

NO. 47605-3-II

**WASHINGTON STATE COURT OF APPEALS
DIVISION TWO**

Nicky Rowlette, Respondent

v.

Ted Morrison and Denise Morrison, Appellants

OPENING BRIEF OF THE APPELLANTS

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I. INTRODUCTION

The Morrisons have a credible claim to ownership of the property from which they were evicted. When a Defendant makes a credible claim to ownership of the property, the unlawful detainer court lacks jurisdiction to decide the issue of ownership and thus the right to possession. The unlawful detainer action must be dismissed.

In this case, the Grays Harbor County Superior Court recognized there were issues of ownership but proceeded anyway. Thus, this Court should reverse and remand, ordering the Superior Court to vacate the Order for Writ of Restitution and the related money judgment.

The trial court also erred when it allowed an Oregon estate or the personal representative of an Oregon estate or an attorney in fact purporting to represent the personal representative to pursue the unlawful detainer over a Washington property. The Oregon representative should not be recognized as a proper plaintiff in Washington.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing Nicky and Randy Rowlette to maintain an Unlawful Detainer against an “owner” as defined by the Residential Landlord-Tenant Act, where:
 - a. Mrs. Morrison was an “owner” under the will the Rowlettes were attempting to enforce.
 - b. Alternatively, Mrs. Morrison was an “owner” under the oral agreement she seeks to enforce.
2. The trial court erred by allowing the personal representative of an Oregon estate to evict a “tenant” from a Washington property.

3. The trial court erred when it allowed the personal representative of an Oregon estate to delegate non-delegable powers through a Power of Attorney.
4. The trial court erred when it allowed an attorney-in-fact to represent a foreign Estate in an action against a co-beneficiary to whom he owed a duty of loyalty.
5. The trial court erred when it allowed attorney fees for wasted and unproductive time.
6. The trial court erred in its Findings of Fact #1. The probate estate is not the owner. CB at 60.
7. The trial court erred in its Findings of Fact #2. Dale Rowlette did not purchase the land nor rent it. A tenancy at will should not be the subject of an unlawful detainer. CB at 60.
8. The trial court erred in its Findings of Fact #3. The Plaintiff did not have the right to terminate defendants' tenancy. CB at 61.
9. The trial court erred in its Findings of Fact #4. The Morrisons were owners and not unlawfully detaining the land. CB at 61.
10. The trial court erred in its Findings of Fact #5. Fees should not have been awarded and these were excessive. CB at 61.
11. The trial court erred in Conclusions of Law #1 through 5 inclusive. CB at 61.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did Mrs. Morrison have a credible claim of ownership of the property from which she was evicted?
2. If so, did the trial court err by allowing Mr. Randy Rowlette to maintain an unlawful detainer action against an “owner” as defined by the Residential Landlord-Tenant Act?
3. Did the trial court err by allowing the personal representative of an Oregon estate to evict a “tenant” from a Washington property?
4. Did the trial court err when it allowed the personal representative of an Oregon estate to delegate non-delegable powers through a power of attorney?
5. Did the trial court err when it allowed an attorney-in-fact to pursue an unlawful detainer against his co-beneficiary, his co-owner?
6. Did the trial court abuse its discretion in granting fees for unnecessary or wasted efforts.

IV. STATEMENT OF THE CASE

Ted and Denise Morrison, a married couple, have been residents of Grays Harbor County for more than 35 years. VRP at 5.¹ Denise Morrison has two older brothers, Nicky and Randy Rowlette; and a younger sister, Julie Rowlette. VRP at 12, 13-16.

Together Ted and Denise purchased the subject property, 53 West Wildcat Road, McCleary, Washington, in 1980. VRP at 21-22. The

¹ The hearing transcript is in two sections indicated here as VRP, 1-111 and VRPII 1-15.

property was an undeveloped five-acre parcel. (TP5 L24). The purchase was initially financed by the seller. VRP at 47.

Three years later, Mrs. Morrison's late father, Dale Rowlette loaned the Morrises \$6,000 to pay off a debt arising from a civil lawsuit against them. VRP at 14. A month later, the young couple offered Dale Rowlette a deed to the property if he would pay off the purchase money note and if they could buy the property back from him for \$30,000. VRP at 14, 48, 54. The Morrises conveyed a deed to Dale Rowlette, filed August 10, 1983. CP 8.

Even though Dale Rowlette held the deed to the property, the Morrises developed the property, installed a well and septic, built a wood processing plant, and opened a Washington State Department of Agriculture-approved food business facility. VRP at 16, 77-78, 82. The Morrises paid for the installation of electricity, septic, driveway, well, pads, and outbuildings, VRP at 16.

In addition to paying for these improvements, over the years, the Morrises made principal payments, not counting tax payments, to Dale Rowlette exceeding \$34,000. VRP at 16. After the principal was paid, the Morrises continued to send Dale Rowlette checks to pay for property taxes. VRP at 14.

In 2006, Dale was ill with his final illness, VRP at 14. He told the Morrisons they had repaid him and all they had to do was continue paying taxes, VRP at 14, and the property would pass to them upon his death, VRP at 52.

A. The Oregon Probate

Dale Rowlette died on March 16, 2013 in Gladstone, Oregon, leaving the property to Mrs. Morrison and her brother Randy Rowlette equally. CP at 82. (Exhibit 3 Will at Art III B & C). Nicky Rowlette was named personal representative. Randy Rowlette was named alternate, in case Nicky Rowlette were to become unable to serve. CP at 82. Exhibit 3, Will at ART. IV). The will was probated in Oregon. VRP at 24.

The Morrisons objected to the provision in the will granting half of their home to Denise Morrison's brother. VRP at 37; CP at 18-20 (Defendants' Response of 3/10/2015). The Morrisons asserted 100 percent ownership of the property because they had met the terms of their agreement with Dale Rowlette. VRP at 26. The Morrisons also objected to the use of the word "rent" in the First Annual Accounting February 5, 2015. Their objection was heard and the Oregon court allowed that the

Morrison had been paying “property tax reimbursement” not “rent.” VRP at 17.

B. The Unlawful Detainer Action

Nearly two years after Dale Rowlette’s death, the Grays County Superior Court entered an unlawful detainer Order To Show Cause. CP 12-13 (February 23, 2015 Order). The Morrises objected to being called tenants CP at 16-20. Before the Grays Harbor Superior Court, the Morrises tried to assert that the Rowlettes fabricated the landlord-tenant agreement to “make it easier to evict” them, CP at 19.

After a hearing on the unlawful detainer, at which the Morrises appeared pro se, the court issued an Order for a Writ of Restitution. VRPII at 14; CP at 103-4 (Writ).The Morrises moved to stay the writ more than once, CP at 39-43, 48-55. The Morrises repeated enough facts for the Court to understand that the unlawful detainer was brought in spite of the Morrises’ credible claim of ownership of the property. The Morrises re-alleged that the property was never rented to them and that they had an agreement with Dale Rowlette that he would give the property back to them, CP at 42-43 (Motion to Stay). They argued that the Oregon Probate Court’s decision to change the accounting reference from “rent” to “tax

reimbursements” was binding on the Washington courts. Even so, the Court denied the motions to stay, CP at 56-7 (May 1 letter).

The writ of restitution required the Morrisons to move by May 19, 2015.³ The Writ was reissued June 1, 2015. The Morrisons filed a timely notice of appeal.

V. ARGUMENT

Whether a trial court has jurisdiction or statutory authority to decide an unlawful detainer case is subject to de novo review. *Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 274 P.3d 1075 (2012) (explaining the narrow scope of unlawful detainer actions and the limited nature of the court’s statutory authority to decide such cases). Moreover, issues of statutory construction, including what is required under the unlawful detainer statutes, are also reviewed de novo. *Housing Authority v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005). Because the unlawful detainer statute is summary in nature and in derogation of the common law, it must be strictly construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 489 (1990). The appellate court reviews challenges to findings of fact for substantial

³ Although the initial notices attempting to terminate the tenancy read “dwelling unit only,” CP at 7; the Writ includes a metes and bounds description of the property, CP at 103.

evidence, that is evidence sufficient to persuade a fair-minded person that the fact is true. *Burgess v. Crosan*, 189 Wn. App. 97, 358 P.3d 416, 418 (2015). Finally, whether a party is entitled to attorney fees is generally a matter of law, while the reasonableness of an attorney fee award is reviewed for abuse of discretion. *Ethridge v. Hwang*, 105 Wn App. 447, 459-60, 20 P.3d 958 (2001).

A. The Trial Court Did Not Have Jurisdiction to Evict the Morrisons Under the Residential Landlord-Tenant Act (RLTA) Because Mrs. Morrison is an Owner, Not a Tenant, and There Was Not a Landlord-Tenant Relationship

1. Under the RLTA, the court does not have jurisdiction to evict a joint owner; disputes about ownership must be resolved in a different action

The trial court did not have proper jurisdiction to proceed with an unlawful detainer action in this case because such actions are improper when there is a dispute as to proper title. And even if the trial court was correct that a tenancy at will existed, a fact the Morrisons dispute, common law applies, not the unlawful detainer statutes.

An unlawful detainer is an expedited action designed to determine the right of possession of real property between landlords and tenants. *Excelsior Mortgage Equity Fund v. Schroeder*, 287 P.3d 21, 26 (2012) (describing the court's unlawful detainer jurisdiction as narrow). Unlawful detainer actions provide the advantage of speedy relief, but they do not

provide a forum for litigating claims to title.” *Puget Sound Investment Group v. Bridges*, 963 P.2d 944, 946 (1998). Where title is disputed, the claimant must first establish superior title in a quiet title action before bringing an unlawful detainer action. *See id.* The Morrisons clearly argued that Ms. Morrison was an owner of the property, CP at 17-20. The dispute over ownership of the property could not be resolved in an unlawful detainer action.

Furthermore, the legislature has defined both “landlord” and “owner” in the Residential Landlord Tenant Act. RCW 59.18.030 (11), (13). Landlord includes “the owner, lessor, or sublessor.” RCW 59.18.030(11). If Ms. Morrison was an owner, then she and her husband could not have been “tenants” under the Act. RCW 59.18.030(24). Yet the court seemed to assume they were tenants, not owners. The court even told the Morrisons during the proceedings: “That’s what you have to prove that it’s your property in this proceeding.” VRP at 94. This constituted error, because the unlawful detainer actions are not the correct vehicle for determining ownership of a piece of real property or for evicting a person with a colorable claim of title.

Mr. Rowlette failed to prove a landlord-tenant relationship sufficient to invoke the court’s jurisdiction to proceed with an unlawful detainer action under the unlawful detainer statutes. Indeed, the Court had

trouble defining the relationship. The Court could not decide “whether or not it might be governed by the Residential Landlord-Tenant Act.” VRPII at 11. The Court then concluded it “can be described as a tenancy at will,” VRPII at 11. But the Residential Landlord-Tenant Act and the unlawful detainer statutes do not apply to a tenancy at will. *Turner v. White*, 20 Wn. App. 290, 291-92, 579 P.2d 410 (1978).

In *Turner*, the Court concluded that tenancies at will are not listed in RCW 59.12.030, and therefore they were not covered by the statutes governing unlawful detainer actions. *Id.*; see also *Najewitz v. City of Seattle*, 21 Wn.2d 656, 152 P.2d 722 (1944). Similarly, under the current version of the unlawful detainer statute, the seven subsections of RCW 59.12.030 describe the situations giving the court jurisdiction in an unlawful detainer. All seven presuppose the resident is “a tenant of real property for a term less than life.” RCW 59.12.030. Tenancy at will is instead a common law concept and the expedited statutory scheme for evictions under Title 59 does not apply. *Turner*, 20 Wn. App. at 291-92.

If the Morrisons were owners, rather than tenants, then the court lacked jurisdiction to issue an order evicting them under the unlawful detainer statutes. Instead, this property dispute could have been resolved through a quiet title action, and possibly ejectment under RCW 7.28.010. At the very least, any dispute about ownership had to be resolved in a

quiet title action before unlawful detainer could be invoked. And even if the Morrisons were tenants at will, something they strongly dispute, the unlawful detainer statutes were still the improper avenue for removing them from the property.⁴ In sum, Nicky Rowlette failed to properly invoke the court's jurisdiction under the unlawful detainer statutes, and as a result, this Court should reverse for lack of proper jurisdiction.

2. The Morrisons were, at the very least, joint “owners” under the will, and they were arguably full owners as a result of their oral agreement with Dale Rowlette

An unlawful detainer action must set forth the factual bases for the action “with reasonable certainty.” RCW 59.12.070. The RLTA also imposes on the Plaintiff a duty of good faith. RCW 59.18.020. The assertion of ownership in the complaint and contention that the Morrisons were “tenants” CP at 4 (EVICTION COMPLAINT, Line 20-23) could not be stated with “reasonable certainty” nor in “good faith” because the Morrisons disputed it from the first time they heard of it, and they presented substantial evidence of the dispute. The Plaintiff knew that ownership was disputed from the reading of the Will and from the

⁴ Failure to properly invoke the Court's jurisdiction defeats the court's authority to decide the case. *Sowers v. Lewis*, 49 Wn.2d 891, 307 P.2d 1064 (1957). Jurisdiction relates to the power of the court and not to the rights of the parties. Therefore, unlawful detainer jurisdiction cannot be waived by a party and the court's lack of jurisdiction can be raised at any time, including for the first time on appeal. *Sullivan v. Purvis*, 90 Wn. App. 456, 966 P.2d 912 (1998) (even though pro se tenant failed to raise jurisdictional challenge, appellate court reversed for failure to meet statutory jurisdictional prerequisite).

Defendants' successful challenge to the First Annual Accounting in the Oregon probate, CP 85-6. The court was aware of the dispute about ownership from the Morrison's first Answer, CP at 17, to their last Motion for a Stay, CP at 109.

First, even if the Court accepted Randy Rowlette's desire to have the will control the ownership of the property, Denise Morrison was, at the very least, a joint owner, not a renter. RCW 11.04.250 provides that real estate title vests immediately in the heirs on the death of the testator, subject to debts, family allowances and expenses. Thus, the Estate was not the "owner" or "landlord," under the Residential Landlord Tenant Act, RCW 59.18.030(11)(13). Denise Morrison and her brother Randy Rowlette were joint owners at the time of the unlawful detainer action (even if the Court rejects the Morrison's view that they are 100 percent owners) because title vested immediately on the death of the testator.

Second, the Morrisons submitted substantial evidence to establish that they are sole owners of the property. The Plaintiffs never presented evidence that was either credible or direct of a "verbal agreement with the the Morrisons for the month-to- month rental" as alleged in the Complaint. CP at 4-6. The Plaintiff's one witness, Randy Rowlette, admitted that Denise Morrison asserted she is not a renter but rather an owner. VRP at 27, 37. He then presented hearsay and contradictory

testimony to support his version of events. VRP at 21-22. For instance, he testified he was familiar with what happened to the subject property in 1983, without saying how he knows these facts. VRP at 21. He then contradicted himself when he said he was not aware of “any contract” between Dale Rowlette and the Morrisons, despite his argument that there was a verbal rental agreement between them. VRP at 31. Because he admitted he was not present when any oral agreements were made, VRP at 31, his testimony should not have carried as much weight as the Morrisons’. They had direct knowledge of the nature of their oral agreement with Dale Rowlette and testified it was not a landlord-tenant agreement but rather a secured loan. VRP at 14, 52.

At the very least, everyone agrees that there was a dispute as to the ownership of the property. Randy Rowlette was aware that Mrs. Morrison believes she is an owner. He said, “I am aware from the reading of the will from that time that you contested my ownership in that property, yes.” VRP at 37. The Morrisons argued to the court there was legal significance to the fact that they had never agreed to pay rent, but had paid taxes through Dale Rowlette. VRP at 53-77.⁵ The trial judge also acknowledged it was not clear that the Morrisons’ payments could be called “rent”, VRPII at 9, undermining the Plaintiff’s view that a landlord-tenant

⁵ At least 20 pages of testimony recite decades of tax payments.

relationship existed. The trial court erred in finding as fact that Dale Rowlette was a purchaser and the probate estate is the current owner when substantial evidence contradicted that finding and the statute was to be strictly construed. CP 60. It was error to proceed with an unlawful detainer. *Puget Sound Investment Group*, 963 P.2d at 946 (1998).

The trial court instead recognized that the disputed ownership was a problem, but said: “That issue is not something that this Court is going to decide,” VRP at 41, and “Any other issues are to be decided in another forum . . .” VRPII at 6. That is, the Court was willing to give possession to the Plaintiff (findings of fact #3, CP at 61, without first resolving the dispute over proper title, even though the issue of ownership goes directly to the court’s jurisdiction in this action. *Puget Sound Investment Group*, 963 P.2d at 946 (1998). By proceeding despite the dispute over who held proper title, the court recognized it could not quiet title or decide ownership in this action. What the court failed to recognize was that it could not validly proceed in unlawful detainer until these issues were properly resolved. *Id.*

B. The Personal Representative of an Oregon Estate Could Not Validly Bring an Unlawful Detainer Action Involving Washington Property Without Filing and Proving an Ancillary Probate in Washington

In addition to the jurisdictional issues raised above, the Oregon estate should not have been allowed to bring a suit for unlawful detainer in

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Washington. Washington's probate statutes provide a means for a foreign estate to open a probate in Washington for the purpose of getting jurisdiction over Washington property.

Foreign wills must be admitted to probate in Washington. RCW 11.20.090. The personal representative of the estate must take an oath. RCW 11.28.170. *Williams-Moore v. Shaw*, 122 Wn. App. 871 (2004). This statutory scheme specifically gives original jurisdiction over a will admitted to probate in Washington, even where the testator is nonresident of the state who died outside the state, as Dale Rowlette did. RCW 11.96A.040(c).

The Grays Harbor unlawful detainer case was brought in the name of the personal representative of the Estate of Dale Rowlette. CP at 1 (Complaint). The will was probated in Oregon, VRP at 25. The will names Nicky Rowlette as personal representative and Randy Rowlette as "alternate personal representative." CP at 82 (Will at Article IV).

In the Estate's unlawful detainer case against the Morrisons, no evidence of a Washington probate was presented—no oath, no bond, no will certified in Washington, no Washington sworn personal representative. Lacking a Washington probate and personal representative, Nicky Rowlette appears to be filing as personal representative not of a Washington estate but of the Oregon estate.

Randy Rowlette was the only witness presented by the Plaintiff. Randy Rowlette under oath said, "I represent the personal representative." VRP at 19. He did not claim to be the personal representative. Instead, he offered into evidence a Power of Attorney granted by the Personal Representative "to do each and every act and thing specified herein as fully as I might or could do if personally present . . ." ⁶ No Letters Testamentary were presented to show that Randy Rowlette had been approved by the Oregon court to become personal representative. Therefore his only authority to speak on behalf of the Estate was through the Power of Attorney.

Even if the Oregon estate could proceed without proving an ancillary probate in Washington, Randy Rowlette was not qualified to appear in Court on behalf of the Estate because Nicky Rowlette's powers as personal representative are not delegable. An administrator is a trustee of the funds of the decedent's estate, and, as a trustee, the administrator cannot delegate his discretionary powers. *In re Estate of Drinkwater*, 22 Wn. App. 26, 31, 587 P.2d 606 (1978); *Meck v. Behrens*, 141 Wn. 676, 682, 252 P. 91(1927). Therefore, Randy Rowlette lacked authority to speak for the Estate in Washington courts.

⁶ Clerk's Papers at 33-35 list Exhibits including #1 Power of Attorney. However, this document is not in the CP file.

The Complaint alleged the personal representative was the landlord. CP at 4. But in the course of the proceedings, it was not established that there was a landlord-tenant relationship between the Estate or its representative and the Morrises. Critical to the Plaintiff's case, Randy Rowlette's testimony attempts to establish such a relationship but he should not have been allowed to testify for the Estate under the Power of Attorney. See VRP at 19-20. Nor did he claim to be the personal representative. VRP at 13. To allow an attorney-in-fact to prosecute the suit for the Estate would bypass Washington's requirement that the personal representative take an oath and the oath be filed in the cause.

Even were Randy Rowlette to testify as a personal representative, he would have had a duty to the beneficiary of the estate. Instead he came to Washington asking the court to "vacate the tenants on this property so that the property can be sold." VRP at 30. But this violated the duty of loyalty that the personal representative would have to Denise Morrison as beneficiary:

The law is that a trustee is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required. The trustee is not permitted to make a profit out of the trust. . . . An executor, executrix, or administrator of an estate of a deceased person acts in a trust capacity, and must conform to the rules governing a trustee. *In re Estate of Johnson*, 187 Wash. 552, 554, 60 P.2d 271, 272, 106 A.L.R. 217 (1936).

In this case, Randy Rowlette's duty was not just to himself but also to his sister, Denise Morrison. He could not be fulfilling his duty to Denise while simultaneously evicting her from her home of 35 years, especially knowing she was claiming full ownership of the property.

Because the personal representative Estate was not a proper party absent the establishment of a Washington probate, this Court should reverse.

C. The Legal Fees Awarded to the Estate's Attorney Were Excessive and Should Be Vacated, or at the Very Least Reduced

The trial court on its own initiative asked the Plaintiff "to prepare any record regarding costs and attorney fees that you're seeking." VRPII at 14. In response, Plaintiff's attorney submitted his statement of fees and costs. The court converted the amounts submitted into an Order.

RCW 59.18.410 is permissive, not mandatory. It allows the court to award "reasonable attorney fees." Finding of fact #5 was in error, CP at 61. The court abused its discretion when it invited and approved fees without examination for excess. Plaintiff's claim of attorney fees was not reasonable. Despite his high rate based on his experience level, counsel charged for legal research regarding Washington evictions and an "eviction kit." He also charged at the attorney rate for work not requiring an attorney. He charged for travel without showing why a Grays Harbor

attorney experienced in Washington unlawful detainers could not have represented the Rowlettes without charging for travel. Duplicated, wasted effort, or otherwise unproductive time need not be compensated. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538; 151 P.3d 976 (2007).

If this Court reverses and vacates the writ on appeal, the attorney fee award should also be vacated. Alternatively, if the Morrisons have to pay for any of the Rowlettes' legal fees, the following should be subtracted:

12/6/14 Legal research	\$250
Eviction kit	\$ 34
1/15/15 Routine clerical work	\$375
2/18/15 Excessive repetition	\$675
2/27/15 Routine clerical work	\$ 75
3/5/15 Routine clerical work	\$ 75
3/16/15 Travel	\$ 200
4/2/15 Routine clerical work	\$ 25
4/17/15 Travel	\$ 200
<hr/> TOTAL	<hr/> \$1,909

D. The Morrisons Should Be Awarded Costs and Attorney Fees If They Prevail On Appeal

Prevailing unlawful detainer parties may recover costs of suit and reasonable attorney's fees under RCW 59.18.290(2). If the Morrisons prevail, they request costs and reasonable legal fees. When counsel work pro bono the court is to consider the fee customarily charged in the

locality for similar legal service, *Council House v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006).

VI. CONCLUSION

When the parties in an unlawful detainer are not in a landlord-tenant relationship, the trial court lacks jurisdiction. The Order granting the Writ of Restitution and related Judgment should be vacated. Alternatively, the Order granting the Writ of Restitution and related Judgment should be vacated because it was brought by an improper party—a foreign “estate” with no jurisdiction over Washington property, represented by a person with no power to represent that estate and who violated his duty of trust to his co-beneficiary. The attorney fee award should be reduced or vacated and the Morrisons should be awarded costs and legal fees on appeal.

RESPECTFULLY SUBMITTED this 10th day of February 2016.

A handwritten signature in black ink, appearing to read "Bruce H. Conklin". The signature is fluid and cursive, with a large initial "B" and "C".

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Certificate of Service

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail, a true and correct copy of Appellants Opening Brief, upon the following:

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