 1878 case of *Sturgeon v. Korte* (1878), 34 Ohio St. 525 for its first proposed proposition of law. Specifically, it claims that this Court last addressed the legal concept of domicile when it decided *Korte*, and that *Korte* created a "subjective intent" standard under which a person's subjective intent effectively determines his domicile. (Memorandum, p.1). Neither is true. This Court didn't last address the legal concept of domicile in *Korte*. This Court addressed the issue 75 years later in the controlling decision of *In re Estate of Hutson*, 165 Ohio St. 115, 133 N.E. 2d 347 (1956)—the very authority the Court of Appeals relied on in its Opinion—and Cincinnati failed to point out to this Court. In *Hutson*, this Court not only directly addressed the issue of domicile, but also decided the exact legal issue involved here—the legal standard for changing one's domicile from Ohio. As the Court of Appeals pointed out here, *Hutson* requires "an actual abandonment of the first domicile, coupled with an intention not to return to it." *In re Hutson*, 165 Ohio St. at 119 (Emphasis added); Court of Appeals' Opinion, at ¶¶25-26, 39.

In addition, the *Korte* case this Court decided 125 years ago dealt with the limited issue of county infirmary inmates' "residence" for purposes of voting in a local election. It also did not create a subjective intent standard for determining domicile as Cincinnati Insurance now claims. In fact, *Hutson* rejects Cincinnati Insurance's "subjective intent" approach and makes clear that a one's subjective intent, while relevant, is not determinative. Instead, one's actions

must be consistent with his or her intent to abandon a previously held domicile and acquire a new one. *In re Hutson*, 165 Ohio St. at 119.

The Court of Appeals also did not improperly weigh the evidence as Cincinnati Insurance now wants to suggest. Instead, it applied a factual record not in dispute to the applicable common law (*Hutson*) and statutory (R.C. 5747.24) standards for changing one's domicile from Ohio. (Opinion, ¶¶25-26, 36-39). The Court of Appeals decided James's domicile as a question of law, just as Cincinnati Insurance asked it to do. (Id.; Cincinnati's Appellate Brief, p.18). Applying the case-specific record to controlling Ohio law, the Court of Appeals properly held that James failed to meet Ohio's legal and statutory requirements for changing his domicile. The Court based its ruling on James's own testimony regarding his intent, as well as his actions. Both are inconsistent with either the actual abandonment of his lifelong Ohio domicile or an intent to make Florida his permanent home.

As a result, the Court of Appeals ruled that James and Robert share the same Ohio domicile for purposes of the Ohio automobile liability coverage expressly afforded under the Ohio policy. (Opinion, ¶¶25-26, 36-39). This ruling is not only supported by the unique factual record as applied to the legal and statutory tests for changing one's domicile, but also by the intent of the parties as expressed in the Ohio policy—one that insured James as an Ohio named insured and contained only Ohio-exclusive coverages and endorsements, and none for Florida. It is also consistent with this Court's admonition that the parties' intent is presumed to reside in the contract language. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411; Opinion, ¶13.

The Court of Appeals further based its ruling on James Schill's admission that he never filed anything to meet Ohio's statutory requirements for changing his lifelong Ohio domicile.

(Id., ¶¶36-37). The fact that James lives in Florida on a part-time basis doesn't change this analysis. His undisputed intent is to return to and remain in Ohio, now and in the future. It is also irrelevant that his wife owned property in Florida and obtained a Homestead Exemption for herself. (Opinion, ¶38). Unlike James, she doesn't remain in Ohio on a continuous and ongoing basis and hasn't expressed any intent to continue living here or running a business here.

The "subjective intent" approach Cincinnati Insurance now wants this Court to apply is contrary to both *Hutson* and R.C. 5747.24. And Cincinnati Insurance hasn't asked this Court to reconsider *Hutson*, nor should it. A subjective intent standard, if adopted, would be unworkable. For example, a Michigan resident could obtain in-state tuition from the Ohio State University merely by claiming that he or she has a "subjective intent" to be domiciled in Ohio. Ohio residents could avoid paying state taxes here by simply claiming a "subjective intent" to be domiciled in Florida or elsewhere. Out of state residents could vote here by merely claiming a "subjective intent" to be domiciled here. That is not the law of Ohio, nor should it be.

**CINCINNATI INSURANCE COMPANY'S PROPOSITION OF LAW NO. 2:** *"Where an Appellate Court reviewing a summary judgment identifies factual issues in the record supporting both the movant and the non-movant, the Appellate Court is required to remand the factual issues to the trial court for further proceedings and may not weigh the evidence to issue judgment."*

In both courts below, Cincinnati Insurance argued and agreed that James Schill's domicile presented a "question of law" for those courts to decide, not a material issue of fact for a jury's determination (Cincinnati's Appellate Brief, p. 18; Mot. Sum. J., pp. 1, 17, 35). Similarly, this Court has recognized that construction of written contracts presents a question of law for a court to decide. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St. 2d 241, 374 N.E.2d 146, Syllabus ¶1; *Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212, 567 N.E.2d 262. This Court has repeatedly held that when a contract is clear and unambiguous, its

interpretation is solely a matter of law for the Court to decide. *Alexander, supra; Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St. 3d 107, 652 N.E. 2d 684; *Accord Villamueva v. Barcroft* (N.D. Ohio, 2011), 822 F. Supp. 2d 726, 733.

Here, the Court of Appeals expressly followed *Guman Bros* and held that Cincinnati Insurance's Ohio policy language was clear and unambiguous. (Opinion, ¶42). But even if reasonable minds could reach a different conclusion, coverage would still exist as a matter of law, since this Court has held that any ambiguities must be construed against the insurer and in favor of coverage. *Westfield Insurance Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E.2d 931, at ¶11; *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus.

After Cincinnati Insurance lost its appeal, however, it did an about face; it now wants to argue that the issue should have been treated as a question of fact for a jury to decide. (Memorandum, p. 14). Cincinnati Insurance had it right the first time. This is a declaratory judgment action in which the Court of Appeals was expressly authorized to declare the parties' rights and obligations under this Ohio contract *de novo*. *Lessak v. Metropolitan Cas. Ins. Co.* (1958), 168 Ohio St. 153, 155, 151 N.E. 2d 730; *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208; Opinion, ¶12. Cincinnati Insurance does not dispute that the Court of Appeals' review of the trial court's ruling was *de novo*. The Court's review was based on a record where the material facts were not in dispute. Adopting Cincinnati Insurance's new argument would have broad reaching implications. It would impede the ability of Ohio Courts to decide insurance coverage disputes under Ohio's Declaratory Judgment Act. It would create bad precedent if *juries*, rather than courts, became the arbiters of insurance coverage disputes. It would be inconsistent with the Declaratory Judgment Act and render it meaningless.

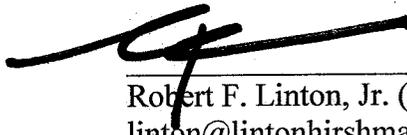
In addition, it is well-settled in Ohio that the intent of the contracting parties is presumed to reside within the four corners of the contract. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E. 2d 411 (1987); Opinion, at ¶13. Adopting Cincinnati Insurance's proposition would prevent Ohio Courts from deciding insurance coverage issues whenever a party claims a subjective intent that conflicts with the language of the insurance contract.

Finally, Cincinnati Insurance's attempted appeal would not survive on the merits anyway under the invited error doctrine, as this Court has held under similar circumstances on multiple occasions. See e.g., *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 961 N.E. 2d 181, 2012-Ohio-54, at ¶16; *Webber v. Kelly*, 120 Ohio St. 3d 440, 900 N.E. 2d 175, 2008-Ohio-6695, at ¶7; *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 254, 648 N.E. 2d 1355, 1358.

#### **CONCLUSION**

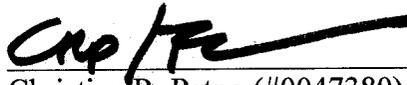
For these reasons, this case does not present a matter of public or great general interest, but a matter of interest primarily to two private litigants. The Court of Appeals correctly and narrowly decided the coverage issue as a matter of law based on the unusual policy language and unique undisputed facts before it—just as Cincinnati Insurance had requested. Any further appeal to this Court should be declined.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing instrument was made by mailing a true and accurate copy thereof, in a sealed envelope, postage fully prepaid and by depositing the same in the U.S. mail on this 3<sup>rd</sup> day of December, 2012, to the following:

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