THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

D. Garrison Hill, Circuit Judge

Case No. 2014-002464

Laurin Stinson,

Respondent,

v.

Hans & Franz, LLC d/b/a
Hans & Franz Biergarten,
Addy's Dutch Café and
Restaurant, Addy Sulley &
Juergen Haubach,

Appellants.

FINAL BRIEF OF RESPONDENT

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April 1, 2015

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STATEMENT OF ISSUES ON APPEAL

I. Did Appellants preserve for appeal their argument that the amount of damages awarded by the trial court was incorrect?

II. Did the trial court err in granting summary judgment in favor of Respondent Laurin Stinson in an amount established by admissible evidence in the record, including materials submitted by Appellants?

STATEMENT OF THE CASE

This is an employment case involving a claim by Respondent Lauren Stinson (Stinson) that she was denied payment of the federal minimum wage under the Fair Labor Standards Act (FLSA) while working as a waitress for Appellants Hans & Franz, LLC d/b/a Hans & Franz Biergarten, Addys Dutch Café and Restaurant, Addy Sulley, and Juergen Haubach (Appellants) from October 2011 to January 2013. Stinson filed this lawsuit in May 2013, raising claims under the FLSA, including the minimum wage claim that is the subject of this appeal. Stinson alleged that Appellants took advantage of the "tip credit" provision of the FLSA, 29 U.S.C. § 203(m), paying her below the normal minimum wage, but did not comply with the FLSA's requirements for claiming the tip credit.

Stinson filed a motion for partial summary judgment on the minimum wage claim on December 23, 2013. The Honorable Gary Hill heard argument on the motion on February 18, 2014, and denied the motion on the grounds that "further development of the facts is necessary to clarify application of the law." R. 4 (3/6/14 Order). Thereafter, the parties conducted additional written discovery and Stinson made a second motion for partial summary judgment.

After another hearing and the submission of additional written arguments, Judge Hill granted Stinson's motion. R. 8-16 (10/16/14 Order). He concluded that Appellants were not entitled to claim the Section 203(m) tip credit because Appellants had required Stinson to pay out of her tips a "breakage fee" equal to one percent of her gross sales on each shift. R. 11-13. Because Appellants had paid Stinson an hourly wage of $2.13, rather than the minimum wage of $7.25, and because they had not followed the rules for claiming the tip credit, Judge Hill found that they were not entitled to the tip credit and thus owed her the

difference ($5.12) for each hour she worked. R. 14-15. As Stinson worked 1,872.51 hours, this resulted in actual damages in the amount of $9,587.25. *Id.*

On October 16, 2014, Judge Hill issued an Order granting judgment to Stinson in the amount of $19,174.50 (actual damages plus an equal amount for statutory liquidated damages under the FLSA) on the minimum wage claim. R. 15. Judge Hill's Order expressly permitted Stinson to file a separate motion for attorneys' fees and costs pursuant to the FLSA. R. 16.

Appellants filed their Notice of Appeal of the Summary Judgment Order on November 14, 2014. In the Notice of Appeal, Appellants stated that they received notice of the judgment on October 20, 2014. R. 332 (Notice of Appeal). It is not clear whether Appellants were actually sent a copy of the Order, but the notice form Appellants received from the Greenville County Clerk of Court (which they attached to their Notice of Appeal) advised that a copy of the Order could be requested by phone or email. R. 333 (10/17/14 Form 4 Order).

Stinson filed a motion in the Circuit Court for fees and costs. A hearing was held before the Honorable R. Lawton McIntosh on December 4, 2014. At the hearing, the parties stipulated that the amount of fees and costs sought by Stinson was appropriate based on the judgment obtained. R. 328-29 (12/4/14 Hearing Transcript). However, pursuant to the parties' stipulation, Respondents reserved the right to challenge the amount of the award in the event the outcome of this appeal results in a lower damage award to Stinson. *Id.* Judge McIntosh granted the motion for fees, subject to the parties' stipulation. *Id.*

Despite having stipulated to the award of fees and costs entered by Judge McIntosh, on December 15, 2014, Appellants filed a Motion to Reconsider pursuant to Rule 59(e).

Appellants argued that the amount of the underlying judgment, which was already subject to this pending appeal, should have been calculated differently, and attached as Exhibit A to the motion a series of damage calculations that were not authenticated and had not previously been submitted to either Judge Hill or Judge McIntosh.[1] R. 259-61 (Mot. to Reconsider Fee Award, Ex. A). Despite their stipulation on the record to the entry of the fee award in lieu of a hearing before Judge McIntosh, Appellants argued in their Motion to Reconsider that "it is improper to award attorney fees without a full hearing and opportunity to discuss certain issues involving the actual damage calculation performed by this Court." R. 256. Appellants' Motion to Reconsider was denied by form order on January 2, 2015.

[1] Appellants' motion to reconsider acknowledged that the damages argument contained therein was not addressed in Judge Hill's summary judgment order. R. 255 (Mot. to Reconsider Fee Award). Moreover, Appellants admitted that "a ruling on [the damages argument] is necessary before such can be heard before the South Carolina Court of Appeals." R. 256 (citing *Ransom v. SC Water Resources Comm.*, 321 S.C. 211, 467 S.E.2d 463 (Ct. App. 1996). Nevertheless, the motion to reconsider was addressed to Judge Hill rather than Judge McIntosh, who had heard the motion for fees. R. 254.

ARGUMENT

I. Appellants' argument that the Circuit Court erred in calculating damages is not preserved for appeal.

a. Appellants did not make the argument to the Circuit Court.

In order to be preserved for review, an argument must be made in the court below. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). The purpose of this requirement is to ensure the trial judge has the opportunity to consider and rule on the precise issue that forms the basis for appeal. *Collins Entertainment Corp. v. Coats & Coats Rental Amusement,* 368 S.C. 410, 418, 629 S.E.2d 635, 639 (2006) (a general, non-specific argument that does not encompass the specific grounds raised on appeal does not preserve the issue); *State v. Hamilton*, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) ("In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.").

Appellants made several arguments in response to Stinson's motion for partial summary judgment.[2] On appeal, they make only one. Appellants contend that Stinson received a twenty percent "service charge" when she waited on tables of six or more

[2] Appellants contended that when credit card tips were considered, Stinson made more than the minimum wage, even accounting for the improper deductions taken out of her tips. R. 116 (Resp. to SJ Mot. 4). They also argued that because they could have, but did not, deduct from her credit card tips a fee that was imposed by the credit card companies, their deduction of a "breakage fee" did not actually prejudice Stinson. *Id.* Appellants have abandoned these arguments.

customers. According to Appellants, such service charges were compulsory (i.e., customers were not given the option to decline to pay the service charge or choose a different percentage, as with regular tips) and were included in the restaurant's gross receipts and paid to Stinson. Appellants argue that the service charges therefore count as wages and can be used as "an off-set against [Appellants'] minimum wage obligations." Resp. Br. 2.

Appellants made a materially different argument in the Circuit Court. First, Appellants repeatedly acknowledged that the only wage they paid Stinson was the base rate of $2.13 per hour:

> The Defendant did take a tip credit of $5.12 and paid all the servers $2.13 per hour. The calculation used was $7.25 (minimum wage) minus the minimum required wage for tip credit schemes ($2.13) which equals $5.12.

R. 114 (Resp. to SJ Mot. 2). *See also,* R. 174 (Defs. Suppl. Resp. to Pl. 1st Interrog. No. 14) ("[t]he rate of pay is $2.13 an hour"). Appellants did not submit any calculation of a higher hourly, weekly or per-pay-period rate based on adding the service charge to regular wages. They neither argued nor submitted admissible proof that the charges were compulsory.

Instead, Appellants argued that their improper deductions from Stinson's tips should be excused because, viewed cumulatively over the course of Stinson's employment, the service charges, which Appellant supposedly could have treated as wages, were larger than the improper deductions:

> Your Honor, the service credit that my client paid to the Plaintiff is $5,948.70. What she's claiming is the one percent deduction that she was cheated out of is $994.
>
> So if we're looking at the big picture here and saying you took $994 from me, however, we paid you $5,948.70 that we didn't have to pay you, I fail to see the violation of the Fair Labor Standards Act. The Fair Labor Standards Act says that service credit, which is clearly in exhibit number four that we provided, is not tip wages.

> So if we're paying something to you, money, that you're not entitled to anyway, but we do it gratuitously, I think we get some sort of benefit from it.

R. 284 (2/18/14 Hearing Tr.). In other words, Appellants did not argue that re-calculating Stinson's wages to include service charges eliminated the minimum wage violations. Appellants merely argued that it would be unfair to deny them the benefit of the tip credit when the amount of their unlawful deductions, over the life of her employment, was allegedly smaller than the lifetime amount of service charge payments.

In light of the clear disconnect between what Appellants argued to Judge Hill and the argument that appears in their brief to this Court, they cannot be said to have raised below the argument they now make. Judge Hill could not have reasonably understood that Appellants were asking him to find that the regular wage was something other than $2.13 per hour. Appellants failed to articulate their argument in the court below in a manner "sufficiently specific to bring into focus the precise nature of the alleged error so it [could] be reasonably understood by the trial judge." *Hamilton*, 344 S.C. 344, 361, 543 S.E.2d 586, 595.

b. Appellants were required to file a timely Rule 59(e) Motion to Reconsider but failed to do so.

When a party wishes to preserve an issue for appeal that is not addressed in the order it wishes to appeal from, it is incumbent on such party to raise the issue in a timely motion to reconsider pursuant to Rule 59(e). *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). A Rule 59(e) motion serves as an important means of ensuring that if an error was made, the court below has the chance to correct it. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (error preservation requirement "prevents a

party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"). Thus, the purpose of a Rule 59(e) motion is not to reargue matters already decided but to alert the trial judge to issues that may have been overlooked. *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.").

Questions concerning the proper measure of damages frequently necessitate Rule 59(e) motions. In *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996), the defendant appealed a judgment against it on the grounds that the court below improperly added pre-judgment interest. This Court refused to consider the issue because the defendant had not filed a timely Rule 59(e) motion objecting to the amount of the judgment. *Id.* at 305, 468 S.E.2d at 300-01. *Lukacs v. Walker*, 301 S.C. 80, 390 S.E.2d 365 (Ct. App. 1990), involved a contract dispute in which the plaintiff was granted summary judgment. This Court rejected the defendant's attempt to challenge the amount of the judgment based on a set-off theory that had not been properly articulated in the court below:

> Although the trial judge granted Lukacs' motion for summary judgment [from the bench] without placing a specific dollar amount on it, the figure of $12,308.80 is clearly due under the contract upon which summary judgment was granted. Strico presented no affidavits or other evidence disputing the amount owed and attempts to argue a right to set-off for the first time on appeal. We therefore find the written order granting summary judgment in the amount of $12,308.80 is consistent with the order from the bench granting summary judgment based on the contract. We further note that Strico failed to make a motion under Rule 59(e) S.C.R.C.P. for the trial judge to alter or amend the judgment rendered in the written order.

Id. at 83, 390 S.E.2d at 366. *See also, Mason v. Gossett*, 303 S.C. 466, 468, 401 S.E.2d 425, 426 (Ct. App. 1991) (where party failed to file Rule 59(e) motion objecting to trial court's order of new trial on damages, the issue was not preserved for appellate review).

Even if Appellants fairly notified Judge Hill of their argument that the service charge should be treated as part of wages for purposes of determining the weekly rate of pay, Judge Hill's Order did not address such argument. Judge Hill's Order says nothing whatsoever about the service charge on tables of six or more customers. Judge Hill specifically concluded that Stinson was paid only $2.13 per hour and that Appellants attempted to utilize the tip credit to make up the difference between that number and the statutory minimum wage of $7.25 per hour. R. 11, 15 (10/16/14 Order).

Given the absence of any discussion of the service charge issue in Judge Hill's Order, if Appellants wished to make their service charge argument in this Court, it was incumbent on them to file a timely motion to reconsider pursuant to Rule 59(e). It is undisputed that Appellants did not file such a motion. Instead they filed this appeal without giving Judge Hill any notice of their argument that service charges should be added to Stinson's hourly wages, on a pay-period-by-pay-period basis, to reduce the amount of Appellants' liability.

Appellants later made a peculiar attempt to correct the failure to file a Rule 59(e) motion. After this appeal had been filed, a hearing was held before Judge McIntosh on Stinson's motion for attorneys' fees. The parties reached an agreement: the fee request was reasonable based on the damages awarded by Judge Hill and subject to this appeal. R. 328-29 (12/4/14 Hearing Tr. 3-4). But if the appeal proves successful and Stinson ends up recovering a smaller amount, Appellants have the right to seek a reduction in the

fee award. *Id.* However, just days after the parties walked out of Judge McIntosh's courtroom having memorialized this agreement, Appellants filed a Rule 59(e) motion purporting to seek reconsideration of the order formalizing their agreement. R. 253-58 (Mot. to Reconsider Fee Award).

In their motion to reconsider the stipulated order granting fees, Appellants admitted that Judge Hill's Order granting summary judgment did not address Appellants' eleventh-hour argument about service charges. R. 255. Appellants also admitted that "a ruling on [the damages argument] is necessary before such can be heard before the South Carolina Court of Appeals." R. 256 (citing *Ransom v. SC Water Resources Comm.*, 321 S.C. 211, 467 S.E.2d 463 (Ct. App. 1996). Thus, it appears that Appellants attempted to substitute a motion to reconsider <u>the fee award</u> for a timely motion to reconsider <u>the summary judgment Order</u>.

Appellants should not be permitted to succeed in this transparent attempt to circumvent Rule 59(e)'s 10-day deadline. Appellants admit they received notice of the entry of the summary judgment Order on October 20, 2014. R. 332 (Notice of Appeal). The notice Appellants received on October 20 specifically advised that a copy of the formal Order could be requested in writing or by email. R. 333 (10/17/14 Form 4 Order). Thus, Appellants had ten days from October 20, 2014, to file a Rule 59(e) motion. S.C.R.Civ.P., Rule 59(e). They filed this appeal on November 14, 2014, and only later filed a motion to reconsider the fee award, on December 15, 2014. R. 332; 25. The motion to reconsider the fee award therefore cannot substitute for a timely motion to reconsider the summary judgment Order. It merely serves to underscore the point that

Judge Hill did not have notice of Appellants' service charge off-set argument until after this appeal deprived him of jurisdiction to revisit his summary judgment ruling.

Appellants' argument on appeal is not preserved. It was not fairly articulated to Judge Hill in connection with briefing or argument of the summary judgment motion, nor was it raised in a timely Rule 59(e) motion. As such, this Court should find the issue unpreserved, and affirm the judgment below.

II. The trial court did not err in granting summary judgment in favor of Respondent Laurin Stinson in an amount established by admissible evidence in the record, including materials submitted by Appellants.

a. Standard of Review

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Accordingly, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.* However, this does not mean that the non-moving party may rest on conclusory assertions, inadmissible evidence or speculation. The non-moving party must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. S.C.R.Civ.P., Rule 56(e); *Moody v. McLellan*, 295 S.C. 157, 163-64, 367 S.E.2d 449, 452-53 (Ct. App. 1988). Failure to respond to a properly supported motion for summary judgment with competent evidence warrants judgment in favor of the moving party. *Id.*

b. Appellants have not offered competent evidence to create a question of fact warranting reversal of Judge Hill's summary judgment Order.

It is well settled that the time period for determining payment of the federal minimum wage is a standard seven-day workweek. *See, e.g., Dove v. Coupe*, 759 F.2d 167, 172 (D.C. Cir. 1985) (standard workweek is appropriate time period for measuring

minimum wage compliance by comparing hours worked and wages); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193, 1198 (4th Cir. 1969) (same); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir.1960) (same). Accordingly, employers are required to maintain records reflecting earnings on at least a weekly basis. 29 C.F.R. § 516.2(a)(8) (requiring employers to maintain records of "[t]otal daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek"); 29 C.F.R. § 516.28(a)(4) & (5) (requiring employers seeking to claim the tip credit to maintain records of "total daily or weekly straight-time payment" for both tipped and un-tipped work).

When an employer fails to keep required records under the FLSA, such employer, and not its employees, must suffer the consequences when the missing records pertain to a disputed wage claim. The Supreme Court explained the rationale for this rule:

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work.
>
> . . .
>
> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA].

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946). *See also, Bingham v. Airport Limousine Serv.*, 314 F. Supp. 565, 572 (W.D. Ark. 1970) ("It is perhaps true that defendant did not anticipate the need of accurate record-keeping, but the penalty for such an omission must fall upon the employer and not upon his employees."). Thus, to the extent it is necessary to estimate, extrapolate, or guess as to work hours or pay that

should have been properly recorded by an employer but were not, it is the employer that must face the consequences of its own non-compliance.

Stinson's motion for summary judgment was based on simple and undisputed facts. Appellants acknowledged that Stinson was paid $2.13 per hour throughout her employment and depended on tips to supplement that hourly wage. R. 114 (Resp. to SJ Mot.); 174 (Defs. Suppl. Resp. to Pl. 1st Interrog. No. 14). Further, Appellants conceded that they deducted a portion of Stinson's tips each shift. As Stinson argued in the court below, and Appellants do not contest on this appeal, the deductions were improper, and thus rendered Appellants ineligible to claim the tip credit. The parties submitted uncontested evidence concerning the number of hours Stinson worked (1,872.51). The award of damages in this case was therefore a simple calculation: the difference between the federal minimum wage ($7.25) and the hourly wage Stinson received ($2.13), multiplied by the number of hours she worked. Judge Hill thus multiplied 1,872.51 by $5.12, and arrived at a damages figure of $9,587.25. R. 15 (10/16/14 Order). This amount was then doubled pursuant to the FLSA's liquidated damages provision, a step that Appellants do not challenge on appeal.

Appellants do not challenge Judge Hill's conclusion that they were ineligible to claim the tip credit. Rather, they argue that Stinson's hourly wage of $2.13 is not the proper baseline for subtracting from the minimum wage because Stinson also earned service charge "wages." However, even if Appellants' interpretation of the law is correct, they did not offer competent proof as to any weekly wages above the regular $2.13 hourly wage.

All Appellants submitted to document the service charges on tables of six or more customers was a set of wage records organized by pay period. R. 122-29 (Resp. to SJ Mot. Ex. 4). Because each pay period consisted of two weeks, it is impossible to tell, in any particular week, how many hours were worked and how much was earned through service charges. This renders it impossible to calculate the combined value of $2.13 in hourly pay and applicable service charge pay on a weekly basis.[3] Even accepting Appellants' theory for the sake of argument, there is no way to determine how much the service charges offset the wage disparity of $5.12 per hour caused by the improper deductions.

In addition to the problems with extrapolating weekly averages from bi-weekly work hours and pay data, from the period from October 2011 through February 2012, Appellants do not even have bi-weekly pay data. In their motion to reconsider the fee award in the court below, Appellants used the average of their bi-weekly calculations for the other weeks (which, as explained above, are themselves illegitimate) to guess as to the damages owed for the weeks not covered by their records. R. 261 (Mot. to Reconsider Fee Award Ex. A, pg. 3). In other words, Appellants are asking this Court to remand this case to the Circuit Court so that it can argue for a new damages measure that is completely unrelated to <u>both</u> the actual hours worked <u>and</u> actual wages paid during the weeks in question.

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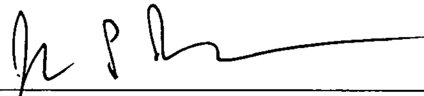
[3] The amount of service charges Stinson earned in a given week was not necessarily a function of her hours worked. Thus, any attempt to alter Judge Hill's damage calculation would be an exercise in pure guesswork. In weeks where the service charge earnings were particularly high, relative to hours worked, the effective hourly rate might even have exceeded $7.25 per hour. But averaging such a week with another in which the effective rate was below $7.25 an hour is not permissible because the minimum wage must be paid <u>every week</u>. *Dove; Blankenship; Klinghoffer Bros.*

As the authorities cited above make clear, an employer cannot use its own poor record-keeping as an excuse to introduce speculative data reducing its FLSA liability. When Appellants chose not to follow the legal requirement of weekly record-keeping, they assumed the risk of not having data to mitigate their liability for FLSA minimum wage violations. It was Appellants' obligation under the FLSA to provide weekly records. Likewise, it was Appellants' obligation pursuant to Rule 56(e) to submit competent, admissible evidence in opposition to Stinson's summary judgment motion. As Appellants have failed in both respects, it is not appropriate to disturb Judge Hill's damage calculations.

CONCLUSION

Appellants did not preserve the argument that service charges offset their liability for minimum wage violations by (1) making such argument to Judge Hill or (2) filing a timely Rule 59(e) motion to reconsider when he did not address such argument in the order granting summary judgment. Moreover, Appellants did not provide competent evidence of weekly payment of service charges mitigating their minimum wage liability. Accordingly, the judgment below should be affirmed and this appeal dismissed.

Respectfully submitted,



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This 1st day of April, 2015.

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Appellants.

Proof of Service

I certify that, on the date indicated below, I served counsel for Appellants with a copy of the Final Brief of Respondent by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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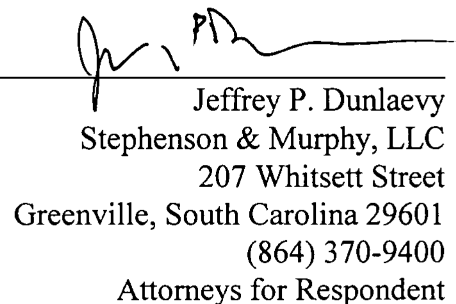

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