STATE OF WISCONSIN
COURT OF APPEALS - DISTRICT I

Appeal No. 2022AP000857 LV
(Circuit Court Case No. 2019-CV-003810)

MELANIE A. HARDRATH,

Plaintiff-Respondent,

v.

ASCENSION SE WISCONSIN HOSPITAL, INC., f/k/a Wheaton Franciscan Healthcare-St. Joseph,

and

RENE A. FRANCO-ELIZONDO, M.D.,

Defendants-Petitioners

RESPONSE BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO APPEAL NONFINAL ORDER AND REQUEST FOR FEES AND COSTS

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PLAINTIFF-RESPONDENT'S RESPONSE BRIEF

Plaintiff-Respondent Melanie A. Hardrath **(hereinafter, "Melanie")** vigorously opposes Defendants-Petitioners Ascension SE Wisconsin Hospital, Inc. and Rene A. Franco-Elizondo, M.D.'s Petition for Leave to Appeal the Order dated May 17, 2022 denying their MOTION TO DISMISS THE THIRD AMENDED COMPLAINT, entered in Milwaukee County C ircuit Court Case No. 2019CV003810, Judge Carl Ashley presiding. Melanie respectfully urges the Court of

Appeals to affirm the Circuit Court's decision to deny Petitioners' motion because it is based upon the correct conclusions of law. If the decision below is reversed, this Court would be reversing case law and statutes supporting a plaintiff's ability to plead negligence and other claims in addition to or in the alternative to medical malpractice, against a health care provider, contrary to the legislature's intent.

ISSUES PRESENTED

1. Did the Circuit Court err in denying the MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT finding Wis. Stat. Ch. 655 is not Plaintiff's exclusive remedy when the facts as pleaded establish a nonmedical decision to circumvent Wisconsin's statutory/legal guidelines?

Plaintiff-Respondent asserts: No.

2. Did the Circuit Court err in denying the MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT when the facts as pleaded and taken as true establish two common law causes of action for Negligence and Negligence Per Se?

Plaintiff-Respondent asserts: No.

STATEMENT OF FACTS

A. NATURE OF THE DISPUTE.

Ascension SE Wisconsin Hospital Inc. **("Ascension")** and Rene Franco Elizondo, M.D. seek leave to appeal the denial of their motion to dismiss Plaintiff Melanie Hardrath's **("Melanie")** Third Amended Complaint.

ProAssurance Casualty Company (**"ProAssurance")** and the Wisconsin Injured Patients and Families Compensation Fund **("the Fund")**, also named defendants, did not file the subject motion or the petition for leave to appeal.

In addition to the alternative Medical Malpractice cause of action filed by Melanie, she filed independent common law claims of Negligence and Negligence Per Se. Hence, the case law cited by Petitioners for the proposition that punitive damages are not available on a Medical Malpractice claim does not apply to Melanie's Negligence and Negligence Per Se claims where punitive damages are available.

As this Court will see, the claim that physicians are immune to common law claims for Negligence and Negligence Per Se is in error. Neither Wis. Stats. §655 nor its listed purposes create blanket immunity for intentional and other negligent torts perpetrated by physicians and hospitals. Wisconsin case law has repeatedly recognized that certain claims in the medical context are not claims governed by §655. Melanie has both pled covered and non-covered

claims. Punitive damages are available on the claims not covered by §655, Stats.

B. MELANIE'S CLAIMS.

Melanie has pled claims for Negligence, Negligence Per Se and, in the alternative, Medical Malpractice. (R-Ap.6-15.) Only the claim for Medical Malpractice is a claim covered by Wis. Stats. §655.

The Circuit Court set forth the most critical facts to its decision in the April 12, 2022 oral decision. (See R-Ap.24-36.)

The following paragraph-number citations are taken directly from the Third Amended Complaint (R-Ap.6-15); virtually all of which were also contained in the earlier Complaints. (See R-Ap.187-200; 171-75; 159-69.)

On or about June 27, 2016, Melanie [age 39] awoke from sleep complaining of shortness of breath at the home she shares with her boyfriend/fiancé of eight years, Scott Meunier **(her "fiancé")**. Her fiancé called 911 in the early morning. (R-Ap.9 at ¶8; R-Ap.192-93, 177, 163.) Pursuant to his 911 call, Melanie was rushed by ambulance to Ascension. (R-Ap.9 at ¶9) Upon information and belief, Melanie was diagnosed to have suffered a stroke and cardiac arrest. (Id. at ¶10.)

Melanie had no healthcare power of attorney, living will, or advance directives at the time she arrived at Ascension on June 27, 2016, nor at any relevant time. (R-Ap.9 at ¶11.) Petitioners do not deny they deferred to Melanie's family to let her die without a power of attorney or living will.

Between June 27, 2016 and June 30, 2016, Ascension had more than one conference with Melanie's mother and sisters (**hereinafter, "family"**) and fiancé regarding Melanie's prognosis. (Id. at ¶12.) Ascension, over the objection of Melanie's fiancé, removed Melanie from life support, treatment, fluids, and nutrition (hereinafter, **"life support treatment")** based solely on Melanie's family's decision to withdraw life support treatment, which was ordered by Dr. Elizondo on June 30, 2016. (Id. at ¶12A.)

Melanie's fiancé was not in agreement with the decision to remove life support treatment and advised Ascension that Melanie had said to him, "please no matter what, don't let me die." (Id. at ¶12B.)

Defendants Elizondo and Ascension (**"Petitioners")**, or anyone acting on their behalf, failed to seek legal authority before removing Melanie from life support treatment. (Id. at ¶13.) It was wrongful and contrary to law and sound public policy to remove Melanie from life support treatment without advance directives, a living will, power of

attorney for healthcare, or any other legal authority and without a finding of the patient being in a persistent vegetative state ("PVS"). In the matter of Edna M.F., 210 Wis.2d 557, 563 N.W.2d 485 (1997); In re the Guardianship of L.W., 167 Wis.2d 53, 482 N.W.2d 60 (1992). (R-Ap.10 at ¶14.)

Melanie's condition was "uncertain" not terminal, nor was she in a persistent vegetative state, per the Petitioners' medical records.

At Ascension, Melanie received large doses of analgesia (Fentanyl) and sedation that affected her responses. (R-Ap.10 at ¶15.) Nevertheless, Ascension records indicate Melanie still demonstrated responsiveness and pain and suffering, including responsiveness to painful stimuli, smiling to jokes, crying out in "pain," speaking occasionally in short sentences, and had a significantly swollen and painful right leg from deep vein thrombosis that Ascension did not treat. (Id.)

On or about July 2, 2016, Melanie communicated with her fiancé through blinking and squeezing his hand to indicate that she wanted to live and he conveyed this to Ascension patient relations personnel and one hospice nurse. (Id. at ¶16.) Melanie also communicated with others in similar fashion, through blinking and/or squeezing hands to indicate 'yes' or 'no' answers to questions,

including Guardian ad Litem Attorney Jeffrey Welcenbach on/about August 4, 2016. (Id. at ¶17.)

Petitioners listened to Melanie's family and: (A) ignored the wishes expressed directly by Melanie through her fiancé; (B) failed to check for Melanie's non-verbal responses to remain alive; and (C) failed to act according to law in terminating Melanie's nutrition and feeding tube when she was never found to be in a persistent vegetative state ("PVS"). Edna M.F., 563 N.W.2d 485 (1997); Guardianship of L.W., 482 N.W.2d 60 (1992). (R-Ap. 10 at ¶18.)

On June 30, 2016, Petitioners discontinued life support treatment, extubating Melanie pursuant to Dr. Elizondo's order. (R-Ap.11 at ¶19.)

Melanie remained off life support, including assisted breathing, intravenous or any kind of fluid replacement and nutritional support for 35 days, from June 30 through August 4, 2016. (Id. at ¶20, 25.) During that time, Ascension deemed Melanie in "hospice" and did not administer nutrition, hydration, or medical treatment other than pain medications and sedatives. (R-Ap.11 at ¶21.) Petitioners were not providing health care services when they withdrew life support treatment. (R-Ap.11 at ¶22.)

On July 13, 2016, Ascension records show Melanie's doctors recommended to commence treatment because of Melanie's

responses, but again deferred to the family who again denied the recommended treatment and Petitioners followed the family's instructions and did nothing.

On August 3, 2016, Judge David Borowski issued an emergency order directing Ascension to place Melanie back on life support treatment. (R-Ap.25, 146; see also R-Ap.306-40.)

Petitioners acted in an intentional disregard of Melanie's rights by ordering and withdrawing life support treatment. (R-Ap.11 at ¶23.) Petitioners acted with a purpose to disregard the rights of Melanie and were aware that their conduct was substantially certain to result in her death. (Id.)

Petitioners acted deliberately in ordering and withdrawing life support treatment from Melanie and actually disregarded her rights to safety, health and life. (Id. at ¶24.) Petitioners' acts or course of conduct is sufficiently aggravated to warrant punishment by punitive damages per Wis. Stat. §895.043. (Id.)

C. PROCEDURAL HISTORY: PETITIONERS ARE BEATING A DEAD HORSE.

Petitioners have repeatedly litigated the points they now seek leave to appeal, ad nauseam since day one.

In Melanie's original May 2019 Complaint, she pled claims for Negligence Per Se, Negligence, Assault and Battery, and False Imprisonment. (R-Ap.165-69.) In June, 2019, Petitioners filed a motion to dismiss for failure to state a claim, asserting the same two arguments they make now: (i) Wis. Stats. §655 provides Melanie's exclusive remedy (so she has failed to state a claim upon which relief can be granted); (ii) Melanie is not entitled to punitive damages; and (iii) Melanie failed to request medical malpractice panel mediation. (R-Ap.118-27.) In June 2019, Melanie amended her Complaint, adding a claim of Medical Malpractice *in the alternative* to resolve without conceding the third issue. (R-Ap.170-85.)

In April 2020, after the stay of proceedings and upon learning the identity of Petitioners' insurer, Melanie promptly filed a Second Amended Complaint adding ProAssurance as a Defendant. (R-Ap. 186-201.) Petitioners adopted their original motion to dismiss against the First and Second Amended Complaints. (R-Ap.202-203, 217-19.) The Court ordered a briefing schedule (R-Ap.216), briefs were timely filed (R-Ap.128-55; 233-42), and oral arguments regarding Petitioners' motion to dismiss was heard by Judge David Swanson on June 26, 2020. (R-Ap.76-117.)

On August 17, 2020, Judge Swanson dismissed the Assault and Battery and False Imprisonment claims, and denied the remainder of Petitioners' motion to dismiss, leaving intact Melanie's claims of

Negligence, Negligence Per Se, and (alternatively) Medical Malpractice. (R-Ap.74-75; 51-63; 64-73.) Judge Swanson struck ¶¶25-26 and Exhibit A of the Second Amended Complaint (regarding the underlying Guardianship case) (R-Ap.195, 201) only for purposes of his decision on the motion to dismiss for failure to state a claim, finding they were prejudicial/not necessary to the analysis but could be raised later. (R-Ap. 54-55.)

Thereafter, Petitioners raised the issue of punitive damages again. This caused a flurry of letters and memorandums to be filed briefing, once more, Petitioners' motion to dismiss punitive damages (R-Ap.243-45; 246-48; 249-50; 251-53; 254-57), and on September 22, 2020, Judge Swanson clarified that punitive damages were not dismissed. (R-Ap.64-73; 74-75.)

Following a judicial rotation and assignment to Judge Carl Ashley in July 2021, and the first complete Scheduling Order in September, Melanie timely filed a Third Amended Complaint. (R-Ap.6-15.)

In an effort to avoid relitigating the same "failure to state a claim" issues, Melanie re-pled only the claims left intact by Judge Swanson's order: Negligence and Negligence Per Se (with punitive damages), and alternatively Malpractice, and deleted the paragraphs

and Exhibit[1] stricken by Judge Swanson. (See R-Ap.6-15; 187-200; & 74-75.) Melanie also deleted an unnecessary adjective, referencing her family as "estranged," because the Petitioners had used that as a basis for unnecessary discovery leading Melanie to seek a protective order. (See R-Ap.299-306.) Other than that, the Third Amended Complaint was almost identical to what was left after Judge Swanson's decision.

On October 28, 2021, Petitioners filed another 20-page motion to dismiss, asserting exactly the same arguments they had in the past: Wis. Stat. §655 is the exclusive remedy and Melanie is not entitled to punitive damages because it only sounds in Medical Malpractice. (P-Ap.79-98.) ProAssurance and the Fund also joined to dismiss. (R-Ap.220-21.)

Melanie responded (R-Ap.41-48). Petitioners replied (P-Ap.141-47). In February 2022, Judge Carl Ashley heard argument and requested supplemental filings from all parties (P-Ap.148-62; R-

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[1] which provided the following historical factual information, subject to judicial notice, useful for a complete understanding of this case. (See R-Ap.195 at ¶¶25-26, R-Ap.201, 306-40.)

On August 3, 2016, Judge David Borowski issued an emergency order directing Ascension to "immediately reinstate the nutrition and feeding tube/life support" treatment to Melanie. (R-Ap.201; see generally, 306-40.)

On August 4, 2016, Ascension's Dr. O'Rell Williams testified that Melanie was not in a vegetative state (nor a "persistent" vegetative state) and Ascension did not check for Melanie's nonverbal responses to remain alive but instead deferred to patient's family members to take her off of life support. (R-Ap.195 at ¶26; 306, 324-26.)

Ap.49-50), received 12 pages from defendants[2] and 2 pages from Melanie, and thereafter, wisely denied the motion. (R-Ap.16-18, 19-40.)

This April 12, 2022 decision (R-Ap.16-36) is what Petitioners now seek leave to appeal, claiming the Court somehow "misunderstood" its arguments (Pet., 13.), which frankly, is impossible after all of the repeated briefings, multiple hearings, and correct decisions by two separate Circuit Court judges. (See R-Ap.24-36.)

The Circuit Court did not misunderstand.

STATEMENT SHOWING IMMEDIATE REVIEW IS UNWARRANTED

1. PETITIONERS ARE NOT CANDID WITH THE COURT IN THEIR "STATEMENT OF FACTS," MISREPRESENTING THE RECORD.

The "most important part of the petition for leave to appeal is the statement of facts. Without an adequate factual background, the petition is a disembodied argument with little relevance." Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin § 9.9 (6th ed. 2015).

[2] three defendants, two pages each, initial and reply positions, totals 12 pages.

The Petitioners' Statement of Facts (Pet., 3-6) lacks accurate facts, accurate citations, distorts and misrepresents the contents of Melanie's Third Amended Complaint, and contains embellishments and argument. This is prejudicial to the Court of Appeals in reviewing a denial of a motion to dismiss for failure to state a claim, which is reliant on the facts as pled which are assumed to be true.

Petitioners' "Statement of Facts" (Pet., 3-6) is a failure to be candid with the Court of Appeals because:

A. It contains only 24 citations to the record (for the 38 sentences provided); of those, 7 are wrong, 2 are misquotes, and many are disingenuous and misleading.

B. It contains argument unsupported by record cites, contrary to the Third Amended Complaint. (See Pet. at 3, lines 4-6; 4, lines 7-9 & 18-21; 5, lines 1-2 & 13-21; 6, lines 8-18.)

C. Page 3, lines 11-13 are not in the Complaint.

D. Page 3, lines 13-17 is a distortion of ¶12 of the Complaint.

E. Page 6, lines 2-3 is incorrect, as the Court invited briefing from all parties and did not state Melanie inadequately addressed an issue. (P-Ap.043, lines 13-17.)

F. Page 6, lines 5-6 is misleading (the parties *waived* further argument). (See R-Ap.23.)

G. Petitioners assert as fact, without any citation, that after Melanie was extubated, "she remained in a comatose state" (Pet., 4 at lines 1-2), contrary to the Complaint which never mentions "coma" and claims she was responsive within 48 hours of extubation. (See R-Ap.10 at ¶¶15-18).

H. Despite Petitioners attributing the following (Pet. at 3, lines 14-17) to ¶12 of the Complaint, literally nothing is stated therein about:

- "results of diagnostic tests,"
- "interpretation of physical evaluations of the Plaintiff",
- "medical opinions,"
- "grave prognosis",
- nor "issues involving the discontinuation of life support."

(Pet. at 3, lines 14-17.) Quite to the contrary, Melanie actually alleged she was responsive (R-Ap.10 at ¶¶15-18) and never in a persistent

vegetative state (R-Ap.10 at ¶14) [nor was she terminal].

I. Petitioners claim (Pet. 3, lines 13-14), citing ¶12 of the Complaint, that Melanie alleged there were "multiple conferences with the Plaintiff's immediate family, which was her mother and sisters," but they omit that her fiancé was also present at these meetings, objecting to the removal of life support treatment. (See R-Ap.9 at ¶12.) The omission is misleading.

J. **Petitioners attribute quotes to the Complaint (Pet. 4, lines 5-7) that are not anywhere in the Complaint and actually originate from the argument of a co-defendant's brief** (see Pet-Ap.161):

> "The Plaintiff also alleges that Ascension Defendants 'omitted appropriate medical treatment' first by 'withdrawing life support and then by failing to reinstate it.' (P-APP 075-076, ¶¶26, 32)."

(Pet. 4, lines 5-7.)

The Court of Appeals has no record to fall back on if the Statement of Facts is insufficient. When briefs make factual assertions without accurately identifying the source of the information, the Court's review of the case is frustrated, and the Court may even decide not to consider the merits of the argument due to failure to follow the briefing rules. See State v. Pettit, 171 Wis.2d 627, 646-47, 492 N.W.2d 633 (Ct.App. 1992).

The reviewing Court need not sift the record for facts that support counsel's contention. Grothe v. Valley Coatings, Inc., 2000 WI App 240, ¶6, 239 Wis.2d 406, 620 N.W.2d 463. The statutes now clarify that **an appeal is frivolous "if any element necessary to succeed on appeal is supported solely by an argument."** Wis. Stat. § 895.044(5).

The Petition for Leave to Appeal lacks a sufficient factual basis, is frivolous, and must be denied.

2. IMMEDIATE REVIEW WILL NOT MATERIALLY ADVANCE THE TERMINATION OF LITIGATION OR CLARIFY FURTHER PROCEEDINGS, PER WIS. STAT. §808.03(2)(a).

If the Court of Appeals grants review it will *delay* rather than advance the termination of litigation and Melanie will be subjected to the expense of two appeals (one now and after final judgment). Delay and re-litigating this precise issue has been the Petitioners' modus operandi so there is no doubt they will appeal a final judgment. To offset such injuries, Melanie respectfully requests per Wis. Stat. §809.50(2) that she be awarded costs and fees against Petitioners, in the instant Petition proceedings, whether or not leave to appeal is granted.

This case was filed May 15, 2019 and proceedings were stayed from July 2019 until March 2020. (R-Ap.161, 209.) The abnormal delay was due to the Medical Malpractice Panel being unable to secure a doctor for a mediation. Since then, while diligently attending to discovery (R-Ap.299-306), Melanie has been forced to respond to Petitioners' repeated motions seeking dismissal based upon Wis.Stats. §655 and their overly broad contention that Petitioners' failure to follow the law is somehow a medical judgment. Petitioners reasserted the same motion to dismiss for years now (P-Ap.79-98; R-Ap.118-27; 202-203; 204-206; 217-19; 243-45; 246-48; 251-53; 258-279; 291-98) and it has been wisely denied each time. (R-Ap.16-18; 19-40; 74-75; 51-63; 64-73.)

The Petition for Leave to Appeal is simply another example of Petitioners' repeat, over-litigation of the exact same point which is devoid of legal support. (See R-Ap.41-50, 128-55, 156-58.) Interim review will lead to even more delay, rather than expedite an end to this litigation.

If Petitioners wanted to appeal the Court's decision denying their motion to dismiss Negligence, Negligence Per Se, and punitive damages, they should have sought leave to appeal Judge Swanson's September 22, 2020 decision on their motion to dismiss the Second Amended Complaint, but they did not. (R-Ap. 74-75; see generally, R-Ap. 118-27; 202-203; 217-19; 187-201.)

The Third Amended Complaint includes the same facts and claims as the Second Amended Complaint and deletes the causes of action dismissed by Judge Swanson when he ruled on the motion to dismiss the Second Amended Complaint. (See R-Ap.6-15; see 187-201; 74-75; contra, Pet., fn.1.) Under such circumstances, it was arguably frivolous for Petitioners to have filed a motion to dismiss the Third Amended Complaint in the first instance, and it is frivolous to seek leave to appeal the April 12, 2022 decision (R-Ap.16-40) that echoes Judge Swanson's consistent 2020 decision that Petitioners could have, but did not, seek to appeal. (R-Ap. 74-75, 51-73.) Petitioners' legal arguments in 2020 are the same arguments they assert now. (Ap.079-099; R-Ap.118-127, 202-203, 217-19.)

It is a ruse to assert granting review will advance "the termination of the litigation well in advance of potentially unnecessary and costly discovery and trial on issues" of Negligence, Negligence Per Se, and punitive damages (contra Pet., 7-8), when only Melanie has filed her witness list and only Melanie exchanged substantial discovery based upon the Third Amended Complaint. Again Petitioners did not but could have sought leave to appeal the first time the Court refused to dismiss Negligence, Negligence Per Se, and punitive damages in 2020. **The Court of Appeals does not accept "conclusory allegations that an appeal will materially advance the termination of litigation."** Heffernan, Appellate Practice, §9.3.

Petitioners' assertion (Pet., 9) that leave to appeal would narrow the discovery issues is disingenuous when expansive discovery has been ongoing for over two years (since 2020) on the Negligence and Negligence Per Se claims. (See R-Ap.299-306.) To date, there has been a minimum of 12 deposition dates and 4 more have been noticed. (See id.) All depositions have been laypeople with one exception, Dr. Grindell, and all are most pertinent to the Negligence and Negligence Per Se causes of action.

Petitioners assert (Pet., 8) that "where the possibility exists" that the Circuit Court committed an error that should have disposed of some causes of action, the Court of Appeals should grant review, but that is far less than the law requires. The law requires Petitioners establish a "substantial likelihood of success on the merits," which is far more than a "possibility," and Petitioners cannot do it because their overbroad contentions lack legal support. See Heffernan, Appellate Practice, §9.4; State v. Webb, 160 Wis.2d 622, 632, 467 N.W.2d 108 (1991); (see infra, 34-48); (R-Ap.31-33).

The case law and statutes clearly support the denial of the motion to dismiss and Petitioners will not prevail on appeal. (See infra, 34-48.) The Court of Appeals is an error correcting Court. The decision will not change (contra Pet., 7) because it has already been decided correctly twice based upon the law, by two different Circuit

Court Judges. Therefore, immediate review will not clarify further proceedings per Wis. Stat. §808.03(2)(a).

3. PETITIONERS WILL NOT BE SUBSTANTIALLY OR IRREPARABLY INJURED IF IMMEDIATE APPEAL IS DENIED, PER WIS. STAT. §808.03(2)(b).

No rights have been lost by the Circuit Court's denial of Petitioners' motion to dismiss. Petitioners still have the right to go to trial and "[a]s a general rule, negligence is a jury question." Morgan v. Pennsylvania General Ins. Co., 87 Wis.2d 723, 732, 275 N.W.2d 660, 665 (1979). Even though commenced in 2019, there has been no trial, mediation, nor evidentiary hearings in this case, and denying leave to appeal will not prejudice Petitioners as they have not lost any substantial rights.

Petitioners' bare assertion that they "will be greatly prejudiced" if Melanie's Negligence and punitive damages claims are not treated as Medical Malpractice claims under §655, because they might be found liable at trial and may not have insurance coverage for it (Pet. 10-11), is faulty logic. The Court of Appeals "does not view the necessity of trial as an irreparable or substantial injury…." Heffernan, Appellate Practice, § 9.3.

The entire time this case has been pending, Melanie has been without redress or compensation for the harm perpetrated by Petitioners. The prospect of multiple appeals (one now, and one after

final judgment), positions Melanie, not Petitioners, to be substantially and irreparably damaged, because justice delayed is justice denied and she will lose the time-value of her remedy which will only be further delayed by an interim appeal, delaying and defeating the ends of justice.

Petitioners' contend review of this case will determine whether it involves ordinary or professional negligence requiring additional testimony and evidence beyond the scope of a lay witness. (Pet., 9.) This is a ruse. Medical Malpractice has always been pled in the alternative to Negligence and Negligence Per Se, so if the common law claims were dismissed as requested, Petitioners would still require expert testimony.

Petitioners' assertion (Pet., 10) that they will be prejudiced if their healthcare providers are subjected to prohibited liability beyond §655 is circular. It rests on the incorrect assumption that all of Melanie's claims can only state a claim for medical negligence, which two judges already disagreed with and which is legally unsupported. (See infra, 34-48.)

Petitioners' contentions pertaining to insurance coverage (Pet., 10) are circular, bare assertions without fact or legal citations, and are another ruse. First, contrary to Petitioners' claim that is unsupported by their appendix, that they were required by statute to maintain only

medical malpractice insurance and did so (Pet., 10), it is difficult to believe Ascension did not have general liability coverage in addition to malpractice insurance. Second, coverage or lack thereof does not dictate liability or what causes of action are available to Melanie.

Wis. Stat. §655 never intended to insulate providers from claims of all types. (See infra, 30-31, 34-48.) Ch. 655 only applies to medical malpractice claims. Common law negligence claims have never fallen within §655. (See R-Ap.41-48, 49-50, 128-55, 156-58.) Wisconsin even has a standard jury instruction that contemplates common law negligence claims like Melanie's against healthcare providers. (R-Ap.156-58.)

As stated by Chief Justice Abrahamson in her concurring opinion in Finnegan v. Patients Comp. Fund, 2003 WI 98, ¶¶46-47, 263 Wis. 2d 574, 600, 666 N.W.2d 797):

> "Several of our cases hold that Chapter 655 does not govern every claim having a connection with medical malpractice. **Claims having a connection with medical malpractice can be brought outside Chapter 655.**
>
> For example, in Johnson v. Rogers Memorial Hospital, Inc., 2001 WI 68, 244 Wis.2d 364, 627 N.W.2d 890, this Court held that parents may sue their child's therapist for negligent infliction of emotional distress resulting from malpractice in treating the child. **The therapist argued that the claims were barred because they did not fall within the scope of Chapter 655, but this Court allowed the claims 'to move forward outside the realm of Chapter 655' because 'Chapter 655 is not the exclusive remedy from such claims'...."**

Id. (See R-Ap. 137-38.)

Finally, as is true of all of the subsections of §808.03(2), Petitioners have not established a substantial likelihood that their appeal will succeed on the merits, so immediate review would not protect Petitioners from any alleged substantial or irreparable injury, anyway. WIS. STATS. §§ 808.03(2)(b), 809.50(2). (See infra, 34-48.)

4. IMMEDIATE REVIEW WILL NOT CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE, PER WIS. STAT. §808.03(2)(c).

Petitioners mischaracterize dramatically (Pet., 10-11), without fact or legal citations, the Circuit Court's decision about what is and is not a medical decision subject to §655. Judge Ashley's decision is the only correct result and was carefully and discerningly rendered based on an extensive record and multiple thorough hearings. (See R-Ap.28-33.) §655 has never protected healthcare providers from negligence claims for the performance of routine custodial, housekeeping, administrative, ministerial, nonmedical or routine duties. (See R-Ap.156-58.) Comments to WIS JI-CIVIL 1385 provide:

> "The duty of care owed a patient by a hospital is one of ordinary care under the circumstances. Payne v. Milwaukee Sanitarium Found, Inc., [81 Wis.2d 264,] 272, [260 N.W.2d 386 (1977)]. However, in applying the ordinary care standard, **there is a recognized distinction between medical care and custodial or routine hospital care.** Thus in Payne, the court noted that:

> 'Where the patient requires nursing or professional hospital care, then expert testimony as to the standard of that care is necessary.
>
> However, the standard of **nonmedical, administrative, ministerial or routine care** in a hospital need not be established by expert testimony.' "

(R-Ap.157) (citations omitted). Petitioners negligently disregarded Melanie's fiancé's information that Melanie wanted to live and not die, as he was providing "other information" to Petitioners that was contrary to the family's information, before, during and at the time life support treatment was withdrawn. (R-Ap.9.) (See R-Ap.156, last bullet-point.) Petitioners ignored the Wisconsin Statutes, case law and conflicting accounts of Melanie's wishes and deferred to family only, which makes their routine/custodial/administrative negligence egregious.

Judge Ashley in this case concluded Melanie pled sufficient facts alleging Petitioners chose to bypass Wis. Stats. §§154 and 155 entirely and relied solely on the directives of Melanie's family, even in the absence of a declaration or power of attorney of healthcare. (R-Ap.33:12-16.) **Judge Ashley held Petitioners' "decision to circumvent Wisconsin's statutory guidelines was not a medical decision. Therefore, Chapter 655 is not plaintiff's exclusive remedy."** (R-Ap.33:17-20.)

Petitioners assert, in essence, that healthcare providers withdraw life support treatment and place patients in hospice all the time without seeking judicial intervention "when the healthcare provider and the immediate family agree on a course of treatment." (Pet., 11.) But here, there was no agreement between Petitioners and Melanie's family. (See R-Ap.9, ¶12.) Melanie's family/sister solely made the final decision and Petitioners deferred to it. (Id.)

Even if there is an agreement in other cases, it does not justify the practice of allowing human beings to expire when they have been hospitalized for only three days, their live-in fiancé is objecting to hospice based on his knowledge of the patient's wishes, the patient is neither in a persistent vegetative state nor terminal, the patient's prognosis is "uncertain," and the patient has not previously directed such withdrawal via living will or healthcare power of attorney. **Deferring to the family was not practicing medicine and did not require professional skill or judgment. It was the lazy "path of least resistance." It was custodial/administrative negligence.**

Contrary to the Petition (at 10), healthcare providers have always been liable for routine custodial, housekeeping, administrative, ministerial, nonmedical or routine duties (see WIS-JI 1385, R-Ap.156-58); therefore both Circuit Courts' decisions do not "carve out an exception" to §655, nor do they change healthcare providers' liability exposure.

The effect of Judge Ashley's decision is not "untenable in current practice" (contra, Pet., 11) as hospital administration routinely employs social workers, et al., to advise patients' loved ones when a need for guardianship arises, especially in the event of a disagreement over hospice between loved ones.

5. POLICY AGAINST PIECEMEAL DISPOSAL OF LITIGATION.

Consistent with a general policy against piecemeal disposal of litigation, the Court of Appeals will not lightly grant a petition for review. See, e.g., State ex rel. A.E. v. Green Lake County Circuit Court, 94 Wis.2d 98, 101, 288 N.W.2d 125 (1980). This is also out of recognition of the Court of Appeals' heavy caseload. See Heffernan, Appellate Practice, §9.5. The decision to grant or deny a permissive appeal is discretionary with the Court of Appeals. Id. It would be judicially inefficient to subject the instant case to piecemeal review by the Court of Appeals.

ARGUMENT

I. PETITIONERS' PETITION FOR LEAVE TO APPEAL DOES NOT SHOW A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS AND MUST BE DENIED BECAUSE GRANTING LEAVE WOULD DELAY AND DEFEAT THE ENDS OF JUSTICE, RATHER THAN EXPEDITE AND CLARIFY THE PROCEEDINGS.

A. Standard of Review.

Whether a complaint states a claim upon which relief can be granted is a question of law subject to independent review. Meyers v. Bayer AG, 2007 WI 99, ¶21, 303 Wis. 2d 295, 307, 735 N.W.2d 448, 454-455 (citation omitted). For the limited purposes of assessing the complaint's legal sufficiency, the Court shall accept as true all facts as set forth in the complaint, and reasonable inferences that may be drawn from such facts. Id. A complaint in a civil action should not be dismissed as legally insufficient unless it is clear that there are no circumstances under which the plaintiff can recover. Id.

The Wisconsin Supreme Court has held:

> "No inference can be reached in respect to the ultimate facts alleged until resolved by judge or jury. …Since pleadings are to be liberally construed, a claim will be dismissed only if 'it is quite clear that under no conditions can the plaintiff recover.'"

Evans v. Cameron, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985) (citations omitted).

In Korkow v. General Casualty Co. of Wisconsin, 117 Wis. 2d 187, 193, 344 N.W.2d 108, 111-112 (1984), the Wisconsin Supreme Court held notice pleadings rules are intended to facilitate orderly adjudication of disputes; pleading is not to become a "game of skill" where one misstep by counsel may be decisive of the outcome. Id.

B. Wis. Stat. §655 is Not Melanie's Exclusive Remedy and Does Not Apply to Anything Other than Medical Malpractice Claims.

Petitioners are unrelenting in their quest to convince someone that Melanie's only remedy is on a medical malpractice claim, subject to Wis. Stat. §655, so that they can inappropriately hide and shield the Petitioners' egregious negligence, not because it is the correct legal conclusion. Petitioners ignore all of the briefs, pleadings, the words of the Complaints (without exaggeration and spin), transcripts of arguments and the prior rulings of Circuit Court Judges Ashley, Swanson, and Borowski.

Petitioners' argue again, in circular fashion, (Pet. 11-12) that Wis. Stat. §655.07 which states any patient having a claim for injury or death "on account of malpractice is subject to this chapter," somehow bars alternative negligence theories. But, the statute does not, by any stretch of the imagination, say that. See also 802.02(1m)(a), Stats. Similarly, the cases cited by Petitioners in their motion do not involve alternative negligence claims. Phelps v. Physicians Inc. Co. of Wis., 2009 WI 74, ¶64, 319 Wis. 2d 1, 768 N.W.2d 615 (quoting Finnegan, 666 N.W.2d 797, ¶22), provides no support for the argument §655 controls because these cases involved bystander claims based on a primary victim's medical malpractice claim, which is inapposite to Melanie. Melanie already exhaustively briefed why Finnegan and Phelps do not control; see R-Ap.137-38.

Petitioners' overbroad argument (Pet. 13) that the acts involved in Melanie's case implicate professional medical judgment and were only medical decisions, not custodial decisions, fails to recognize the distinction drawn by Judge Ashley:

> "[B]etween a healthcare professional's duty to follow statutory guidelines that protect the patient's right to life and a healthcare professional's professional duty to competently make medical decisions. For example, whether a patient has an incapacity or is in a persistent vegetative state is a medical, not legal, determination. Matter of Edna.
>
> Had [Petitioners] made a mistake during Hardrath's determination of incapacity or a persistent vegetative state prior to any decisions about withdrawing or withholding life-saving procedures, this may raise a medical malpractice claim. This case, however, does not concern a medical determination or choices made during such determinations. Here, [Petitioners] chose to bypass Wis.Stat. §§154 and 155 entirely and relied solely on the directives of Hardrath's family, even in the absence of a declaration or power of attorney of healthcare. [Petitioners'] decision to circumvent Wisconsin's statutory guidelines was not a medical decision. Therefore, Chapter 655 is not [Melanie's] exclusive remedy."

(R-Ap.32-33.)

Petitioners misstate the Court's holding, misrepresenting that the Court held 'the extubation' was the custodial care decision. (Pet. 13.) Contrarywise, the Court actually held there is a clear "distinction between a healthcare professional's duty to follow statutory guidelines that protect the patient's right to life and a healthcare professional's professional duty to competently make medical decisions." (R-Ap.32-33.)

Without legal authority, Petitioners engage in linguistic gymnastics (Pet., 12, 18) in an effort to contort Melanie's Complaint into only a claim of medical malpractice, claiming Melanie's Complaint alleges Petitioners "were evaluating, diagnosing and providing a prognosis (P-APP 072-073, ¶¶10, 12, 15) when they decided to remove life support" (Pet., 12), but that is not what the Complaint says and it is contrary to Melanie's allegation that Petitioners "were not providing healthcare services when they withdrew life support" treatment. (R-Ap.11, ¶22.)

Judge Ashley correctly recognized, "Simply because the statutory duty extends to health care professionals and involves situations in the scope of their employment does not automatically make the failure to follow that duty medical malpractice." (R-Ap.32.)

Petitioners cite McEvoy v. Group Health Cooperative, 213 Wis. 2d 507, 530, 570 N.W.2d 397, 406 (1997), which actually supports Melanie's position. In McEvoy, 213 Wis. 2d 507, 529, 570 N.W.2d 397 (1997), the Wisconsin Supreme Court left the door open to cases such as Melanie's. The McEvoy Court examined the scope and application of chapter 655, stating that: "an examination of the language of chapter 655 reveals that the **legislature did not intend to go beyond regulating claims for medical malpractice**." Id. at 529 (emph. added). "We conclude that ch. 655 applies **only** to negligent medical acts or decisions made in the course of rendering professional medical care."

Id. at 530 (emph. added). **"To hold otherwise would exceed the bounds of the chapter and would grant seeming immunity from non-ch. 655 suits to those with a medical degree."** Id. (emph. added.)

Thus, by the same reasoning, Petitioners' decision to bypass Wis.Stat. §§154 and 155 entirely and rely solely on the directives of Hardrath's family, even without a declaration or power of attorney of healthcare, was a custodial or administrative decision to circumvent Wisconsin's statutory guidelines, not a medical decision. This duty to follow legal guidelines, separate from a professional duty to competently make medical decisions, provides the proper basis for Melanie's common-law Negligence, Negligence Per Se and punitive damages claims. As such, §655 does not provide the exclusive remedy for Melanie's common-law negligence claims and to hold otherwise would give immunity for claims outside §655 to anyone with a medical degree, contrary to the legislature's intent. See McEvoy, 213 Wis. 2d 507, 529.

Contrary to Petitioners' assertion that Melanie failed to plead facts which demonstrate the acts at issue were "non-medical, administrative, ministerial, or routine" (Pet., 13), Melanie sufficiently pled the Petitioners' conduct violated her rights to safety, health and life, citing Wis. Stats. §§ 895.043, 154.01(5m), 154.02(3), 154.11(4)(b), 155.70(7) and 155.05(2), and Edna M.F., 210 Wis.2d 557, and

Guardianship of L.W., 167 Wis.2d 53. (R-Ap.10 ¶14; R-Ap.11 ¶¶23-24; R-Ap.12 ¶¶26-27; R-Ap.13 ¶33; see also 156-58.)

These legal provisions, taken together, along with the following Office of the Attorney General Opinion 10-14, annotated within Wis. Stats. Ch. 155 *and* 154, specifically deprive the Petitioners of immunity:

> "Wisconsin Statutes provide 3 instruments through which an individual may state healthcare wishes in the event of incapacitation: a "declaration to physicians," a "do-not-resuscitate order," and a "health care power of attorney." These statutory instruments apply under specific circumstances, have their own signature requirements…. **A form will trigger no statutory immunities for healthcare providers when it lacks the features of these statutory documents."**

Id. Clearly, there is no immunity intended by the legislature for healthcare providers relying on documents or other information from family that lacks "the features" required by Wis. Stat. §§155 and 154.

In Montalvo v. Borkovec, 2002 WI App 147, 256 Wis.2d 472, 647 N.W.2d 413, the appellate court held:

> "In Wisconsin, the interest in preserving life is of paramount significance. …As a result, there is a presumption that continued life is in the best interest of a patient. …In the absence of proof of a persistent vegetative state, our courts have never decided it is in the best interest of a patient to withhold or withdraw life-sustaining medical care."

(See R-Ap.31-32, 286.) The constitutional right to life under Montalvo, together with the statutory provisions cited above, give rise to the

Petitioners' duty to protect Melanie's life, consistent with Judge Ashley's decision. (See id.)

The Petitioners' claim that Judge Ashley failed to rely on the cases that define and interpret what is considered medical decision-making (Pet., 14), is baseless. Judge Ashley analyzed and correctly distinguished the facts and holdings of McEvoy, supra 38-39, and Engrav v. ProAssurance Wis. Ins. Co., 2010 U.S. Dist. Lexis 23294; 2010 WL 897465, but simply reached a conclusion Petitioners disagree with, which is not a basis for seeking or granting review. (See R-Ap.28-31.)

Noteworthy, in Engrav, which is a non-controlling decision of United States District Court for the Western District of Wisconsin, the medical provider's insurer, ProAssurance Wisconsin Insurance Company, argued the claim sounded in Negligence rather than Medical Malpractice in an effort to have the claim dismissed on a statute of limitations that could not be tolled (unlike Medical Malpractice which can). The decision appears to be result-driven and the Court denied Gunderson Clinic and ProAssurance's motions, which provided Engrav their day in Court. See Engrav, 2010 U.S. Dist. Lexis 23294 at 5-6. Funny that a healthcare provider and

"ProAssurance" argued the opposite in Engrav of what they argue now in this case.[3]

Interesting, though, that the clinic and insurer made a case that Engrav's claim was Negligence and not Malpractice.

Judge Ashley did not ignore the decisions defining custodial care. (Contra, Pet. 14-15.) It aptly reached the same conclusion as did Judge Swanson, finding Snyder v. Injured Patients Compensation Fund, 2009 WI App 86, 320 Wis.2d 259, 768 N.W.2d 271 (Ct.App. 2009), to be similar and on point. (See R-Ap.32, see also R-Ap.55-57.) The current Circuit Court observed:

> "In Snyder, the Court of Appeals determined that a hospital's failure to check a patient for a weapon prior to admittance was a custodial, not medical, decision. Similarly, a hospital and a healthcare [provider]'s duty to follow the legal procedures and guidelines prior to withdrawing or withholding life support is not a medical decision. **Simply because the statutory duty extend to healthcare professionals and involves situations in the scope of their employment does not automatically make the failure to follow that duty medical malpractice**."

(R-Ap.32.)

Petitioners' contention (Pet. 14) that the allegations of Melanie's Complaint "are not remotely similar to any of the cases in which any Wisconsin Court has ever found custodial care was at issue" is

[3] ProAssurance in Melanie's case joined the motion to dismiss and motion for reconsideration but not this Petition for Leave to Appeal.

spurious and contrary to the legal conclusions of Judge Swanson and Judge Ashley. Melanie's facts might be the most egregious disregard of a patient's right to life (no life supporting treatment, hydration and nutrition for 35 days), but that does not take it outside of the realm of common law negligence.

By deferring to the family, Petitioners took their medical coat off and committed distinct, custodial negligent acts. (See, e.g., R-Ap.147-55; see also R-Ap.29)

When Melanie was not terminal (only 3 days had passed!), not in a persistent vegetative state, had no valid healthcare power of attorney, and had no valid Living Will, Petitioners' approach to withdrawal of life support treatment solely on the mother/sister's direction, over the objection of Melanie's fiance and his report of Melanie's wishes, is tantamount to Melanie being euthanized slowly. They had no legal basis to place her in hospice and the decision to do so was an intentional disregard of her right to life.

The Circuit Court held:

> "Had [Petitioners] made a mistake during Hardrath's determination of incapacity or a persistent vegetative state prior to any decisions about withdrawing or withholding life-saving procedures, this may raise a medical malpractice claim. This Case, however, does not concern a medical determination or choices made during such determinations. Here, …[Petitioners] chose to bypass Wis.Stat. Section 154 and 155 entirely and relied solely on directives of Hardrath's family, even in the absence of a

> declaration or power of attorney of healthcare. [Petitioners'] decision to circumvent Wisconsin's statutory guidelines was not a medical decision. Therefore, Chapter 655 is not plaintiff's exclusive remedy."

(R-Ap.33.)

Under Payne, 81 Wis.2d 264, 276, applying these laws to Melanie involves "subjects within the realm of the ordinary experience of mankind" and does not require special medical knowledge or skill. (Contra, Pet. 16.) Following the law is within the realm of the ordinary experience of mankind. Contrary to Petitioners' contention that Payne supports the extent to which §655 has been held applicable to acts in decision making of healthcare providers, Payne involved a therapeutic decision to leave the patient unattended that does not exist in Melanie's case. No party has alleged Petitioners took Melanie off life supporting treatment as a therapeutic measure.

Petitioners' claim (R-Ap.16-17) that Guardianship of L.W. is confined strictly to Court appointed guardians and not other third-party decision-makers is at least broadened by its statement that, "the clear indication is that a guardian has identical decision-making powers as a health care agent." Id., 167 Wis.2d 53, 82. The fact that the Supreme Court in L.W., which involved a patient in a persistent vegetative state, did not decide familial decision-making, does not conflict with Judge Ashley's decision in Melanie's case where she was

not in a persistent vegetative state. Id., 167 Wis.2d 53, 63; (R-Ap.10, ¶14.)

Petitioners wrongly assert (Pet., 17) that Melanie's contention that the health care providers "took off their medical coats" is not pled nor supported by any of the facts that were pled. In 2007, Waukesha County Circuit Court decided that intentional tort claims for fraud and intentional infliction of emotional distress, and punitive damages, *as well as malpractice*, could viably be asserted against a doctor and hospital in Sally Sytsma, et al. v. David S. Haskell, Waukesha County Case No. 06-CV-2441, where the doctor knew he did wrong and purposely acted to obscure his actions from his patient. The reasoning in Haskell applies here. When Dr. Haskell tried to cover up the botched surgery, the Court found that he "took off his medical coat," and the motion to dismiss the plaintiff's intentional torts and punitive damages was denied. Dr. Haskell was held to the same standard as anybody else respecting his acts, regardless of the doctor-patient relationship and context.

In Melanie's case, Petitioners "took off their medical coats," subjecting themselves to Negligence/Negligence Per Se liability, before removing her from life support treatment contrary to the law.

II. THE CIRCUIT COURT CAREFULLY CONSIDERED AND CORRECTLY CONCLUDED MELANIE'S FACTS AS PLED SUFFICIENTLY STATE A CLAIM FOR NEGLIGENCE AND

NEGLIGENCE PER SE IN THE ALTERNATIVE TO MALPRACTICE.

The Circuit Court's decision reaches the only proper legal conclusion, is careful and discerning, and based upon numerous written and oral arguments by counsel for all parties, after multiple motion hearing dates.

The Circuit Court found the support for Negligence and Negligence Per Se in Melanie's Third Amended Complaint. (R-Ap.24-26.) Based on the facts from the Complaint, Judge Ashley's decision correctly summarized the precise arguments that Petitioners now claim he supposedly did not understand. (R-Ap.26:21-25:5.) The Court applied the correct standard of law to the motion (R-Ap.27-28) and provided a thorough, reasoned analysis reflecting a clear understanding of the same arguments Petitioners now assert to the Court of Appeals. (See R-Ap.26-33.)

Petitioners' argument (Pet., 18) that because Melanie did not have a valid power of attorney or living will, those sections do not apply, is without merit. Wis.Stat. §154.11(4) states,

> "OTHER RIGHTS. This subchapter does not impair or supersede any of the following:
>
> **…(b) The right of any person who does not have a declaration in effect to receive life-sustaining procedures or feeding tubes."**

Id. Life support treatment cannot be withdrawn even with power of attorney or advance directive authority unless the patient is terminal or in a persistent vegetative state, which Melanie never was. (See supra, 37-45.) It is unconscionable to argue that healthcare professionals do not need to reference Chapters 154 and 155 of the statutes when life-sustaining procedures are at issue (Pet., 18), since they are safety statutes that reflect the public policy to preserve life. (Supra, 37-45.)

Petitioners dissect (Pet., 18-26) Judge Ashley's decision in a fashion that takes his holding completely out of context. A simple read of his holding clarifies that all elements of Negligence and Negligence Per Se are met. (See R-Ap.24-36.) Petitioners provide the Court of Appeals (Pet., 18-26) no controlling legal authority to support their argument that the specific statutes cited in Melanie's Complaint are not "safety statutes." (But see R-Ap.34, 12 at ¶26; supra, 40-41.)

Under Meyers, 735 N.W.2d 448, ¶21, the Court of Appeals shall accept as true all facts as set forth in Melanie's Complaint, and all reasonable inferences in her favor that may be drawn from such facts. Id. Melanie's Complaint cannot be dismissed as legally insufficient because Petitioners have failed to establish that there are no circumstances under which Melanie can recover. Id. Melanie's complaint is sufficient under Korkow, 117 Wis. 2d 187, 193, which

held notice pleadings rules are not intended to become a "game of skill" where one misstep by counsel may be decisive of the outcome. See id.

CONCLUSION

Please do not forget, after 35 days of starvation and no life support treatment, Melanie expressed to Judge Borowski, through her Guardian Ad Litem, that she wanted to live and did not want to die. We respectfully request the petition for leave to appeal be denied.

Dated this 5th day of July, 2022 at Milwaukee, Wisconsin.

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CERTIFICATION

Pursuant to s. 809.50(4), I hereby certify that this Response to Petition conforms to the rules contained in s. 809.50(1) for a Response for a brief produced by using proportional serif font. The length of this Petition is **7,932** words.

Electronically signed by Attorney Kristin A. Leaf
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