THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2016-000259

Jerry Hogan, Respondent,

v.

Corder and Sons, Inc., Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT PROPERLY DENY APPELLANT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT (JNOV)?

STATEMENT OF THE CASE

On September 6, 2013, Respondent Jerry Hogan commenced this action, alleging negligence against Appellant Corder and Sons, Inc. Respondent alleged personal injury caused by, among other allegations, Appellant directing Respondent to work under a raised load without the load being secured and Appellant's violation of S.C. Regulation 71-112A, resulting in a vehicle falling on Respondent. (R. p. 10, lines 8-10, 19-p. 11, line 3). Corder and Sons, Inc. answered, denying negligence and asserting negligence by Hogan. Appellant's Answer further alleged that Hogan was never injured and instead staged an accident. (R. p. 14, lines 5-9). The action was tried by a jury beginning on January 4, 2016. The jury found for Hogan and awarded him $864,341.80. (R. p. 6, line 14). Corder and Sons promptly requested, and was granted, ten days to file post-trial motions. Appellant timely filed and served its post-trial motions. The trial court denied the motions by order signed January 19, 2016, filed January 22, 2106. On February 10, 2016, Corder and Sons, Inc. served the Notice of Appeal on Hogan.

FACTS

The Respondent's witnesses at trial were James H. Corder; Respondent Jerry Hogan; two women present at the incident location: Natasha Smith and Becky Davis; Respondent's rigging expert, Stephen Fournier; Respondent's wife, Melinda Hogan; two physicians who performed surgery on Respondent: E. Myron Barwick and Karl Lozanne; and Respondent's psychology and

vocational expert, Robert Brabham, Ph.D. Dr. Barwick's testimony largely concerned the initial stage of a surgery completed by Dr. Lozanne. The testimony of Respondent's spouse and Dr. Brabham chiefly concerned the amount of damages.

Appellant's Business Operations

Appellant Corder and Sons, Inc. owns a salvage yard in Lexington County. (R. p. 18, lines 23-25). Appellant's business is to buy wrecked vehicles and sell parts from those vehicles. (R. p. 19, lines 5-9). James H. Corder (hereinafter "Harold Corder") is the sole shareholder and only corporate officer of Appellant. (R. p. 18, lines 2-9). Harold Corder had worked for his foster father, who did some mechanical work, when he "was a kid." (R. p. 33, lines 8-19). He also worked on vehicles in the military. (R. p. 34, line 22-p. 35, line 3). Prior to incorporating and operating a salvage yard, Harold Corder was in the used car business. (R. p. 18, lines17-19). Over time, he accumulated vehicles he bought for parts to fix the used cars, which led to the salvage business. (R. p. 33, line 22-p.34, line 3). Prior to opening the salvage business, he neither took courses nor read any books on salvage yard set-up. (R. p. 33, lines 22-25; p. 34, lines 4-6). Appellant never employed a safety officer. (R. p. 34, lines 7-9). He taught Appellant's employees safety based on his own life experiences. (R. p. 34, lines 4-12). From 1989 to 2005, Harold Corder's son, Robert, worked for Appellant full time. (R. p. 217, lines 11-17).

When an engine was sold from a salvage vehicle, the entire vehicle was moved from the storage part of the yard to an area beside the garage. (R. p. 67, lines 6-10). The practice in Appellant's salvage yard was to move vehicles at the yard with a Caterpillar loader that forks instead of a bucket. (R. p. 19, line 20-p. 20, line 7; p. 271). The vehicle was moved to an area near the garage. (R. p. 22, lines 2-5). An employee would then loosen and remove the bolts, gas, line, linkage, and wire harness that were accessible from above the vehicle, while the

vehicle sat on the ground. (R. p. 66, line 22-p. 67, line 18). The work from above took about 30 to 40 minutes. (R. p. 67, line 23-p. 68, line 1). The vehicle would then be raised to access other parts that needed to be removed, such as exhaust and torque converter bolts. (R. p. 66, line 25-p. 67, line 22). The work underneath the vehicle took about an hour, depending on how rusty the bolts were. (R. p. 68, lines 2-5).

To access the lower part of the motor for removal, Appellant's practice was to raise the vehicle on the forks of the loader and have the employees stand underneath while working. (R. p. 22, lines 9-15). Appellant directed its employees to place a mobile home axle vertically under one fork of the loader as a "safety device". (R. p. 22, line 15-p. 23, line 10; p. 286). One end of the axle was placed under the loader's fork; the other end was placed into a wheel lying on a cement pad. (R. p. 23, line 16-p.24, line 12). One employee would hold the axle in place while Harold Corder would lower the forks. (R. p. 24, lines 21-24). Robert Corder testified that, with regard to setting the mobile home axle under the forks, "One man can't do it; it's a two-man operation." (R. p. 223, lines 12-15). Harold Corder testified that he or his oldest son would always run the Caterpillar loader. (R. p. 25, lines 8-13). He also, however, gave conflicting testimony that Respondent sometimes ran it. (R. p. 26, lines 3-16). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that with respect to running the Caterpillar, "anytime there was something to be brought down or something, I always do it." (R. p. 26, line17-p.28, line 23).

With regard to when the use of the mobile home axle as a "safety device" began, Harold Corder gave conflicting testimony. He initially testified that the mobile home axle came into use after the previous forklift's hydraulic cylinder cracked. (R. p. 29, lines 20-25). Harold Corder then testified that he didn't know how long the axle had been in use. (R. p. 30, lines 1-6). Harold Corder then testified that he used the axle before the forklift cylinder cracked. (R. p. 31,

lines 6-7). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that, with reference to the prior forklift "the cylinder cracked on it and so they got this thing and started using it." (R. p. 31, lines 19-25).

Respondent's Injuries

Respondent Jerry Hogan worked for Corder and Sons on two different occasions. (R. p. 36, lines 14-21). He worked primarily in the salvage yard, pulling motors or transmissions. (R. p. 65, lines 8-10). At the time of his injuries, just Harold Corder and Respondent worked at the business. (R. p. 65, lines 22-24). Respondent was injured on November 18, 2011, a Friday. (R. p. 70, lines 4-8). On that day, Respondent was an employee of Appellant, although Harold Corder disputed whether Respondent was supposed to be working at the time of the injury. (R. p. 82, lines 18-22). The day of his injury, Respondent started removing a motor from an SUV for a customer of Appellant. (R. p. 71, line 12-p. 72, line 8). He began right after lunch at noon and finished removing the bolts and parts on the upper part of the motor about one o'clock. (R. p. 72, lines 3-11). Respondent testified that Harold Corder then started the Caterpillar, raised up the vehicle, and Respondent placed the mobile home axle in place. (R. p. 72, lines 12-18). Respondent placed the mobile home axle the way he had been taught to place it. (R. p. 72, lines 19-23). The SUV was supported only by the mobile home axle and the loader forks. (R. p. 72, lines 24-25). Harold Corder did not stay to help with the lower half. (R. p. 132, lines 1-2).

Harold Corder alleged that Respondent left at noon to pull a motor for someone and he believed Respondent had left the property. (R. p. 39, line 23-p. 40, line 3). Harold Corder testified that the first time that he was aware Respondent had not left was when he heard him yelling. (R. p. 40, lines 10-14). Harold Corder testified that he did not hear the loader running that day. (R. p. 41, lines 11-13). Respondent impeached Harold Corder with his prior deposition testimony that Mr. Corder heard the loader running and went outside and saw Respondent

"piddling around there. I didn't see him doing nothing; he was just piddling around and I went back in to there where the ladies was." (R. p. 43, line 16-p. 44, line 1). At trial Harold Corder agreed that two persons were present at the time, Natasha Smith and her mother. (R. p. 41, lines 21-25). Natasha Smith testified about 15 or 20 minutes after she arrived, Respondent came into the office, spoke to Harold Corder, then left the office. (R. p. 99, lines 2-11). She and her mother continued to speak to Harold Corder, and then she heard Respondent screaming "help me." (R. p. 99, lines 12-16). They ran out of the office and found the SUV on top of Respondent. (R. p. 99, lines 16-19). Only about 10 or 15 minutes elapsed between Respondent leaving the office and when the SUV fell. (R. p. 99, lines 20-23). Likewise, Becky Smith, Natasha Smith's mother, testified that she went to Appellant's salvage yard. (R. p. 110, lines 17-20). Ms. Smith recalls Respondent speaking in the office when Harold Corder was present. (R. p. 111, lines 6-16).

Respondent testified that he was underneath the vehicle when he noticed the SUV was leaning, was rocking, and the fork looked like it was going to come out from underneath the SUV. (R. p. 76, line 19-p. 77, line 4). Prior to this, Respondent had not hit or brushed against the axle or done anything to cause the SUV to fall. (R. p. 77, lines 5-15). The SUV fell onto Respondent and pushed him from his head straight down. (R. p. 77, lines 16-19). He felt immediate severe pain in his back. (R. p. 78, lines 7-8). An ambulance transported Respondent from the Appellant's facility to Lexington Medical Center. (R. p. 79, lines 9-17). Respondent suffered a burst fracture of his lumbar vertebrae, requiring surgery on February 25, 2011. (R. p. 166, lines 19-21; p. 169, line 4-p. 170, line 21; p. 171, lines 3-9; p. 172, lines 3-14). Dr. Lozanne later performed a second surgery to stabilize Respondent's spine on May 16, 2011. (R. p. 173, line 1-p. 175, line 4). Dr. Lozanne testified that Respondent's injuries and the surgery were

caused by the injury he presented with on February 18——a car landing on him. (R. p. 176, line 24-p.177, line 14).

Evidence of Appellant's Failure to Maintain a Safe Work Environment

Respondent presented testimony at trial from Stephen Fournier, a civil engineer. (R. p. 113, lines 18-18). Mr. Fournier was qualified as an expert in the field of engineering and rigging. (R. p. 120, lines 1-3; p. 121, line 4). The field of rigging is a subset of engineering. (R. p. 119, lines 13-15). Rigging is the science of the process of safely lifting materials, whether by crane or, as in this case, by forklift type equipment. (R. p. 118, line 21-p. 119, line 12).

The chief deficiency Mr. Fournier identified in the work process utilized by Appellant is that employees should not work underneath an elevated load unless there is secondary bracing, cribbing, or blocking underneath the load. (R. p. 122, line 14-p. 123, line 3). Further, the blocking and cribbing should have at least two forms of support. (R. p. 123, line 13-p. 124, line 2). Cribbing or blocking is a series of 4x4s, 6x6s, or things of that nature interlaced and stacked "so that if a load falls, it only falls an inch or two down onto the cribbing . . . ." (R. p. 138, lines 5-13). The two forms of support should be at "both sides of the load so you're bracketing the load." (R. p. 125, lines 6-10). Mr. Fournier testified that the mobile home axle used by Appellant was only a single point of support. (R. p. 124, lines 4-5). Further, positioning the mobile home axle under the fork at the machine end of the fork caused a cantilever action because the load is applied outboard of the means of support. (R. p. 124, line 9-p. 124, line 5). The principles of working under an elevated load apply equally to lifting from above by crane or from below by a modified loader configured like a forklift. (R. p. 122, lines 17-21).

Mr. Fournier testified that the procedure that Appellant designed and utilized was not safe. (R. p. 135, line 24-p. 136, line 2). He testified that the compressive strength of the mobile home axle was not the issue—it was the use of a single support, rather than two supports, and the

placement of the support. (R. p. 136, line 3-p. 137, line 12). With respect to the nature of the work in the salvage yard, the supports should have taken into consideration the horizontal movement of the load caused by the forces involved with dismantling the vehicles. (R. p. 139, line 20-p. 140, line 10). Appellant should have used either two sets of temporary cribbing or a stationary stand that was stable and structurally sound. (R. p. 137, line 25-p.138, line 4). Mr. Fournier testified that working under a suspended load is a recognized hazard that could cause serious injury. (R. p. 142, lines 2-4). In summation, Mr. Fournier testified that the cause of Respondent's injury was the failure to provide secondary support underneath the load and the mobile home axle was not an adequate secondary support. (R. p. 163, lines 18-24).

ARGUMENT

Appellant presents a straw man argument in alleging a failure of proof by Respondent concerning why the vehicle fell. The case presented by Respondent proves negligence without regard to why the vehicle fell. Respondent first will demonstrate how he presented evidence of negligence. Respondent then will respond to Appellant's argument that Respondent employed res ipsa loquitor in presenting his case.

Standard of Review

An appellate court will reverse the trial court's ruling on a directed verdict or JNOV motion "only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). The trial court must view all evidence and all inferences that can reasonably be drawn from the evidence in the light most favorable to the non-moving party. *Id.* When deciding a directed verdict or JNOV motion, the trial court "is concerned only with the existence or non-existence of evidence" and cannot consider credibility issues or conflicts in evidence or

testimony. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). The appellate court therefore must determine whether any evidence existed on each element of the cause of action. *First State Sav.& Loan v. Phelps*, 299 S.C. 441,446, 385 S.E.2d 821, 824 (1989).

I. BECAUSE RESPONDENT PRESENTED EVIDENCE OF NEGLIGENCE BY APPELLANT, THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR DIRECTED VERDICT AND JNOV.

Respondent presented evidence of Appellant's breach of a duty to provide a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees, and that the breach proximately caused damage to Respondent.

The plaintiff in a negligence action must prove the familiar three elements: "(1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001).

Appellant Owed Respondent a Duty to Maintain a Place of Employment Free of Recognized Hazards

The existence of a duty is an issue of law. *Ellis by Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). Whether the parties have the relationship involved in the duty is a question of fact for the jury. *See Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 194, 771 S.E.2d 639, 644 (Ct. App. 2015)(considering the existence of a doctor-patient relationship). South Carolina has long recognized that employers owe their employees the duty to provide them with reasonably safe and suitable machinery and a party who goes to work for a company

has a right to assume that the company has reasonably safe and suitable appliances to do the work. *Jackson v. Southern Ry.*, 73 S.C. 557, 570, 54 S.E. 231, 235-36 (1906).

Alternately, the existence of a duty can be established by statute and the breach of the duty can be established by showing a violation of the statute. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001). The existence and violation of an agency regulation may establish the duty and breach the same as a statute. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994). South Carolina regulation charges employers with the duty to "maintain a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees and he shall comply with this regulation . . . ." 9 S.C.Code Ann.Regs. 71-112A (Supp. 2012).

The trial court charged the jury under *Jackson* and Regulation 71-112. (R. p. 253, lines 1-25). There were no objections to these charges. (R. p. 268, line 25-p. 269, line 12; p. 270, lines 1-4).

Respondent Hogan presented evidence that he was an employee of Appellant on the day of his injury. While Appellant contended that Respondent was not about the business of Appellant and was not supposed to be at the workplace, there was conflicting testimony on the issue. Respondent testified he was pulling a motor for Appellant's customer. Harold Corder's testimonies at trial and at his prior deposition were in conflict about whether he knew Respondent was present. Ms. Smith and Ms. Davis testified that Respondent spoke to Harold Corder minutes before hearing him scream for help. It therefore was within the jury's province to find that Respondent was an employee of Appellant, who owed Respondent the duty to keep the workplace free of recognized hazards which may cause serious harm.

Appellant Breached the Duty to Maintain a Place of Employment Free of Recognized Hazards

Respondent presented evidence of Appellant's breach chiefly through his rigging expert, Stephen Fournier. Respondent's expert opined directly that working under a suspended load is a recognized hazard that could cause serious injury. Respondent presented evidence that he was working under a SUV held up by the Caterpillar. Mr. Fournier testified that the critical failure—the breach of the duty—in this matter was when Appellant put Respondent underneath the raised vehicle without adequate support. He testified that the mobile home axle was not an adequate support. Respondent therefore met his burden of presenting some evidence on the element of breach of duty.

Appellant's Breach Proximately Caused Respondent's Damages

"As a general rule, the question of proximate cause is one of fact for the jury." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 136, 558 S.E. 2d 271, 276 (Ct. App. 2001). To prove causation, a plaintiff must demonstrate both causation in fact ("but for" cause) and legal cause. *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). The touchstone of legal cause is whether an injury is foreseeable from the breach. *Id.*

With regard to cause in fact, Mr. Fournier testified that the failure to provide secondary support underneath the raised vehicle was the cause of Respondent's injuries. Respondent testified that the SUV fell on his head, pushing him to the ground, causing immediate severe back pain. He testified that he was transported by ambulance from the scene of his injuries directly to Lexington hospital. Dr. Lozanne testified that the Respondent's medical treatment and surgeries were caused by the injury he presented with at the hospital on February 18, 2011. Respondent therefore presented evidence of cause in fact.

With regard to forseeability, the injury suffered by Respondent is exactly the type of injury that adequate secondary supports are intended to prevent. Mr. Fournier testified: "that's the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant." (R. p. 158, lines 20-24). A reasonable employer in Appellant's position could have foreseen that if there was not an adequate secondary support, a worker could be hurt by a falling vehicle. There was evidence presented that the mobile home axle came into use after a previously used forklift experienced a cracked cylinder. The Appellant's use of the mobile home axle, although inadequate as an appropriate secondary support, demonstrated that the company had recognized the need for a secondary support. Respondent therefore presented evidence from which the jury could find that Appellant's breach of its duty to provide an adequate secondary support proximately caused Respondent's damages.

Respondent Presented Evidence of Each Element of Negligence

With regard to the elements of a cause of action for negligence Respondent presented evidence that: (1) Appellant owed a duty to provide a system of secondary bracing, cribbing, or blocking consisting of two points of support when employees are working underneath a suspended load; (2) that Appellant breached this duty by having Respondent work under a vehicle suspended without adequate secondary bracing, cribbing, or blocking; and (3) that the improperly suspended vehicle fell onto him, causing a fractured spine. Respondent presented evidence of each of the required elements of the cause of action. The trial court therefore properly denied Appellant's motions for directed verdict and JNOV.

II. APPELLANT MISIDENTIFIES THE DUTY AND BREACH AT ISSUE IN THIS MATTER IN ALLEGING LACK OF PROOF.

Appellant misapprehends the duty owed to Respondent in raising issues of proof. Appellant focuses on the reason for the vehicle beginning to move, incorrectly suggesting the duty owed to Respondent is to provide any sort of support. Appellant suggests that Respondent must prove the reason for the SUV falling from the loader. Respondent need not demonstrate the reason for the falling vehicle, however, because Respondent did not proceed with a theory that Appellant was negligent in causing the vehicle to fall.

Respondent instead has proven negligence through the breach of a duty to provide an adequate secondary support. The negligent act occurred when Appellant designed a process that did not include adequate secondary supports. The need for the secondary support assumes that there may be a failure of the primary lifting mechanism. As the rigging expert, Mr. Fournier, testified, "that's the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant." (R. p.158 , lines 20-24). He continued: "With the secondary system in place, the accident would not have happened." (R. p. 159, lines 4-5). The duty owed to Respondent, the duty to provide an adequate secondary support, assumes that the load falls from the lifting device. The negligent act was to put Respondent under a falling vehicle in the absence of an adequate secondary support system. In denying Appellant's renewed directed verdict motion at the close of the evidence, the trial court recognized Respondent's negligence claim relied on the lack of an adequate secondary support and that the reason for the vehicle falling was immaterial. (R. p. 242, line19-p. 243, line 8).

Nonetheless, Respondent presented evidence from which the jury could infer the reason for the vehicle falling. Respondent testified that he was removing a motor from an SUV for Appellant's customer just before he was injured. (R. p. 72, lines 3-8). This necessarily involved loosening the exhaust, torque converter bolts, and other valves and bolts while underneath the vehicle. (R. p. 66, line 22-p. 67, line 22). Respondent first noticed there was a problem when he saw the vehicle was leaning, "looking like it was about to slide off" the forks. (R. p. 76, line 19-p. 77, line 4). Respondent's expert testified the movements involved in loosening nuts and dismantling a vehicle cause horizontal forces that were not properly supported in the Appellant's rigging. (R. p. 139, line 20-p. 140, line 10). Mr. Fournier testified that the angle that the forks set down on the axle could explain the condition of the forks later titling:

> Now we've heard that post-accident that, that this thing was, the forks were tilted. So if I take like my fork in this instance like this and I tilt it instead of bearing over the top. The whole think I now only have bearing and I'm actually creating a horizontal force on the top of that - - on the top of that stand and you get that horizontal force that I can kick that thing, kick that thing over. And then you have no support at all and then you can have addition[al] tilting action, you know of the fork.

(R. p. 137, lines 3-12).

Mr. Fournier testified that the forks were a smooth surface. (R. p. 137, lines 16-24). After the SUV fell, Harold Corder noted the forks were "tilted just enough for [the SUV] to slide down on its side." (R. p. 46, lines 18-25). From the combination of tilted forks, the forces applied in working on the vehicle, the smooth metal surface the SUV rested on, the vehicle rocking before it fell, and the precarious stability of the axle, there was sufficient evidence for the jury to infer that the SUV slid off the forks onto Respondent. Further, contrary to Appellant's assertion, Mr. Fournier testified that the final event of the SUV falling was not necessarily caused by a hydraulic leak in the loader. (R. p. 140, lines 19-24).

Because Respondent proved a different negligent act than the act Appellant focuses on, the strength of the primary system is immaterial. The reason for the SUV beginning to fall toward Respondent is immaterial. There was an unbroken chain of events between the negligent act of Appellant placing Respondent under a falling load in the absence of a secondary support and Respondent's injuries.

Respondent provided evidence of each element to prove his case and did not rely on res ipsa loquitor to prove his case. Res ipsa would only be an issue in a situation not present: if Respondent was injured in the presence of an adequate secondary support and could not explain the failure of the secondary support. That is not the case before the Court, however. The Respondent presented evidence of duty, breach, and proximate cause without resorting to the doctrine of res ipsa loquitor. Accordingly, the trial court properly denied Appellant's motions and properly submitted the case to the jury.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

September 8, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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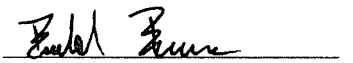

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