THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No.: 2022-CP-26-06296

Appellate Case No. 2024-000786
Order Dismissing Appeal, Dated August 14, 2024

Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall .....Respondents

v.

William Bertram von Herrmann and The Von Herrmann Law Firm. ..... Petitioners

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PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that they filed Petition for Rehearing and that the Court of Appeals denied that Petition by order dated November 4, 2024.

QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals err in dismissing the appeal as interlocutory when the appealed circuit court's order purported to strike or otherwise prevent Petitioners from litigating the attorney-immunity defense?

SPECIAL CONSIDERATIONS FOR GRANTING WRIT UNDER RULE 242(B), SCACR

In the midst of a domestic relations dispute concerning child custody, a father photographed from the mother's smart watch text messages between Respondents, who are the child's mother and the mother's parents. The father hired Petitioner von Hermann and his law firm to bring a civil suit against the mother and others. Upon discovering the photographed text messages, Respondents filed a separate suit against Petitioners based on Petitioners' actions in representing the father, claiming Petitioners invaded Respondents' privacy and violated the S.C. Homeland Security Act (Act) by using or disclosing in litigation text messages they claim were intercepted.

Because attorneys are immune from third-party claims in precisely these circumstances under *Gaar*, Petitioners moved to dismiss Respondents' claims. The circuit court agreed in part and dismissed the invasion of privacy claims. Refusing to dismiss the claim under the Act, however, the circuit court opined on a novel question of law that the Act abrogated the attorney-immunity defense. But the circuit court went too far in its order, holding Petitioners "cannot assert the attorney-immunity defense going forward."

Petitioners appealed the order, but the Court of Appeals dismissed the appeal as interlocutory without explanation or guidance, string citing authorities culminating in the holding

that a "denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings."

On the one hand, the circuit court ruling purports to establish the law of the case and effectively strike the attorney-immunity defense. This ruling requires immediate appeal to correct the error and allow Petitioners to litigate the defense. On the other hand, the Court of Appeals' ruling implies Petitioners can raise the defense later because it was made within an order denying a motion to dismiss. This ruling conflicts with the circuit court and, essentially, directs Petitioners (and subsequent circuit court judges) to ignore the circuit court's order and continue to litigate the defense.

As a result of the conflicting rulings, Petitioners are in unenviable position that exposes an apparent ambiguity in appealability law: what happens when a circuit court makes a ruling that by its content (finally decides a defense) is immediately appealable but in its form (an order denying a motion to dismiss) is not immediately appealable. This Court should grant this Petition to address this issue in appealability law. If granted and this Court agrees with Petitioners, this Court should reverse and remand the case to the Court of Appeals for the appeal to continue and decide the novel question of whether the Act abrogates the common law defense of attorney immunity. Alternatively, this Court could reverse the Court of Appeals and certify the case for its own review under Rule 204(b), SCACR, or decide the novel issue out of judicial economy.

STATEMENT OF THE CASE

Respondents sued Petitioners asserting liability for the use and disclosure of Respondents' electronic communications that Petitioners were provided by their client, Justin Fulmer, who shares a daughter with Respondent Anna. Respondents assert Petitioners used the electronic communications to bring a lawsuit against the Respondents on Mr. Fulmer's behalf (Fulmer

Action). Respondents allege Mr. Fulmer intercepted the electronic communications and Petitioners, with knowledge the information was "unlawfully obtained", disseminated the material. The Court of Appeals addressed the interception in the Fulmer Action. ***See* Appx. 64**. The Fulmer Action was tried to verdict in December 2023, and is on appeal.

In the present lawsuit, Respondents originally asserted claims for violation of the South Carolina Homeland Security Act (S.C. Code Ann. § 17-30-10, *et seq.*), the Computer Fraud and Abuse Act (18 U.S.C. § 1030), and Invasion of Privacy for publicizing private affairs and for wrongful intrusion and outrage. Petitioners removed the case to federal court based on the federal claim and moved to dismiss based on the defense of attorney immunity. Respondents quickly voluntarily dismissed the federal claim to deprive the federal court of jurisdiction. As a result, the federal court remanded the case and did not rule on the motion to dismiss.

On remand, the circuit court granted in part and denied in part Petitioners' motion to dismiss. **Appx. 8**. The court ruled that attorney immunity barred Respondents' claims for Invasion of Privacy. **Appx. 8**. The court noted that the Amended Complaint made clear Attorney von Herrmann's allegedly wrongful actions took place while he was representing Mr. Fulmer. **c** Because the Amended Complaint did not allege Petitioners breached an independent duty to Respondents, or that Petitioners acted in their own interest and outside the scope of representing Mr. Fulmer, Petitioners were protected by the attorney immunity defense. **Appx. 11**.

The only surviving claim was Respondents' claim under the South Carolina Homeland Security Act (Act) for using or disclosing intercepted communications. As a matter of law on a novel issue, the circuit court ruled attorney immunity does not apply to claims under the Act, and found Petitioners "cannot assert the defense going forward." ***See* Appx. 12-13**. Petitioners timely

appealed the order, primarily based on the troubling finding preventing Petitioners from asserting the defense going forward. **Appx. 1**.

Respondents then moved to dismiss the appeal, arguing that the orders are not immediately appealable. **Appx. 37**. Petitioners responded, asserting the holding that they could not assert the defense moving forward made the order immediately appealable. **Appx. 72**. The Court granted Respondents' motion to dismiss on August 14, 2024, by summary reference to authorities without an express opinion on the effect of the circuit court barring Petitioners from asserting the attorney immunity defense. **Appx. 33**. Petitioners asked the Court of Appeals to rehear the matter, but it refused. **Appx. 113; 35**. Petitioners respectfully petition this Court to grant certiorari, reverse the Court of Appeals and find the issue immediately appealable.

ARGUMENT

I. This Court should grant the petition for certiorari and reverse the Court of Appeals because the circuit court's order is immediately appealable by statute, this appeal is distinguishable from cases finding denials of motions to dismiss not immediately appealable, and granting the petition favors judicial economy.

The right to appeal is governed by statute. *See* S.C. Code Ann. § 14-3-330. When determining immediate appealability, our courts are bound to examine "the effect of the order, not the label given to the motion or to the order granting it." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 479 (Ct. App. 2011). Thus, while a denial of a motion to dismiss is generally not immediately appealable, if the effect of the order falls within the 14-3-330 then the order is appealable despite its name. Further, this Court can grant certiorari to address novel issues in the interest of judicial economy, which here favors deciding the novel issues of appealability and application of the attorney immunity defense under the Act.

a. The Court of Appeals ignored the effect of the circuit court's order that purported to strike the attorney immunity defense, making the order immediately appealable under section 14-3-330.

Section 14-3-330(1) of the South Carolina Code permits appeal of "[a]ny intermediate judgment, order or decree in a law case involving the merits." Section 14-3-330(2)(c) also permits immediate appeal of an "[a]n order affecting a substantial right made in an action when such order . . . (c) strikes out an answer or any part thereof or any pleading in any action." An appeal can arise under either or both. *Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 178 (1990).

"An order involves the merits under [section]14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense." *Stone v. Thompson*, 426 S.C. 291, 294, 826 S.E.2d 868, 869-70 (2019) (finding that order determining couple were common-law married was immediately appealable despite the remaining claims for divorce and equitable distribution because the determination of marriage was a substantial part of the causes of action and defenses); *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988).

"An order affects a substantial right [under 14-3-330(2)(C)] by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479. In determining whether an order "strikes" a material issue from the case, the court must examine "the effect of the order, not the label given to the motion or to the order granting it." *Id.* at 303, 705 S.E.2d at 479. "If the circuit court errs in striking out any material allegations of a good cause of action or good defense, *it is impossible to remedy it in the course of the trial*, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings."

Id. at 303-04, 705 S.E.2d at 479 (emphasis added) (quoting *Bowden v. Powell*, 194 S.C. 482, 484, 10 S.E.2d 8, 9 (1940)). Ultimately, appealability is determined on a case-by-case basis. *Stone*, 426 S.C. at 295, 826 S.E.2d at 870.

As recently as 2015, this Court reaffirmed the principle that a court is free to evaluate the trial court's order for appealability under *Thorton* regardless of what the order says and addressed an order not immediately appealable by name (order bifurcating trial) but appealable in effect. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015). In *Morrow*, a nursing home resident sued a nursing home and its parent entities when the resident sustained injuries at the nursing home. *Id.* at 535-36, 773 S.E.2d at 144-45. The parent entities moved to bifurcate trial, which the trial court granted, and stayed trial and discovery against the parent entities while the claims against the nursing home moved forward. *Id.* at 536, 773 S.E.2d at 145. The order, however, also noted that the claims against the parent entities could only proceed if the plaintiff was successful against the nursing home. *Id.* The plaintiff appealed the order bifurcating trial. *Id.* A single judge of the Court of Appeals dismissed the appeal after finding an order bifurcating trial was not immediately appealable. *Id.* The plaintiff petitioned for rehearing and three judge panel of the Court of Appeals denied the petition. *Id.*

The South Carolina Supreme Court, however, granted writ of certiorari and reversed the Court of Appeals. The Court recognized the line of cases holding that an order bifurcating trial is not immediately appealable. *Id.* at 540, 773 S.E.2d at 147. But the Court examined the effect of the order and found it affected a substantial right because the circuit court's ruling misunderstood the claims against the parent entities—the circuit court's finding the plaintiff could proceed against the parent entities only if successful against the nursing home was based on a theory of vicarious liability and overlooked that plaintiff was also proceeding on a theory of direct corporate liability.

Id. at 538-39, 773 S.E.2d at 146. Despite its name, the effect of the order implicated a substantial right and was immediately appealable. *Id.* at 539, 773 S.E.2d 146. As a result, this Court reversed the Court of Appeals' order dismissing the case and remanded for a determination on the merits of the appeal. *Id.* at 540, 773 S.E.2d at 147.

Following *Morrow*'s guidance, the circuit court's order is immediately appealable because its effect involves the merits and strikes a good defense. The order explicitly states that Petitioners "cannot assert the [attorney immunity] defense going forward." Because the effect of the order prevents Petitioners from asserting the attorney immunity defense during litigation, the order has "finally determined" a substantial matter forming the whole or part of a defense and, therefore, "involves the merits" and is immediately appealable under section 14-3-330(1). *See Stone*, 426 S.C. at 294, 826 S.E.2d at 869-70.

In addition, because the order has the effect of striking a defense and removing that material issue from the case, it affects a substantial right, prevents the issue from being litigated on the merits and, therefore, is appealable under 14-3-330(2)(c). As stated in *Thorton*, the court's ruling that Petitioners cannot assert the defense going forward is impossible to remedy in the course of a trial in this case because the evidence and issues submitted to the jury cannot extend beyond the issues in the pleadings. *Thorton*, 391 S.C. at 303-04, 705 S.E.2d at 479. This deprives the appellate court from being able to evaluate on appeal after trial if there was an error of law confining the evidence and jury charges to the pleadings, which would not include attorney-immunity because the court explicitly stated Petitioners cannot assert the defense moving forward. *Id.* Because Petitioners cannot assert the defense, they are prevented from raising the issue at a later point in time in the case.

The Court of Appeals erred in dismissing the appeal because the decision is based on the name of the circuit court's order rather than its purported effect. By its summary ruling, the Court of Appeals ruled based on the name of the circuit court's order: denial of a motion to dismiss. The Court of Appeals acknowledged that a denial of a motion to dismiss is not immediately appealable, and found the denial of a motion to dismiss does not establish the law of the case and the issue can be raised again later. The Court of Appeals did not, however, address the effect of the order barring Petitioners from asserting the defense of attorney-immunity moving forward. Thus, the Court's reference to only the name of the circuit court's order appears to be a ruling based on the name not the effect of the order.

If instead the Court of Appeals had examined the effect of the order, the order should be immediately appealable under the statute and *Morrow*'s guidance because the order affects a substantial right by removing the attorney immunity defense from litigation and *attempts* to establish the law of the case by barring Petitioners from asserting the defense moving forward. Certainly, although an order denying a motion to dismiss is not *supposed* to establish the law of case, the order at issue *purports* to establish the law of the case by finding the Act abrogated the common law attorney immunity defense and barring Petitioners from raising it later.

What Petitioners are left with is an inherent conflict between the Court of Appeals' ruling and the circuit court's order that will undoubtedly lead to issues in this litigation, which warrants this Court granting the petition for writ. The circuit court ruling explicitly forbids Petitioners from raising and continuing to litigate attorney immunity as a defense. But the Court of Appeals' reference to case law regarding the impact of orders denying motions to dismiss implies that Petitioners can raise and litigate the attorney immunity defense. Either the circuit court is right, or the Court of Appeals is right, it cannot be both.

Further, if the Court of Appeals is right and Petitioners can raise the defense, the Court of Appeals is essentially instructing the litigants and subsequent judges in the circuit to ignore the circuit court's ruling on attorney immunity. This is bad for two reasons. First, it sets a dangerous example for future litigation—indicating that a circuit court's ruling on an issue is meaningless and requiring litigants to actively advocate a judge's ruling can be ignored. Second, practically speaking it is difficult to imagine that subsequent judges in the same circuit would actually ignore a prior judge's ruling on an issue to give the litigants a fair chance at litigating the issue later in the case.

In sum, this Court should grant the petition for writ, reverse the Court of Appeals, find that the circuit court's order is immediately appealable under 14-3-330, and remand for the appeal to continue on its merits. In the alternative, as explained more thoroughly below, this Court should take the appeal up for itself under Rule 204(b), SCACR, and out of concerns for judicial economy to decide the novel issue of attorney immunity under the Act.

b. The circuit court's order is unlike the orders in cases involving denials of motions to dismiss based on other types of immunity.

As a general matter, denials of motions to dismiss are usually not immediately appealable. And some courts have held that denials of motions to dismiss on other immunity claims are not immediately appealable. *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005) (finding denial of individual county council members' motion to dismiss based on absolute immunity was not immediately appealable).

However, orders denying motions to dismiss based on immunity claims are usually not appealable because the order denying the motion to dismiss is not supposed to finally decide anything about a case and the litigants are free to raise the issues at a later point in the case. *Id.* ("Furthermore, the trial court's denial of the individual council members' motion to dismiss does

not preclude the individual council members from raising the issues presented in their motion at a later point in the case."); *see also Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 431, 622 S.E.2d 564, 567 (Ct. App. 2005) ("[D]enial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case.").

Brown is particularly distinguishable on this point because the Court noted that the circuit court refused to dismiss based on absolute immunity claims "at this early stage," which at least implied that the council members could raise immunity at a later stage. *Id.* at 359, 622 SE.2d at 536. It is also notable that the *Brown* Court analyzed the scope of immunity under the Tort Claims Act, finding that it is not absolute as the council members claimed but was instead qualified. *Id.* at 361-62, 622 S.E.2d at 537-38. The Court then expressly found "the individual council members will be free to raise such issues as qualified immunity, qualified privilege, and the provisions of the Tort Claims Act, at later stages." *Id.*

Here, contrary to the circuit court's indication in *Brown* that the immunity could be raised later in the case, the circuit court expressly ruled that Petitioners cannot continue to raise the defense in this litigation. Further, despite finding the case unappealable, the Court in *Brown* took the time to opine on the immunity claimed, clarifying it was not absolute immunity, and it expressly stated immunity could be raised later. Here, the Court of Appeals did not express any limited opinion on attorney immunity and only implied the defense could be later raised. Thus, *Brown* should not govern appealability in this case. But even if *Brown* was instructive, it should yield at least an express ruling in this case that Petitioners are free to raise attorney immunity at a later stage of the litigation. If that is the case, this Court should grant the petition for writ and expressly find that Petitioners can raise attorney immunity going forward.

c. This Court should grant the petition and address the novel issue of appealability, and application of attorney immunity under the Act, out of judicial economy and Rule 204(b), SCARC.

Our courts have previously addressed novel issues involved in an appeal despite dismissing an order as not immediately appealable. *See Ex parte Wilson*, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005). *Wilson* involved an appeal of an order quashing a subpoena duces tecum and the scope of discovery under Rule 69, SCRCP. *Id.* at 11, 625 S.E.2d at 207. Our supreme court determined the order on the subpoena duces tecum was not immediately appealable under section 14-3-330. *Id.* at 13-14, 625 S.E.2d at 208. However, the court addressed the novel issue of discovery under Rule 69, SCRCP, in the interest of judicial economy. *Id.* at 14, 625 S.E.2d at 208. ("Although we dismiss the order as not immediately appealable, we address this novel issue in the interest of judicial economy.").

Additionally, our courts have seen fit to address novel issues at the motion to dismiss stage when the issues involve interpretation of the law, not application of fact, and developing the record will not aid in resolving the issues. *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005). In fact, in a different legal malpractice context the Court of Appeals addressed at the motion to dismiss stage the novel issue of the impact of a no contest plea on a subsequent claim against a criminal defense attorney, finding dismissal appropriate because the plaintiff's no contest plea was the cause of his damages not his attorney. *See generally Brown v. Theos*, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999).

Moreover, this Court has the authority to take up the appeal and decide the issues on their merits. Under Rule 204(b), SCACR, this Court can certify the case for its own review on the issue of Act's impact on attorney immunity because the Court of Appeals has not ruled on the issue. *See*

Rule 204(b), SCACR ("In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion . . . certify the case for review by the Supreme Court before it has been determined by the Court of Appeals."). Further, this Court can decide issues itself out of judicial economy rather than remanding for the Court of Appeals to decide. *See Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528 n.10, 753 S.E.2d 428, 434 n.10 (2014) ("While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether summary judgment in favor of Respondents was proper.").

Judicial economy favors ruling on (1) appealability of the circuit court's order, and (2) the Act's effect on the common-law attorney immunity defense regardless of appealability. First, it appears no South Carolina court has opined on what impact a circuit court's ruling has denying a motion to dismiss when the ruling purportedly strikes a defense and prohibits raising the defense. Specifically, whether that makes an order immediately appealable despite being in the context of a denial of a motion to dismiss. Thus, the appealability issue is novel. Also, as it currently stands there is a conflict between the circuit court's order and the Court of Appeals' decision on Petitioner's ability to raise the defense. Petitioners plan to continue to raise attorney immunity based on the Court of Appeals ruling, but expect argument they should be prevented from doing so because the circuit court expressly forbid it. Therefore, the parties in subsequent litigation will dispute the impact of the circuit court's order. A clearer ruling from this Court will avoid the inevitable disputes that will follow over that conflict, and reducing those disputes will save judicial resources and party resources from having to argue and hear those issues.

Second, this case presents a novel issue on the interplay of attorney immunity and liability under the South Carolina Homeland Security Act. Respondents are attempting to impose liability on Petitioners for quintessential attorney activities—bringing a lawsuit on behalf of a client and

engaging in discovery. This is precisely why the circuit court granted the motion to dismiss the invasion of privacy claims. As a matter of first impression in South Carolina, the circuit court found that the Act abrogated the common law attorney immunity defense. Petitioners disagree, as outlined in their motions before the circuit court. Nevertheless, this is a novel issue that can be decided at the motion to dismiss stage because it is interpretation of the law and developing the facts would not aid in resolving the dispute like in *Brown v. Theos*.

Deciding the interplay between the Act and attorney immunity now favors judicial economy. The immunity question is a threshold issue to liability, and the case is already on appeal with sufficient information to decide a question on the interpretation of law. If the defense applies under the Act, then the case should be dismissed, and the parties do not need to spend any time, effort, or funds to litigate the issue any further. Thus, deciding it now saves judicial and party resources from having to continue litigation on the issue. Moreover, because the claim under the Act relates to attorney activities, discovery and litigation will include getting into attorney-client privileged and work-product doctrine protected material generated in the underlying Fulmer Case—which is currently on appeal before the Court of Appeals. Petitioners will continue to refuse to provide privileged material in written discovery and deposition discovery, leading to multiple motions to compel and discovery motions before the lower courts. Taking up the appeal and deciding the novel issues now will avoid wasting judicial and party resources.

Conclusion

This Court should grant the petition for writ because the Court of Appeals overlooked or misapprehended the effect of the circuit court's order finally determining a defense and, instead, focused on the name of the order and general principles regarding the effect of a denial of a motion to dismiss. The order is immediately appealable. Further, this Court should take up the appeal on

its merits after appealability is decided under Rule 204(b), SCACR, and for the sake of judicial economy.

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December 4, 2024.

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PROOF OF SERVICE

I certify that I have served ***Petitioners' Petition for Writ of Certiorari*** upon the parties below by electronic mail, addressed as follows:

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Date:	Wednesday, December 4, 2024 1:29:33 PM
Attachments:	image001.png Petition for Writ of Certiorari.pdf Appendix.pdf

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Good afternoon everyone,

Today we are filing the attached Petition for Writ of Certiorari and the Appendix with the SC Supreme Court, on behalf of Petitioners William Bertram von Herrmann and The Von Herrmann Law Firm. When we email it to the Court for filing, we will include you on that email.

Thank you and best regards,

csvl-block

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REPLY TO SC OFFICE

December 4, 2024

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Re: Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall (*Respondents*) v. William Bertram von Herrmann and The Von Herrmann Law Firm (*Petitioners*)
Appellate Case No. 2024-000786
State Case No.: 2022-CP-26-06296
CSVL File No.: 2283-64549

Dear Ms. Kitchings:

Please find enclosed, a copy of Petitioners William Bertram von Herrmann and The Von Herrmann Law Firm's *Petition for Writ of Certiorari* and the Appendix in this case, filed today with the SC Supreme Court. By copy of this letter, we are providing a copy of the Petition and the Appendix to all counsel of record and advising of our communication with this Court. Please let us know if anything further is required at this time.

Sincerely yours,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
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