
IN THE SUPREME COURT OF THE STATE OF OHIO

No. 14-1161

WORLD HARVEST CHURCH,

Plaintiff-Appellee,

vs.

GRANGE MUTUAL CASUALTY COMPANY,

Defendant-Appellant.

**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS
IN SUPPORT OF APPELLEE**

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I. INTRODUCTION

United Policyholders supports the positions of World Harvest Church (“WHC”) in this appeal. United Policyholders writes separately, as *amicus curiae*, to stress that public policy supports WHC’s positions.

First, WHC specifically purchased coverage to compensate victims of corporal punishment when it causes injury. A key fact of this case is that an insurance company sold specific coverage for corporal punishment by endorsement, but then resisted providing that coverage when a claim was made. Public policy supports insurance coverage of loss because it compensates victims and provides for the fulfillment of the promise of insurance. This is particularly true for vicarious liability for the intentional torts of others.

Second, the Supplementary Payments Provision of the insurance policy provides coverage for attorneys’ fees and other costs, as well as post-judgment interest. The Supplementary Payments Provision is not dependent on the existence or non-existence of covered damages, but instead on the duty to defend. If the insurance company defends the case, it is obligated to make supplementary payments for interest, attorneys’ fees, and other costs. This is important supplementary coverage that cannot be read out of the policy.

Third, both attorneys’ fees and post-judgment interest are compensatory damages that were awarded in this case “because of” bodily injury. This Court has held that “because of” is even broader than the word “for.” State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St. 3d 165, 169, 551 N.E.2d 955 (1990). Moreover, in Neal-Pettit v. Lahman, 125 Ohio St. 3d 327, 928 N.E.2d 421 (2010), this court held that an award of attorneys’ fees is compensatory, not punitive, and is covered. Since the mid-1800’s, Ohio court have made it clear that attorneys’ fees, even when accompanied by punitive damages, are compensatory (not punitive).

II. STATEMENT OF THE CASE AND FACTS

United Policyholders adopts the Statement of the Case contained in the brief of the Plaintiff-Appellee, World Harvest Church.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Colorado and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support our work. United Policyholders does not accept funding from insurance companies.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery*[™] (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). United Policyholders hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

State insurance regulators, academics, and journalists throughout the United States routinely seek United Policyholders' input on insurance and legal matters. We have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. United Policyholders works with insurance regulators, including the Ohio Department of Insurance, on matters that impact policyholders.

United Policyholders seeks to assist courts as amicus curiae in appellate proceedings throughout the United States, including the Ohio Supreme Court, particularly in cases involving insurance principles that are likely to impact large segments of the public. United Policyholders has appeared as *amicus curiae* in numerous Ohio Supreme Court cases, including: The Lincoln

Electric Company v. Travelers Casualty and Surety Company, et al. (2013-1088) and Pennsylvania General Insurance Co. vs. Park-Ohio Industries, Inc., et al. (2009-0104). A complete listing of all cases we've weighed in on can be found in our online Amicus Project library.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

A policyholder's vicarious liability for an employee's intentional torts is covered.

Ohio courts have held that “a principal is vicariously liable for the torts of its employees under the doctrine of respondeat superior.” Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St. 3d 594, 599, 913 N.E.2d 939, 943 (2009) (quoting Clark v. Southview Hosp. & Family Health Ctr., 68 Ohio St. 3d 435, 438, 628 N.E.2d 46, 48 (1994)). Indeed, as the Tenth District noted: “[o]ne of the most common situations in which courts have found coverage for vicarious liabilities is where an employer is held liable for the intentional injuries or damage(s) caused by one of its employees under the theory of respondeat superior.” World Harvest Church v. Grange Mut. Cas. Co., No. 13AP-290, 2013 WL 6843615, at *8 (Ohio Ct. App. Dec. 24, 2013) (quoting French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 Hastings Bus. L. J. 65, 90 (2012)); Wuerth, 122 Ohio St. 3d at 599, 913 N.E.2d at 944 (“[T]he most common form of derivative or vicarious liability is that imposed by the law of agency, through the doctrine of *respondeat superior*.”). Vicarious liability provides an important source of compensation for victims. See James, Fleming Jr., Vicarious Liability, 28 TUL. L. REV. 161, 163 (1954) (discussing how “[e]mployees are ill equipped to provide for the distribution of such losses through liability

insurance or otherwise”). Liability insurance provides an important public purpose in providing compensation for the direct and vicarious liability of people and entities.

The intent of the *employee* that commits the tort is immaterial when an *employer* seeks coverage for its own vicarious liability. Safeco Ins. Co. of Am. v. White, 122 Ohio St. 3d 562, 568, 913 N.E.2d 426, 432 (2009). This Court looks at whether the act is intentional from the perspective of the person seeking coverage. Id. This Court has reasoned that “a contrary decision would ‘effectively dissolve[] the distinction between intentional and negligent conduct, allowing the intentional act to devour the negligent act for the purpose of determining coverage.’” Id. (internal citations omitted). The vicarious liability imposed upon WHC was not based on the intentional conduct of WHC.

A claim of vicarious liability against an employer for the intentional torts of its employees is not based on any expected or intentional harm caused by the employer. See TIG Ins. Co. v. Travelers Ins. Co., No. CV-00-1780-ST, 2003 WL 24051560, at *2-3 (D. Or. Mar. 24, 2003) (holding that claims of negligence against an employer arising from sexual abuse by an employee to fall within coverage for an “occurrence”); McLeod v. Tecorp Int’l, Ltd., 844 P.2d 925, 927 (Or. Ct. App. 1992) (“Vicarious liability is imposed as a risk allocation between the employer and an innocent plaintiff and, therefore, does not require any degree of fault on the employer’s part).¹

¹ Other jurisdictions have also found coverage for vicarious liability. See e.g., Gen. Direct Mktg., Inc. v. Lexington Ins. Co., 410 F. Supp. 2d 387 (M.D. Pa. 2006) (holding that an Intentional Discrimination Exclusion did not apply to the vicarious liability claims); Northland Cas. Co. v. HBE Corp., 160 F. Supp. 2d 1348, 1362 n.10 (M.D. Fla. 2001) (finding coverage for vicarious liability even though the insurance company originally claimed there was no coverage as a result of an exclusion for the underlying event); Prop. Cas. Co. of MCA v. Conway, 687 A.2d 729 (NJ 1997) (finding coverage for parents’ vicarious liability for their son’s intentional vandalism of school property even though insurance company argued that an intentional acts exclusion negated coverage).

Denying employers the ability to obtain insurance coverage for vicarious liability would put the public at risk. It would harm tort victims by taking away a source of payment for their damages. Insurance serves as a risk allocation tool to ensure that one incident does not destroy a business. More importantly, insurance serves a ready source of resources available to compensate victims. Indeed, society understands and expects that an employer will obtain a liability policy “to cover *its liability to the public* for negligence of its agents, servants and employees under the doctrine of respondeat superior.” Am. Family Mut. Ins. Co. v. Tickle, 99 S.W.3d 25, 29 (Mo. Ct. App. 2003); 9A Couch on Ins. § 129:10. Moreover, precluding coverage would risk preventing the victim from obtaining a fair and adequate recovery, in contravention of the purpose of modern tort law. Doe v. Shaffer, 90 Ohio St. 3d 388, 395, 738 N.E.2d 1243, 1248 (2000). Indeed, this Court has recognized that public policy favors liability insurance as a means of assuring that innocent persons are made whole. Harasyn v. Normandy Metals, Inc., 49 Ohio St. 3d 173, 176, 551 N.E.2d 962, 965 (1990).

PROPOSITION OF LAW NO. 2

An award of attorneys’ fees to the underlying plaintiff is not punitive and is covered under a CGL policy as either damages under the insuring agreement or as costs under the supplemental payments provision.

A. Awards of Attorneys’ Fees Are Sums That the Policyholder Becomes Legally Obligated To Pay Because of Bodily Injury or Property Damage to Which This Insurance Applies.

Under Coverage A, the typical commercial general liability (“CGL”) policy provides that the insurance company will “pay those sums that the [policyholder] becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” See Grange Supplement, SUPP-14. Likewise, under Coverage B, the insurance company agrees

to pay as “damages” those sums the policyholder becomes liable for “because of ‘advertising injury.’” See Grange Supplement, SUPP-18.

In Neil-Pettit, this Court held that the insurance policy at issue covered “attorney-fee awards and that public policy does not prevent such coverage.” 125 Ohio St. 3d at 327, 928 N.E.2d at 422. In that case, Neil-Pettit sued Lahman for compensatory and punitive damages after Lahman struck Neil-Pettit’s car while she was intoxicated and was fleeing the scene of an earlier accident. Id. The jury awarded Neil-Pettit compensatory damages, punitive damages, and attorneys’ fees. Lahman’s auto insurance company, Allstate Insurance Company (“Allstate”), refused to pay the punitive damages and attorneys’ fees, forcing Neil-Pettit to file a supplemental complaint against Allstate for the attorneys’ fees. Id. After losing on the issue of attorneys’ fee on summary judgment at trial and on appeal, this Court accepted Allstate’s appeal.

At issue, *inter alia*, was whether “an attorney-fee award can be characterized as ‘[damages] because of bodily injury,’ as required for coverage under Allstate’s policy.” Id. at 328, 928 N.E.2d at 423. Allstate’s policy covered damages which the policyholder was legally obligated to pay because of bodily injury or property damage. The Allstate policy did not define the term “damages.” Allstate argued that an “attorney-fee award was not covered under its policy, because attorney fees are not ‘[damages] because of bodily injury,’ as required by the policy, but rather are awarded as a result of punitive damages.” Id. at 330, 928 N.E.2d at 424. This Court rejected Allstate’s argument, finding that to the extent that the parties had separate plausible interpretations of the policy, the uncertainty must be resolved in favor of the policyholder.²

² Ohio law is consistent with the law of other jurisdictions holding that attorneys’ fees are recoverable as damages. See e.g. Hollybrook Cottonseed Processing, L.L.C. v. Am. Guarantee & Liab. Ins. Co., 772 F.3d 1031, 1036 (5th Cir. 2014) (attorneys’ fees were an element of

Ohio courts have long held that an award of attorneys' fees is considered compensatory, not punitive. See Roberts v. Mason, 10 Ohio St. 277, 279 (1859) ("The jury are at liberty, if they see fit, to allow the plaintiff, as part of his actual or compensatory damages, any reasonable expenditure for counsel fees which are necessarily incurred in the prosecution of this suit); Smith v. Pittsburg, Ft. Wayne & Chi. Ry. Co., 23 Ohio St. 10, 18 (1872) ("The doctrine there announced is, that in a case where punitive as well as compensatory damages may be awarded, the jury, in discriminating, should regard counsel fees as compensation and not as punishment").

Liability insurance is a risk shifting device designed to ensure that funds will exist to compensate innocent tort victims for their injuries and to protect businesses from their liability for the full range of damages that flow from bodily injury, property damage, and other loss. It is a maxim of tort law to make the injured party whole again. When the law permits an award of attorneys' fees to make the injured party whole, those attorneys' fees are compensatory damages "because of" the bodily injury, property damage, or advertising injury that the injured party has suffered. The phrase "because of" implies "but for" causation. See Lovewell v. Physicians Ins. Co. of Ohio, 79 Ohio St. 3d 143, 164, 679 N.E.2d 1119, 1122 (1997) (applying "but for" reasoning when construing insurance policy term "because of a medical incident"); Thomas v.

damages, and thus fell within scope of defendant's commercial general liability policy); Episcopal Church in S.C. v. Church Ins. Co. of Vt., 993 F. Supp. 2d 581, 590 (D.S.C. 2014) (reasoning that attorneys' fees were monetary compensation owed to underlying plaintiff and therefore, "damages" under the policy); Am. Family Mut. Ins. Co. v. Spectre W. Builders Corp., No. CV09-968, 2011 WL 488891, at *9 (D. Ariz. Feb. 4, 2011) (Court therefore finds that the attorneys' fees and costs awarded at the arbitration are damages that fall under the insuring clause of the policies). City of Ypsilanti v. Appalachian Ins. Co., 547 F. Supp. 823, 828 (E.D. Mich. 1982) (a reasonable person in the position of the Insured would believe that the words "all sums which the Insured shall become legally obligated to pay as damages" would provide coverage for all forms of civil liability, including attorney fees.); XL Specialty Ins. Co. v. Loral Space & Commc'n, Inc., 918 N.Y.S.2d 57, 64 (App. Div. 1st Dep't 2011) (holding that attorney fees that corporate insured had to pay in shareholder derivative action and class action brought against it were "damages" under insured's management liability and company reimbursement policy).

Columbia Sussex Corp., No. 10AP-93, 2011 WL 96277, at *6 (Ohio Ct. App. Jan. 6, 2011) (reasoning that the terms “because of” and “on the basis of” are equivalent to “but for” causation). This Court has held that “because of” is even broader than the word “for.” State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St. 3d 165, 169, 551 N.E.2d 955 (1990). Here, but for the bodily injury, there would have been no attorney fee award. Accordingly, there can be no legitimate question under Ohio law that attorneys’ fee awards are compensatory damages. Likewise, there can be no legitimate factual dispute in this case that the attorneys’ fee award was made “because of” bodily injury. If there had been no bodily injury, there would have been no award of attorneys’ fees.

B. Awards of Attorneys’ Fees Are a “Cost” Under the CGL Policy’s Supplementary Payments Provision.

The Supplementary Payments Provision in the insurance policy sold by Grange provides that it “will pay, with respect to any claim we investigate or settle, or any ‘suit’ against an insured we defend” certain expenses and costs, including, *inter alia*, “[a]ll costs taxed against the insured in the ‘suit.’” Grange Supplement, SUPP-20-21. “Suit” is defined as a civil proceeding in which damages because of bodily injury, property damage, or person and advertising injury to which this insurance applies are alleged.” Grange Supplement, SUPP-28.

In Employers Mutual Casualty Co. v. Donnelly, the Idaho Supreme Court held that under the Supplementary Payments Provision, when the insurance company defended the suit, it had to pay the attorneys’ fees awarded even though no claims were covered under the policy. 300 P.3d 31, 35 (Idaho 2013). The court reasoned that under the plain language of the Supplementary Payments Provision, the “policy states that damages only need to be ‘alleged’ to trigger coverage, they do not need to be proven.” Id. The court further reasoned that since the underlying plaintiff “clearly alleged damages that implicate the applicable provisions of the

policy, [the insurance company] is obligated to pay [a]ll costs taxed against the insured in the ‘suit.’” Id. A prior Idaho case reached the same conclusion under a similarly worded policy. In Mutual of Enumclaw v. Harvey, the court reasoned that

Beyond what appears to be the clear term of the policy, it is arguable that since the Company has the right to control the defense, including the power to refuse settlement, it should also bear the consequences of its case management decisions, including the consequence that the trial court may tax the opponent’s costs against the insured.

772 P.2d 216, 219 (Idaho 1989).

The Supplementary Payments Provision is therefore tied to the duty to defend. It matters not if the damages ultimately awarded are covered. If the insurance company has defended the lawsuit, it will pay the costs taxed against the insured in the suit. In Prichard v. Liberty Mutual Insurance Co., the court held that the CGL “policy, in essence, obligates the insurer to pay the costs in any lawsuit it *defends*.” 84 Cal. App. 4th 890, 911 (4th Dist. 2000). The court explained that this is a function of the insurance company’s defense obligation, not its indemnity obligation. Id. at 911-12. Other jurisdictions have reached the same conclusion. See e.g. Littlefield v. McGuffey, 979 F.2d 101, 105 (7th Cir. 1992) (“the district court correctly decided that the insurance policy’s coverage of costs included attorneys’ fees”); R.W. Beck & Assocs. v. City & Borough of Sitka, 27 F.3d 1475, 1484 (9th Cir. 1994) (holding that the Supplementary Payment Provision included awards of attorneys’ fees).

When an insurance company prepares insurance policy language that is doubtful, vague, or ambiguous, the language must be construed in favor of the policyholder and strictly against the insurance company. Byers v. Motorists Ins. Cos., 160 Ohio App. 3d 404, 408, 863 N.E.2d 196, 199 (2006). Any ambiguity about whether “costs” includes or excludes “attorneys’ fees” must be construed in favor of the policyholder. As one court observed, “[i]f an [insurance

company] does not wish to underwrite attorneys' fees charged against its [policyholders], it need only add words of exclusion to its contracts. Here, the four words 'exclusive of attorneys' fees', inserted into the policy after the word 'costs', would have accomplished State Farm's goal."

Littlefield v. McGuffey, 979 F.2d 101, 105 (7th Cir. 1992). Indeed, recent versions of the CGL policy issued by the Insurance Services Office, Inc. ("ISO") have eliminated attorneys' fees from the supplementary payments coverage. For example, the Supplementary Payments Provision of ISO CGL form CG 00 01 12 07 provides that supplementary payments include "[a]ll court costs taxed against the insured in the 'suit'. However, these payments **do not include attorneys' fees or attorneys' expenses** taxed against the insured." See ISO CGL form CG 00 01 12 07.

Insurance companies have the option to include specific exclusory language preventing payment of attorneys' fees awards. If they fail to do so, attorneys' fees are covered, either as damages because of bodily injury or as costs under the Supplementary Payments Provision.

PROPOSITION OF LAW NO. 3

The Plain Language of the Supplementary Payments Provision Obligates the Insurance Company to Pay Post-Judgment Interest on the Entire Judgment Because It Defended the Lawsuit.

The Tenth District was correct in holding that the Supplementary Payments Provision of the CGL policy plainly obligates Grange to pay World Harvest for post-judgment interest on the entire judgment. See Reconsideration Application Memorandum Decision ("Recon. App. Op."), ¶ 23, attached as Appendix of Grange's Memorandum in Support of Jurisdiction ("Grange Appx.") 13. The plain language of the Supplementary Payments Provision provides for payment of post-judgment interest on the full amount of any judgment. The Supplementary Payments Provision provides that the insurance company "will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend" certain expenses and costs . . . all interest earned **on**

the full amount of any judgment that accrues after entry of the judgment” See Grange Supplement, SUPP-20-21 (emphasis added).

There is no ambiguity, as the Supplementary Payments Provision unambiguously states that if an insurance company defends a suit, it will pay “all interest earned on the full amount of the judgment that accrues after the entry of the judgment.” The words “full amount of the judgment” could not be clearer. The triggering event for the insurance company’s payment obligation is not the presence of covered or uncovered claims, but the entry of a judgment in a lawsuit that the insurance company defended. When the insurance company has defended the lawsuit, it must pay “all” interest earned on the “full” amount of the judgment. As the Tenth District noted, if insurance companies like Grange wish to limit the Supplementary Payments Provision, they are free to draft limiting language. See Recon. App. Op., ¶ 22, Grange Appx. 8.

In Coventry v. Steve Koren, Inc., this Court held that the insurance company had to pay post-judgment interest on an entire judgment, even though the judgment exceeded policy limits. 1 Ohio App. 2d 385, 205 N.E.2d 18 (1965), aff’d, 4 Ohio St. 2d 24, 211 N.E.2d 833 (1965). A judgment was entered against the policyholder for \$60,000, and the policy limit was only \$10,000. The policy required the insurance company to pay “all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company’s liability thereon.” This Court ruled that interest must be paid on the entire judgment, even though only \$10,000 of the judgment was covered. Id. at 392, 205 N.E.2d at 23; see also Rader v. Carroll, No. CA92-06-011, 1992 WL 379315, at *4 (Ohio Ct. App. Dec. 21, 1992) (“By affirming Coventry, it would appear that the supreme court explicitly adopted the rule that an insurer is obligated to pay interest on the total amount of judgment rendered.”). Grange chose to sell a policy with a broad requirement to pay

post-judgment interest on the **full amount** of the judgment. The Tenth Circuit, on reconsideration, correctly held that Grange was liable for the entire award of post-judgment interest.

Ohio public policy does not preclude an insurance company from paying post-judgment interest on judgments that include punitive damages. Indeed, while insurance for directly assessed punitive damages is disfavored in Ohio, there is no public policy prohibition on the insurability even of directly assessed punitive damages if the insurance policy includes specific contractual language covering punitive or exemplary damages. State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St. 3d 165, 551 N.E.2d 955 (1990). If there is no public policy prohibition on the insurability of punitive damages that are imposed when the insurance policy includes specific contractual language covering punitive or exemplary damages, then there can be no public policy prohibition on the insurability of compensatory post-judgment interest that is payable under specific contractual language insuring interest on the “full judgment,” without limitation.

Here, the Court imposed \$1,528,470 in direct punitive damages against WHC and imposed \$100,000 against Vaughan for which WHC was liable only vicariously. WHC is entitled to recover at least the \$100,000 for which it was held liable only vicariously. Nearly all states to consider the issue have ruled that vicarious liability for punitive damages is insurable. See JOHN H. MATHIAS, JR., JOHN D. SHUGRUE, & THOMAS A. MARRINSON, INSURANCE COVERAGE DISPUTES, §9.02 n.39 (David M. Kroeger ed., 2015). Moreover, in the present case, the policy used the phrase “because of bodily injury” the language that was at issue in Hutchinson not the narrower “for bodily injury” language that was at issue in Blevins. See Blevins, 49 Ohio St. 3d at 169, 551 N.E.2d at 959. As such, WHC’s vicarious liability for punitive damages awarded against Vaughan are covered.

Indeed, the Ohio Court of Appeals found coverage for punitive damages when the policy included the “because of” language and where there was no finding of actual malice. See Corinthian v. Hartford Fire Ins. Co., 143 Ohio App. 3d 392, 397, 758 N.E.2d 218, 222 (2001). The court could “discern no public policy reason for not covering the damages at issue here, i.e., punitive damages awarded pursuant to former R.C. 3721.17(I), without any showing of intent or malice.” Likewise, there is no public policy reason that would prohibit an insurance company from paying post-judgment interest that is not punitive at all. Rather, post-judgment interest compensates for the time value of money. This Court has held that attorneys’ fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorneys’ fees on behalf of an insured even when they are awarded solely as a result of an award for punitive damages. Neal-Pettit v. Lahman, 125 Ohio St. 3d 327, 330-31, 928 N.E.2d 421, 425 (2010). For the same reason, public policy does not prohibit an insurance company from covering interest on the full amount of a judgment that contains some punitive damages.

Under the terms of a liability policy, the insurance company “has complete control of any litigation from which it might incur liability.” River Valley Cartage Co. v. Hawkeye-Security Ins. Co., 161 N.E.2d 101, 103 (Ill. 1959). Therefore, any “delay which causes interest to run, and the cost thereof, should rest on the shoulders of the [insurance company], who has complete control of the litigation and settlement. This responsibility should not be cast upon the [policyholder], who cannot settle the litigation without releasing the [insurance company] from his obligation. Rader v. Carroll, No. CA92-06-011, 1992 WL 379315, at *4 (Ohio Ct. App. Dec. 21, 1992).

V. CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Honorable Court accept their proposed propositions of law.

Dated: March 30, 2015

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