

2014 WL 7201931 (Fla.App. 4 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Fourth District.

Stephen FISCHER, Appellant,
v.
Richard DEBRINCAT and Jason Debrincat, Appellees.

No. 4D14-1855.
October 8, 2014.

LT Case No: 502009CA015835XXXXMB

Appellees Answer Brief

Taylor & Taylor Law, P.A., 4440 PGA Boulevard, Suite 600, Palm Beach Gardens, Florida 33410, Telephone No: [REDACTED]
[REDACTED] Email: [REDACTED] Barry W. Taylor, Florida Bar No. [REDACTED], for
appellees.

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***iii PREFACE**

All citations to the record will be referred to in this brief as “R “. All citations will be the exact page of the document contained within the record unless reference is made to the entirety of the document.

***iv STATEMENT OF THE CASE AND FACTS**

I. STATEMENT OF THE FACTS

In November 2007 Richard Debrincat and Jason Debrincat through counsel initiated a civil lawsuit in the Fifteenth Judicial Circuit with the style of the case Debrincat v. Fischer, Case No. 502007CA02110XXXXMBAA (“Original Proceeding”). (R.1,187). On October 9, 2008 Richard Debrincat and Jason Debrincat added Stephen Fischer as an additional party defendant in the Original Proceeding by including him in the Second Amended Complaint. (R.1-86).

In the original proceeding Stephen Fischer was sued for defamation, defamation per se, tortious interference and conspiracy. (R.1-86) in the original proceeding. Richard Debrincat and Jason Debrincat after retaining new counsel filed a Notice of Dropping Parties dismissing Stephen Fischer (R.2-188)

II. STATEMENT OF THE CASE

On May 4, 2009 Stephen Fischer filed a complaint seeking damages for malicious prosecution against Richard Debrincat and Jason Debrincat. (R-86).

*v On May 26, 2009 Richard Debrincat and Jason Debrincat served an answer (R. 137-9).

On June 1, 2010 Richard Debrincat and Jason Debrincat served an amended answer and affirmative defenses. (R. 137-9). On September 17, 2013 Richard Debrincat and Jason Debrincat served a second amended answer and affirmative defenses. (R.175-7).

On September 25, 2013 Richard Debrincat and Jason Debrincat served a motion for summary judgment. (R.178-80).

The sole issue presented in the Motion for Summary Judgment was that whether litigation privilege which was raised in Richard Debrincat and Janson Debrincat’s second amended answer and affirmative defenses (R.178-80), precluded Stephen Fischer’s claims for Malicious Prosecution, under [Wolfe v. Foreman, 128 So.3d 67 \(Fla. 3d DCA 2013\)](#).

The trial court granted Summary Judgment in favor of Richard Debrincat and Jason Debrincat, (R.192).

On April 22, 2014 the trial court entered a final judgment in favor of Richard Debrincat and Jason Debrincat (R.207-8).

*vi On May 20, 2014, Stephen Fischer filed a Notice of Appeal. (R.209-12).

*vii SUMMARY AGRUMENT

The trial court correctly found that litigation privilege precluded Stephen Fischer's action against Richard Debrincat and Jason Debrincat for malicious prosecution. This affirmative defense applies both to actions initiating the proceeding as well as acts taken during the course of the proceeding in order to allow litigants to freely seek redress in the Courts without fear of subsequent legal action.

*1 STANDARD OF REVIEW

The summary judgment poses a pure question of law as to whether the litigation privilege precludes an action for malicious prosecution by a party defendant that was added to a prior civil proceeding. The standard of review of a summary judgment posing pure questions of law is de novo. [Eco-Tradition, Llc v. Pennzoil-Quaker State Co., 137 So.3d 495 \(Fla 4th DCA 2014\)](#).

*2 ARGUMENT

The decision of the trial court in precluding Appellant's action against Appellees for malicious prosecution is a clear and proper application of litigation privilege. Appellant's action for malicious prosecution was predicated upon his joinder in a prior judicial proceeding. Appellees raised the Affirmative Defense of litigation privilege and citing [Wolfe v. Foreman 128 So. 3d 67 \(Fla 3rd DCA 2013\)](#) prevailed on their Motion for Summary Judgment. Contrary to Appellants assertions that "it is not the function of the trial court or intermediate appellate court to abrogate the a common Law cause of action or modify its elements" it is the Courts that create common law.

In [Wolfe](#) the third District Court of Appeals applied a careful analysis of prior Florida Supreme Court decisions including [Myers v. Hodges, 44 So. 357 \(Fla. 1907\)](#) where the court first recognized litigation privilege to provide legal immunity for actions that occur during judicial proceedings. [Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell P.A. v. U.S. Fire Insurance Co, 639 So. 2d 606 \(Fla. 1994\)](#) where the Court stated "[W]e find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a *3 defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding... [P]articipants [must] be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct."

and In [Ecehvarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380 \(Fla 2007\)](#) where the court recognized "a]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding... so long as the act has some relation to the proceeding," in reaching its decision.

Appellant tries to distinguish between that the filing of the civil proceeding and acts taken in the course of that proceeding, arguing that litigation privilege only applies to the latter, but cites no case law to support this position. Contrary to this position the Appellate Court in [Wolfe](#) referencing the broad language used in [Levin](#) and [Echevarria](#) stated "The filing of a complaint, which initiates the judicial proceedings, obviously "occurs during the course of a judicial proceeding" and "relates to the proceeding."

*4 This is further supported by in *Ange v. State*, 98 Fla. 538, 123 So. 916 (1929), where the Court explained that the litigation privilege “extends to the protection of the judge, parties, counsel, and witnesses, and arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto.” Clearly the filing of the action fits within these parameters Accordingly, because Appellant was joined as a defendant in a judicial proceeding, which in fact was ongoing at the time. In joining the Appellant they were performing an act in the due course of a judicial proceeding or as necessarily preliminary thereto and the joining of the Appellant clearly related to the proceeding, under Florida law they were protected by litigation privilege.

With regard to Appellants argument concerning Jury instructions, this argument was not made at the hearing for Summary Judgment and should be stricken. Furthmore, jury instructions are not precedent.

***5 CONCLUSION**

The decision of the trial court should be affirmed.

2014 WL 7201870 (Fla.App. 4 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Fourth District.

Theresa RIVERNIDER, Plaintiff(s),
v.
Steven H. MEYER, et al, Defendant(s).

No. 4D14-819.
October 27, 2014.

An Appeal from the Circuit Court in and for Palm Beach County
Lower Tribunal Case# 502013CA005398XXXXMB

Appellant's Reply Brief

John J.R. Skrandel, FL Bar# [REDACTED], Jerome F. Skrandel, PL, 300 Prosperity Farms Road, Suite D, North Palm Beach, FL 33408, Phone [REDACTED], Fax [REDACTED], Email [REDACTED].

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All citations in this Reply Brief are to the Record on Appeal or the Meyer Answer Brief in the following format:

Example 1

R: 1-- 1 Refers to page 1 of the Record on Appeal, paragraph 1.

Example 2

Meyer Brief 7 Refers to page 7 of Meyer's Answer Brief. The page number referenced is the page number typed at the bottom of each page of the actual brief.

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*4 INTRODUCTION

Meyer's answer brief raises three issues. First, Meyer alleges Rivernider failed to prove a lack of probable cause. Regardless of any previous court ruling on the issue, Rivernider's sworn allegation of fraud or other corrupt means employed by the person initiating the prosecution is sufficient to overcome any presumption of the existence of probable cause in this case. *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217, 1217 (Fla. 1986).

Second, Meyer alleges Rivernider failed to prove the prior proceedings ended with a bona fide termination in her favor. Rivernider proved the withdrawal of the proceedings by the person bringing them with a corresponding dismissal by the trial court which is sufficient proof of a bona fide termination in her favor for summary judgment purposes. *Rowen v. Holiday Pines Prop. Owners' Ass'n*, 759 So. 2d 13, 15-16 (Fla. 4th DCA 2000). R: 562-563, R: 61.

Finally, Meyer argues litigation privilege. The litigation privilege would not apply because the challenged activity did not occur during the course of the litigation and was not related to the underlying proceedings. In addition, the Florida Supreme Court has limited the application of the litigation privilege in the recent case of *Delmonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013), wherein the allegations of out-of-court wrongdoing by an attorney are very similar to this case.

***5 ARGUMENT**

Meyer's argues three reasons to affirm the award of summary judgment in their favor. First, Meyer claims that Rivernider did not prove a lack of probable cause. Meyer incorrectly claims that the issue of probable cause is a purely a question of law for the court and an order to show cause issued by a judge conclusively establishes probable cause. Meyer Brief 10, FN13. But, Meyer cut the cited portion of the Maily case short. The citation actually reads as follows:

"What facts and circumstances constitute probable cause is a pure question of law; whether they exist is a pure question of fact. (underlining emphasis added)

Maily v. Jenne, 867 So. 2d 1250, 1252 (Fla. 4th DCA), rev. denied, 884 So. 2d 23 (Fla. 2004).

Even if it can be said that any of the previous court proceedings found probable cause, the Florida Supreme Court has held that a finding of probable cause may be attacked in a subsequent action for malicious prosecution.

"In a suit for malicious prosecution, does a presumption of the existence of probable cause arise from a magistrate's finding of probable cause for an arrest warrant, that presumption being conclusive absent proof of fraud or other corrupt means employed by the person initiating the prosecution?"

"We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the negative."

Burns v. GCC Beverages, Inc., 502 So. 2d 1217, 1217 (Fla. 1986).

*6 In this case, Rivernider's verified complaint repeatedly alleged the charges against her were false. R: 1-11
R 2 - pp# 10 "false charges" pp# 11 "false charges"

R 3 - pp# 22 *alfa affidavit* pp# 23 "false testimony"

R 5--pp# 39 "Affidavit were false and untrue" pp# 40 "allegations presented to the trial Court were false and untrue"

R 6--pp# 46 "false motions and affidavits executed and filed with malice"

R 8 - pp# 58 "proffered his false affidavit as evidence" pp# 59 "Defendants and their false testimony"

R 10--pp# 76 "false Complaint executed and filed with malice"

Meyer's motion for summary judgment offered no proof sufficient to conclusively disprove Rivernider's claim that the underlying proceedings were procured by fraud or other corrupt means employed by the person initiating the prosecution. R: 291-321. Therefore, at best, the issue of probable cause was a disputed issue of material fact precluding summary judgment.

"In an action for malicious prosecution, the question of probable cause is a mixed question of law and fact. When the facts relied on to show probable cause are in dispute, their existence is a question of fact for the determination of the jury; but their legal effect when found or admitted to be true, is for the court to decide as a question of law."

Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 381 (Fla. 1999).

There is also a second exception to any presumption of probable cause following court proceedings, which exception can be termed as the right to be *7 heard. This exception provides that there is no presumption of probable cause established by prior court's proceedings unless a defendant had the opportunity to be heard by the court on the issue of probable cause.

"Accordingly, we hold that the issuance of an arrest warrant by a magistrate establishes a presumption of probable cause

for purposes of an action for malicious prosecution only if the defendant had the opportunity to be heard by the magistrate on the issue of probable cause."

Burns v. GCC Beverages, Inc., 502 So. 2d 1217, 1220 (Fla. 1986).

In the underlying proceedings, Rivernider DID NOT have the right or opportunity at the March 10, 2011, contempt hearing to contest the truth or accuracy of the allegations against her. R: 890-891. Pursuant to [Rule 3.840, Fla.R.Crim.P.](#), at that particular phase of the proceedings, when the court is considering whether or not to issue an order to show cause, the Rule does not provide the accused with any right or opportunity to a contested evidentiary hearing on the issue of probable cause. Thus, the trial court's ruling in this case at summary judgment on the issue of probable cause was in error.

Meyer's second argument in support of summary judgment is that Rivernider did not prove the prior proceedings resulted in a bona fide termination in her favor. This Appellate Court has held the element that there be a bona fide termination of the underlying civil suit is satisfied by either a favorable decision on the merits or a bona fide termination of that lawsuit.

***8** *"Civil proceedings may be terminated in favor of the person against whom they are brought... by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceeding's because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken. If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail."* (underlining emphasis added)

Rowen v. Holiday Pines Prop. Owners' Ass'n, 759 So. 2d 13, 15-16 (Fla. 4 DCA 2000).

There are no special or magic words for termination. A bona fide termination exists when there is an acknowledgment that the particular matter will not be further prosecuted.

"HN5 The essential element of a bona fide termination of the criminal prosecution in favor of the person bringing the malicious prosecution action has been held to be satisfied if there has been an adjudication on the merits favorable to him or if there is a good faith nolleprosequi or declination to prosecute....There are no magic words for termination. A malicious prosecution complaint that merely alleges that "the County Prosecutor... refused information on the said charge or charges and completely abandoned prosecution thereof" sufficiently pleads that element of the action....We would agree that the allegation of favorable termination might be made more specific, but there is no specific requirement that it be terminated in a particular way. See 52 Am.Jur.2d Malicious Prosecution § 34. The action for malicious prosecution does not depend on some specific event, because termination may be evidenced in a variety of ways... Calleja v. Wiley, supra, at 125. (underlining emphasis added)

Gatto v. Publix Supermarket, Inc., 387 So. 2d 377, 380-382 (Fla. 3rd DCA 1980)

***9** The record proves Rivernider satisfied the bona fide termination element. The Defendant Sterling Villages filed a notice withdrawing the motion for contempt with prejudice on 2/20/2013, entitled Association's Notice of Withdrawal of Motion for Issuance of Order to Show Cause with Prejudice. R: 562-563. Pursuant to that motion, the County Court judge entered an order dismissing the contempt proceedings with prejudice on 2/20/2013. R: 61. And, Rivernider expressly pled that the Defendants abandoned pursuit of the claim of contempt and the matter was dismissed with prejudice.

"38. Thereafter the Defendants abandoned any attempt to allege the Plaintiff committed any wrongdoing and all contempt proceedings against the Plaintiff were dismissed with prejudice. A copy of this Order is attached hereto and made a part hereof as Exhibit "K."

R: 5, pp# 38.

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In *Alamo v. Mancusi*, 632 so. 2d 1352 (Fla. 1994), the Florida Supreme Court examined a case from the 4th DCA on the issue of bona fide termination. The Court noted that when the plaintiff submits evidence of a bona fide termination, the burden shifts to the defendant to rebut that the termination was bona fide. *Id.* at 1356. If the defendant offers such evidence, the matter is then one for the jury to decide. *Id.* Rivernider submitted such evidence by way of her verified complaint and by attaching a copy of the Final Order Dismissing Contempt Proceedings with Prejudice to the complaint as Exhibit "K". R: 61. *10 Meyer's motion for summary judgment did not submit any affidavits or other sworn testimony disputing the issue of abandonment of the contempt charges. R: 291-321. Even if Meyer did properly dispute Rivernider's allegation of the bona fide termination in her favor, such would be a factual dispute resolved only by the jury, not on summary judgment. *Alamo v. Mancusi*, 632 so. 2d 1352, 1356 (Fla. 1994).

The third and final argument by Meyer in support of the summary judgment ruling is the litigation privilege. There is a conflict among the DCA's as to whether the litigation privilege even applies to a cause of action for malicious prosecution and, if so, how it applies. The 3rd DCA held that the litigation privilege applies to a cause of action for malicious prosecution. *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. Dist. Ct. App. 3d Dist. 2013). The 2nd DCA says there is no such absolute privilege. *Olson v. Johnson, et al*, 961 So. 2d 356, 360-361 (Fla. 2nd DCA 2007). The 4th DCA seems to acknowledge the litigation privilege defense in the context of a claim for malicious prosecution but with exceptions. *Am. Nat'l Title & Escrow of Fla., Inc. v. Guar. Title & Trust Co.*, 810 So. 2d 996, 998 (Fla. 4th DCA 2002). The Florida Supreme Court has not clarified this issue. Strangely, the Meyer brief cites dicta in the recent Florida Supreme Court case of *Delmonico* to support various aspects of their defense without mentioning the similarities of the facts of that case and this case: both *11 allege instances of out of court misconduct by attorneys who allege the defense of the litigation privilege. *Delmonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013). Meyer Brief 10, 23, 28, 33.

Before the trial court may consider the litigation privilege, Meyer must offer proof of the threshold requirements: proof the acts complained of occurred during legal proceedings or were related to those proceedings. *Id.* at 1219. Meyer offered no such sworn proof. First, none of the alleged contemptuous acts of Rivernider occurred during actual court proceedings, but rather occurred outside of the presence of the court and after all final orders and judgments had already issued. The original Final Judgment for overdue assessments was entered by the trial court on 1/7/2009. R: 355-356. The Final Judgment in Garnishment was entered 3/6/2009. R: 370-371. The motion for contempt was executed on 3/25/2009 in the same County Court case. R: 372-376. Thus, Rivernider's alleged wrongdoing occurred after all court proceedings had concluded and after all final judgments had issued.

Second, Meyer never filed any sworn statements that the contempt proceedings against Rivernider were related to the underlying proceedings against her. R: 291-321. There was a Final Judgment entered against Rivernider for money damages for her failure to pay condominium assessments. R: 355-356. There was a final order of garnishment entered requiring a tenant to pay his rent to *12 the condominium instead of Rivernider. R: 370-371. But, the contempt proceedings had nothing to do with enforcing/collecting the underlying judgment for damages against Rivernider or enforcing/collecting the garnishment order against Rivernider. None of the various motions for contempt filed by Meyer sought to collect the underlying judgment for the plaintiff, Sterling Villages Condominium Association. Both motions for contempt sought to collect damages solely for Mr. Hannigan's repairs based on the actions of a third party that Mrs. Rivernider did not know of or authorize. In the alternative, the motions sought to enforce the underlying lease agreement between Hannigan and Rivernider.

12. The Defendant, RIVERNIDER, should be held in contempt and ordered to reimburse Mr. Hannigan for the full cost of the air conditioning repairs. Upon information and belief, the Defendant has given her tacit or express permission to Mr. LaPorte to engage in the criminal conduct described above. Further, subject to the terms of the lease, the Defendant is obliged to repair he air conditioning unit but has failed to do so.

R: 14--pp# 12, R: 37--pp# 12.

The prayers for relief in both motions for contempt requested money for Mr. Hannigan, it did not seek to recover funds to

satisfy the judgment in favor of the plaintiff Sterling Villages.

WHEREFORE, the Plaintiff respectfully requests that the Court enter an award of appropriate sanctions against the Defendant, RIVERNIDER, and order her to immediately reimburse Mr. Hannigan for the cost of the repairs made to the air conditioning unit or be held in contempt by this Court.

R: 15--prayer for relief. R: 38-- prayer for relief.

*13 Meyer's motion for summary judgment never disputed their own sworn allegations in the County Court case that only Mr. Laporte damaged the subject air conditioner. R: 291-321, R: 14--pp# 10). Nor did their motion dispute that finding by the Appellate Court.

Given Mr. Laporte 's alleged actions in this case, the trial court likely believed that Mr. Laporte acted upon Rivernider's direction; however, there is no sworn allegation that he did so. Although the facts in the affidavit are likely sufficient to establish an agency relationship between Rivernider and Mr. Laporte, they are not sufficient to establish Rivernider's criminal contempt based upon Mr. Laporte 's acts.

R: 56.

Meyer avoided addressing the facts underlying these issues because it proves the contempt proceedings did not occur during the underlying litigation nor did it relate to the underlying litigation against Rivernider. Without proof of these elements, which should have been submitted by way of affidavits or other sworn statements, Meyer cannot invoke the litigation privilege.

Finally, the recent case of *Delmonico* erodes Meyer's claim for the application of the litigation privilege. *Delmonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013). *Delmonico* originated in the 4th DCA. The issue before the Florida Supreme Court was whether Florida's absolute privilege, which shields judges, counsel, parties, and witnesses from liability for alleged defamatory statements made in the course of a judicial proceeding, extends to statements made by an *14 attorney during ex-parte, out-of-court questioning of a potential, nonparty witness while investigating matters connected to a pending lawsuit. *Id.* at 1208. The 4th DCA relied on the Court's decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So. 2d 606 (Fla. 1994), to hold the privilege applies if the statements bear some relation to or connection with the pending matter. *Id.* The Florida Supreme Court reversed.

"We hold that Florida's absolute privilege, as this Court has developed the common law doctrine, was never intended to sweep so broadly as to provide absolute immunity from liability to an attorney for alleged defamatory statements the attorney makes during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit. In this narrow scenario, we conclude that a qualified privilege instead should apply to ex-parte, out-of-court statements, so long as the alleged defamatory statements bear some relation to or connection with the subject of inquiry in the underlying lawsuit. However, where the statements do not bear some relation to or connection with the subject of inquiry in the underlying lawsuit, the defendant is not entitled to the benefit of any privilege - either absolute or qualified.

Providing a qualified privilege under the circumstances of this case, which involves an attorney's ex-parte, out-of-court questioning of several nonparty witnesses, is sufficiently protective of the competing policies underpinning the privilege: "[T]he right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings." *Levin*, 639 So. 2d at 608. We adopt the reasoning of Judge Warner's scholarly dissent in the decision below that the purpose of absolute immunity is not "advanced by protecting a lawyer who is defaming a party to a witness outside of a proceeding at a time when both parties are not present and do not have an opportunity to be heard. "

*15 *Id.* at 1208-1209.

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The present case is one of first impression but is similar to the facts of *Delmonico*. Rivernider's claim of malicious prosecution centers on an out of court conspiracy among members of the Sterling Villages Condominium, Donald Hannigan, and attorney Steve Meyer to knowingly bring false accusations against Rivernider for criminal contempt of court. R: 1-61. There were no pending contempt proceedings before the conspirators acted. R: 1-61. Meyer's motion for summary judgment did not contain, allege, or refer to any affidavits or other sworn testimony on the issue of their out of court actions, discussions, or agreements sufficient to overcome Rivernider's verified complaint. R: 291-321. To paraphrase the reasoning of Judge Warner's scholarly dissent, the purpose of absolute immunity is not advanced by protecting a lawyer from convincing others to pursue criminal contempt charges against a party outside of a proceeding at a time when both parties are not present and do not have an opportunity to be heard. Therefore, summary judgment was improper.

CONCLUSION

For all of the foregoing reasons, Rivernider prays that this Honorable Court grant the appeal, quash the order dismissing this case, and remand the case for further proceedings on the merits.

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