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STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN CHILDERS, as conservator for JUSTIN CHILDERS, a legally incapacitated person,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee

vs.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.

Docket nos. 164953, 164954.
Court of Appeals nos. 356914, 356915
Genesee Circuit Court
LC Case No. 13-101626-NF
Hon. Brian S. Pickell

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PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I.

DOES AN INSURED'S CLAIM AGAINST A LOWER-PRIORITY NO-FAULT INSURER ACCRUE WHEN THE HIGHER-PRIORITY INSURER IS DECLARED INSOLVENT?

Plaintiff-Appellee would answer "YES."

Defendant-Appellant would answer "NO."

The Court of Appeals answered "YES."

The trial court answered "NO."

II.

DOES MCL 600.5813 DETERMINE THE STATUTE OF LIMITATIONS?

Plaintiff-Appellee would answer "YES."

Defendant-Appellant would answer "NO."

The Court of Appeals answered "YES."

This question was not before the trial court.

III.

SHOULD THE COURT OF APPEALS DECISION THAT PROGRESSIVE QUALIFIED AS THE NEXT INSURER IN THE CHAIN OF PRIORITY UNDER MCL 500.3114(4)(b) BE AFFIRMED?

Plaintiff-Appellee would answer "YES."

Defendant-Appellant would answer "NO."

The Court of Appeals answered "YES."

This question was not before the trial court.

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INTRODUCTION AND SUMMARY OF ARGUMENT

When a Michigan no-fault insurer is declared insolvent, who is left holding the bag? That, essentially, is what this Court needs to decide.

On August 6, 2011, Justin Childers was a passenger in an uninsured automobile owned and operated by Shaina Groulx. Groulx rear-ended another vehicle; Childers was severely injured and is now quadriplegic.

At the time of the accident, Childers did not own a vehicle; however, Childers and his mother, Susan Childers, were domiciled in the same household. Susan Childers was a named insured on a no-fault automobile insurance policy issued by American Fellowship Mutual Insurance Company. Childers was entitled to receive personal protection insurance ("PIP") benefits from American Fellowship.

On October 12, 2012, a Rehabilitation Order was entered in the Ingham County Circuit Court placing American Fellowship into rehabilitation under MCL 500.8112. American Fellowship was declared insolvent by order of the Ingham Circuit Court on June 12, 2013.

Fortunately for Childers, however, the Michigan Property and Casualty Guaranty Association was available to take over the obligations of American Fellowship. However, the statutes that created the Guaranty Association also required Childers to "first exhaust all coverage provided by any policy." Childers' claims for PIP benefits against American Fellowship qualify as a "covered claim" under MCL 500.7925.

After receiving Childers' covered claim, the Guaranty Association investigated whether there were any potentially higher-priority insurers for payment of Childers' PIP claim. The Guaranty Association advised Childers that Progressive Marathon insured Groulx's brother. Childers made a claim to Progressive. Progressive denied it, relying

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on both the no-fault act's statute of limitations and an exclusion in its policy that would preclude the driver from receiving first-party benefits if she had sought them.

Childers, in cooperation with the Guaranty Association, filed suit against Progressive in 2013. The trial court held that the one-year statute of limitations in the no-fault act did not apply, so that Childers' suit was timely, but that the driver was not "an insured" under the Progressive policy.

Childers appealed to the Court of Appeals. The panel (Judges Cavanagh, Garrett and Yates) held that the claim "accrued" no later than the date at which the original insurer was declared insolvent, and that the driver was an "insured" under the Progressive policy.

Progressive applied for leave to appeal.

On May 26, 2023, this Court directed the parties to brief three issues: (1) when did Childers' claim "accrue;" (2) what statute of limitations applied to it; and (3) whether the driver was "an insured" under the policy.

Childers submits that the Court of Appeals' analysis was correct and adopts his response to Progressive's application for leave to appeal by reference in the present brief. In addition, however, Childers offers supplemental arguments.

Childers' claim accrued when the original insurer was declared insolvent. Insolvency of the obligor on a contract is equivalent to an anticipatory breach of the contract and insolvency of a party is an "anticipatory breach." Alternatively, Childers simply had no claim against Progressive until the insolvency of the original insurer so that his claim could not have accrued before the insolvency.

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The applicable statute of limitations is the general statute for “personal actions,” not the one-year statute of limitations in the no-fault act. The Guaranty Association is not governed by the no-fault act and its function is not to “step into the shoes of” an insolvent insurer. In addition, because the Guaranty Association requires that a claimant “first exhaust all coverage provided by any policy," applying the one-year-back rule would subvert the purpose of the Guaranty Association by shifting the burden of insurance from an insurance company to the Guaranty Association.

Plaintiff-appellee adopts and reasserts her response to Progressive’s application for leave to appeal but submits the following additional arguments.

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STATEMENT OF FACTS

The parties agreed to a stipulated set of facts. (Progressive's appendix, pp 114-117.) For purposes of this brief, these are the relevant highlights:

1. Justin Childers ("plaintiff") was injured in a motor vehicle accident and became eligible for PIP benefits.

2. Plaintiff's PIP claim exceeded the threshold for reimbursement by the MCCA.

3. At the time of the accident, Childers was a passenger in a car owned and operated by Shaina Groulx.

4. Groulx did not have insurance and her car was not insured.

5. Plaintiff lived with his mother, who was insured.

6. Plaintiff received PIP benefits from his mother's insurer.

7. Plaintiff filed suit against his mother's insurer within one year of the accident.

8. Plaintiff's mother's insurer became insolvent more than one year after the accident.

9. The MCPGA took over the liabilities of the insolvent insurer.

10. Groulx lived [for purposes of the summary disposition motion only] with a relative who was insured by Progressive.

11. MCPGA identified Progressive as an insurer liable for plaintiff's PIP benefits.

12. Plaintiff made a claim to Progressive, which was denied based on a policy exclusion applicable to Groulx.

13. Plaintiff filed suit against Progressive more than one year after the accident.

14. MCPGA intervened in plaintiff's suit against Progressive.

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ARGUMENT I

A CLAIM FOR PERSONAL PROTECTION INSURANCE BENEFITS PAYABLE BY A LOWER-PRIORITY INSURER ACCRUES WHEN THE HIGHER-PRIORITY INSURER IS DECLARED INSOLVENT.

Standard of Review

This Court "reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761, 918 NW2d 785, 791 (2018). "[A] trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties ... in the light most favorable to the party opposing the motion." *Id*. . "A genuine issue of material fact exists when the record "leave[s] open an issue upon which reasonable minds might differ."

(a)

A claim accrues "when the harm is done."

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues." MCL 600.5827. Unless another section of the judicature act specifies an accrual date, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id*.;

Trentadue v Buckler Automatic Lawn Sprinkler Co, 479 Mich 378, 388; 738 NW2d 664 (2007), quoting MCL 600.5827 is notable for its holding that a claim could "accrue" and expire even if the plaintiff had no way of determining who was at fault until after the statute of limitations had run.

Frank v Linkner, 500 Mich 133; 894 NW2d 574 (2017), while not precisely on point, illustrate how the "wrong" can be "done" before the plaintiff suffers any appreciable damage from it. The plaintiffs were former employees of a company created by Linkner who became shareholders of an LLC. As the result of a series of

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transactions, the plaintiffs' shares became effectively worthless. They sued under a statue allowing actions by members of an LLC against the managers. One issue was when the plaintiffs' claims had accrued. This court concluded that "the 'harm' that is actionable under [that statute] is the 'substantial[ ] interfer[ence] with the interests of the member as a member.'" 500 Mich 151. "[E]ven if plaintiffs did not incur a calculable financial injury until 2012, *their actions could still have accrued at an earlier date if their interests as members had been the subject of substantial interference*." 500 Mich 153 (emphasis added).

Pontiac Police and Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac (On Remand), 317 Mich App 570; 895 NW2d 206 (2016) is also of interest. The plaintiffs sued to require the city to make a contribution to the pension fund. The Court of Appeals held that a cause of action accrues "when all the facts become operative and are known. . ." 317 Mich App 585, citing *In re Certified Questions,* 416 Mich 558, 573; 331 NW2d 456 (1982).

It is undisputed that no statute covers the situation of the present case: when does a claim against a lower-priority no-fault insurer accrue when a higher-priority insurer has been declared insolvent. That, what is "the wrong upon which the harm is based"?

In *Trentadue*, this Court held that a wrongful death claim "accrued" when the plaintiff's decedent was murdered (i.e., the "wrong" was "done"), even though the plaintiff could not identify the potential defendants until the statute of limitations had expired. *Frank* presented the opposite case: the "wrong" was unknown but the defendants were identifiable. *Pontiac Police and Fire* and *In Re Certified Questions*

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show that a claim accrues when both elements – the "wrong" and the perpetrators – are known.

In the case at hand, the "wrong" was "done" when American Fellowship stopped paying benefits, that is, when it became insolvent. Plaintiff learned of the "wrong" when he learned of the insolvency. Applying *Linkner*, *Trentadue* and *Pontiac Police and Fire* and *In Re Certified Questions,* his claim "accrued" when the first-priority insurer was declared insolvent and his cause of action ran from that date.

(b)

A breach of contract claim accrues when the obligor is declared insolvent.

i. A claim against an insurer is a claim for breach of contract.

"Insurance" has been defined as:

> A *contract* whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. . . . A *contract* whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in [the] future. [Black's Law Dictionary (5th ed), p 721. Emphasis added.]

In general, "a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract.". *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 61 NW2d 846 (2008), citing *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245–246, 673 NW2d 805 (2003).

See also, e.g., *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 182; 48 NW2d 95 (2014) (breach of indemnification agreement).

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ii. Insolvency of the obligor constitutes an anticipatory breach of contract.

An anticipatory breach of contract occurs "if, before the time of performance, a party to a contract unequivocally declares the intent not to perform." *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). "[T]here is ample authority for the proposition that the promising party can anticipatorily repudiate a unilateral contract," such as an insurance contract. *Combs v Int'l Ins Co*, 354 F3d 568, 599–600 (CA6, 2004) (citations omitted).

In *Central Trust Co of Illinois v Chicago Auditorium Ass'n*, 240 US 581; 36 SCt 412; 60 LEd 811 (1916), the United States Supreme Court held that "proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement." 240 US 592.

See also, e.g., *In re Neff*, 157 F 57 (1907) ("[b]ankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance. . ." 157 F 62.

iii. A claim for anticipatory breach accrues when the obligor becomes insolvent.

In *Leo v Pearce Stores Co*, 54 F2d 92, 93 (ED Mich, 1931), the court held that "where one party [to a contract] is a corporation, its insolvency and the appointment of a receiver, who refuses to further perform," "the *breach dates from the receiver's appointment*." *Id*. (emphasis added).

Board of Commerce of Ann Arbor v Security Trust Co, 225 F 454 (CA6, 1915) was a bankruptcy adversary proceeding. The Sixth Circuit held in part that "the rule of anticipatory breach is applicable to the facts in this case, and that it requires the

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conclusion that *the company's agreement was broken at the time the petition in bankruptcy was filed*." 225 F 471 (emphasis added).

In the case at hand, then, plaintiff would have had a claim against American Fellowship that accrued when the Guaranty Association declared it insolvent. The Guaranty Association's only role is to insure that open claims against an insolvent insurer are paid. It is required to seek out alternative coverage, such as a lower-priority no-fault insurer, but unless an injured party with a claim against the insolvent insurer exists, the association has no claim against any other insurer. That is, no "harm" has been done until the higher-priority insurer has created an anticipatory breach by being declared insolvent.

(c)

Alternatively, plaintiff's claim against Progressive did not come into existence until the appointment of the receiver.

MCL 500.7935(2) creates the legal fiction that a "claimant entitled to the benefits of this chapter" has "assigned" to the Guaranty Association "any . . . rights [he] may have against another person for payment of the covered claim . . ."

Plaintiff, however, was required to "exhaust all coverage provided by any policy" as a condition of benefiting from the Guaranty Association's takeover of American Fellowship's obligations to him. MCL 500.7931(3). That is, plaintiff "gave" his rights to the Guaranty Association, but the Guaranty Association then "gave" them back by requiring him to pursue "all coverage" potentially available.

Absent the insolvency of the first-priority insurer (American Fellowship), plaintiff would not have had a claim against a lower-priority insurer (Progressive). It was only by operation of law that he had any right of action against Progressive. His claim,

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therefore, should be considered to have accrued when the receiver was appointed, on June 12, 2013.

ARGUMENT II

MCL 600.5813 DETERMINES THE APPLICABLE STATUTE OF LIMITATIONS

(a)

The no-fault act statute of limitations is inapplicable.

i. The Guaranty Association is not "subject to" the no-fault act.

MCL 500.7901 *et seq*. constitute the Michigan property and casualty guaranty association act. "[A]ll insurers authorized to transact in this state insurance other than life or disability insurance" are required to participate in the association. MCL 500.7911(1). Each insurer pays into the guarantee fund. 500.7941(1).

The association "is not subject to the other chapters of this act." MCL 500.7911(3)[1]. The definitions of "act" and "chapter" may be identified. MCL 500.100 provides that "*[t]his act* shall be known and may be cited as 'the insurance code of 1956'" (emphasis supplied). MCL 500.7901 provides that "*[t]his chapter constitutes*, and may be cited as the 'property and casualty guaranty association act'" (emphasis supplied). "This chapter" consists of MCL 500.7901 - Guaranty Association is not "subject to" any sections of the insurance code, including those in Chapter 31, "motor vehicle personal and property protection," i.e., the no-fault act.

As the Court of Appeals concluded, "[the] limitations period in MCL 500.3145(1) does not govern because [the Guaranty Association] is not generally subject to the no-

[1] There is an exception for Chapter 81, "supervision, rehabilitation and liquidation," which is not relevant here.

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fault act and has not brought this action directly under the no-fault act." *Childers v Progressive,* Slip op, p 9; Appellant's appendix, p 10.)

ii. The Guaranty Association does not replace an insolvent insurer.

As the Court of Appeals explained in *Yetzke v Fausak*, 194 Mich App 414; 488 NW 2d 222 (1992), "[t]he purpose of the Property and Casualty Guaranty Association Act is to protect the public against financial losses to either policyholders or claimants due to the insolvency of insurers." 194 Mich App 418 (citation omitted). It does not "step into the shoes of" an insolvent insurer. *Id.*

In a situation something like that of the present case, *ACIA v Meridian Mutual Ins Co,* 207 Mich App 37; 523 NW 2d 821 (1994) makes the point that the MPCGA is a last resort. When his personal no-fault insurer became insolvent, he applied to Meridian, the insurer of his mother as a "resident relative." The Court of Appeals rejected Meridian's argument that the Guaranty Association should be liable. "[A]n insured of an insolvent insurer can look to the MPCGA for coverage only if there is no other insurance company to turn to for coverage." 207 Mich App 41-42.

Titan Ins v North Pointe Ins, 270 Mich App 339 ; 15 NW2d 324 (2006), which Progressive relies on, is not controlling. Aside from the fact that it is a Court of Appeals decision and, therefore, not binding on this Court, it is not on point. *Titan* was explicitly an action for subrogation, that is, a case in which one party (one insurer) pays a debt owed by another party (another insurer). Titan paid PIP benefits to a motorcyclist who was injured in an accident with a motor vehicle but later discovered that North Pointe was liable instead. It brought a subrogation action. The Court of Appeals held that because Titan had effectively taken the place of North Pointe, it was subject to the

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same constraints as North Pointe's insured, and, therefore, was bound by MCL 500.3145. , 270 Mich App 343

Think of a long-distance race team: the first-priority insurer runs with the rod until it becomes exhausted and drops out. The "coach" jumps in, picks up the rod and runs just long enough to pull another runner from the team to take over. The "coach," like the Guaranty Association, simply bridged a gap between two insurers.

iii. Applying the one-year back rule would subvert the purpose of the requirement to exhaust all other insurance.

MCL 500.7931(3) requires a "claimant" against the Guaranty Association to "first exhaust all coverage provided by any policy . . ." The intent of this statute is to make the Guaranty Association the "insurer of last resort." *ACIA v Meridian*, *supra*.

If the one-year statute of limitations, and the one-year-back rule, apply, however, many claims arising out of motor vehicle accidents that should be paid by lower-priority no-fault insurers will be shifted back to the Guaranty Association. If, as in the case at hand, a no-fault insurer becomes insolvent more than a year after the accident, the insured would not be able to "exhaust" any other available no-fault policy and the Guaranty Association would be required to pay the claim.

Applying the abbreviated statute of limitations of MCL 500.3145(1), then, would undermine the purpose of MCL 500.7931(3).

(b)

The general statute of limitations applies.

As this Court is well aware, MCL 500.3145(1) provides that a suit for PIP benefits must be filed within one year of the accident unless either the insurer has received "written notice" or "has previously made a payment" for the injury. Subsection (2), the

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"one-year-back rule" rule, allows suit within one year "after the most recent allowable expense," but limits damages for unpaid benefits to the year before "the action was commenced." MCL 500.3145(2).

The Court of Appeals held "Because the Legislature has seen fit to largely exempt [the Guaranty Association] from the Insurance Code . . . [it] is not subject to the one-year limitations period that applies to a party pursuing benefits under the no-fault act, including other insurers asserting rights to subrogation." *Childers*, slip op, p 9; Appellant's appendix, p 10.)

If no specific statute of limitations is provided for, the general statute of limitations in MCL 600.5813 should apply. "All other personal actions shall be commenced within the period of 6 years after the claims accrue." As the Court of Appeals held, "[b]ecause the Legislature has not adopted any limitations period for claims pursued under the guaranty act, the six-year limitations period applies." *Childers*, slip op, p 9; Appellant's appendix, p 10.)

This Court should affirm.

ARGUMENT III

THE COURT OF APPEALS' DECISION THAT PROGRESSIVE QUALIFIED AS THE NEXT INSURER IN THE CHAIN OF PRIORITY UNDER MCL 500.3114(4)(b) SHOULD BE AFFIRMED.

(a)

Plaintiff's arguments in support of his response to Progressive's application for leave to appeal remain persuasive.

Plaintiff adopts and reasserts Argument III(B) from his response to Progressive's. application for leave to appeal.

Plaintiff submits the following additional points for this Court's consideration.

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(b)

The Court of Appeals' decision was correct.

i. Unrebutted evidence can support a party's position.

Barnard Mfg Co, Inc v Gates Performance Engineering, Inc, 285 Mich App 362; 775 NW2d 618 (2009), was a dispute involving the parties to a joint enterprise. The Court of Appeals affirmed summary disposition for the plaintiff, because "[The defendants'] attorney essentially left [the plaintiff's] evidence completely unrebutted." 285 Mich App 375.

See also, e.g., *Schultz v Black (On Remand)*, 215 Mich App 248, 252; 544 NW2d 741 (1996) (plaintiff's evidence regarding discovery of damages unrebutted); *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240, 242; 483 NW2d 422 (1992) (plaintiff failed to rebut evidence he was aware of the alleged hazard).

The Court of Appeals stated that "Progressive offered no evidence that Shaina was not residing at Matthew's apartment at the time of the accident" and "Progressive did not present any evidence to refute Shaina's testimony on the subject of her injuries." (Slip op, p 12; Appellant's appendix, p 13.) The Court of Appeals was correct that this lack of opposing evidence supports a finding that Groulx met the definition of "insured person."

ii. Progressive should be estopped from denying that Groulx was an "insured person" when it relies on a policy exclusion applicable only to "insured persons."

"'Estoppel' means that [a] party is prevented by his own acts from claiming a right to [the] detriment of [an]other party who was entitled to rely on such conduct and has acted accordingly." Black's Law Dictionary (5th ed), p 494. "An inconsistent position, attitude or course of conduct may not be adopted to loss or injury of another." *Id*

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Equitable estoppel "may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Kelly-Stehney & Associates, Inc. v MacDonald's Indus Products, Inc*, 254 Mich App 608, 616; 658 NW2d 494 (2003) (quotations omitted).

In the present case, Progressive argued that it has no liability under its policy because "While Ms. Groulx is an 'eligible injured person,' her claim is excluded under 'Exclusion 8' of the policy (i.e., providing that no PIP benefits are payable for injuries sustained by "the owner or registrant of a motor vehicle involved in an accident" that was not insured for PIP benefits), which operates to exclude Plaintiff's claim under the policy." (Appellant's appendix, pp 37-38.) The Court of Appeals, however, pointed out that "the exclusion only applies to an 'insured person,' so Progressive's reliance upon it is an admission that Shaina was an insured person." (Slip op, p 13; Appellant's appendix, p 14.)

Progressive should be estopped from claiming that Groulx was not an "insured person" when that position is inconsistent with its reliance on Exclusion 8.

CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

In compliance with MCR 7.212(B)(1), counsel for plaintiff-appellee certifies that this brief contains no more than 4,420 words.

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RELIEF REQUESTED

Plaintiff Susan Childers, conservator of Justin Childers, respectfully asks that this honorable Court AFFIRM the September 15, 2022 opinion of the Court of Appeals.

/s/Richard F. Burns, Jr.

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