IN THE SUPREME COURT OF ALABAMA
CASE NO. 1111202

REGINA NEWSOME and BURTON NEWSOME,

APPELLANTS,

v.

DREW JEFFREY GUNNELLS,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
RE: CV-2009-901168
NEWSOME v. GUNNELLS

APPELLANTS' BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under Ala. Code § 12-2-7 because the amount involved, exclusive of interest and costs, exceeds the $50,000 limit of jurisdiction exclusive to the Alabama Court of Civil Appeals under Ala. Code § 12-3-10.

This Court has appellate jurisdiction under Ala. Code § 12-22-2 because the trial judge has entered a final judgment dismissing all remaining claims, and the Plaintiffs filed a Notice of Appeal with that court within the time required by Rule 4, Ala. R. App. P.

TABLE OF AUTHORITIES

Alabama Supreme Court Cases

Alabama Circuit Court Cases

Alabama Rules

Alabama Statutes

STATEMENT OF THE CASE

This is an appeal from the Jefferson County Circuit Court's final orders in favor of the Defendant. The Plaintiffs, Burton and Regina Newsome, initiated the suit on April 3, 2009, seeking damages for the Defendant Jeffrey Gunnells' outrageous conduct surrounding the birth and death of the Plaintiffs' twin babies.

Plaintiff Regina Newsome's claim was erroneously dismissed on summary judgment for failure to provide expert testimony pursuant to the inapplicable Alabama Medical Liability Act. Plaintiff Burton Newsome's claim was erroneously dismissed for failure to support his claim in response to the Defendant's improperly considered affidavit. The Plaintiffs appeal to this Court, seeking to establish the validity of their claims, the inapplicability of the AMLA, and the procedural errors committed by the trial court.

STATEMENT OF THE ISSUES

1. Whether Plaintiff Regina Newsome's Intentional Infliction of Emotional Distress claim falls under the Alabama Medical Liability Act where the conduct made the basis of the claim was for the circumstances surrounding the death of her children following their birth.
2. Whether the facts supporting the Plaintiffs' claims are of the type found to support a claim for Intentional Infliction of Emotional Distress/Outrage.
3. Whether the trial court's issuance of a protective order preventing Plaintiff Burton Newsome from taking the deposition of a neonatologist at the birth hospital was an abuse of discretion where there was no evidence that the Plaintiff had not followed the correct procedures or that justice so required.
4. Whether the trial court's consideration of the Defendant's Supplemental Affidavit on his Renewed Motion for Summary Judgment was improper based on its prior exclusion by the court and the Defendant's failure to properly resubmit the affidavit.

STATEMENT OF THE FACTS

Expecting twin babies, the Plaintiffs, Burton and Regina Newsome, chose St. Vincent's Hospital for the delivery, and the OB/GYN practice, with which Defendant Jeffrey Gunnells is associated, as Regina Newsome's doctor. (C. at 27.) (Co-Plaintiff Burton Newsome was never a patient of the OB/GYN Practice and/or Dr. Gunnels and therefore the AMLA has no application to him whatsoever.)Before the birth, however, the individual doctor, whom the parents had chosen, suffered a death in the family, and they were re-assigned to the Defendant. (C. at 27.)

Regina Newsome is from Uzbekistan and has a strong accent. (C. at 27, 412). Upon meeting her, the Defendant abruptly asked her what her religion was. (C. at 27, 412.) Although a practicing Christian, her first response was that she is "half-Muslim," ethnically-speaking. (C. at 415.) The Defendant's immediate response was negative, and he would not treat her. (C. at 27, 412.) She was assigned to a third doctor within the practice who was willing to treat her. (C. at 27.)

Not long afterward, when she was between 22 and 23 weeks pregnant, Mrs. Newsome began to leak amniotic fluid, and, although her regular doctor told her this was normal, three days later, she was rushed to the St. Vincent's emergency room--where the Defendant was the doctor on call. (C. at 27, 413, 423.)

The Defendant told the parents that their babies were dead and that nothing could be done. (C. at 28.) Despite Mrs. Newsome's request, he refused to call in the first doctor (who had since returned to practice after his family tragedy). (C. at 28.) After four hours of labor, in which the Defendant treated Mrs. Newsome disrespectfully and without regard for the dire nature of the events, the babies were born alive. (C. at 28, 423-24.)

Despite the fact that they were clearly alive, crying and responding, the Defendant failed or refused to provide any medical care to the twin babies. Plaintiff Regina Newsome had begged Dr. Gunnels to call in the Neonatologists prior to giving birth to try and save the babies. (C. at 28, 424.) The babies were never cleaned up but, instead, left to die before their parents' eyes. (C. at 28, 424.) For over four hours more, the babies cried,

with no assistance from the Defendant, dying there in the room with their distraught and bewildered parents. (C. at 28, 429.)

STANDARD OF REVIEW

This Court reviews the grant of summary judgment using the same standard as that of the trial court in determining whether summary judgment is appropriate. A motion for summary judgment may be granted only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Ala. R. Civ. P. 56(c); Sanjay, Inc. v. Duncan Construction Co., 445 So. 2d 876, 878 (Ala. 1984). All reasonable inferences from the evidence are to be viewed in the light most favorable to the non-movant. Id. The burden is initially on the moving party to make a prima facie case showing that there is no material fact in dispute, and that the movant is entitled to judgment as a matter of law. McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957 (Ala. 1992). The burden then shifts to the non-movant to demonstrate that there is substantial evidence to create a genuine issue of material fact. Bass v. Southtrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989).

SUMMARY OF THE ARGUMENT

The Alabama Medical Liability Act does not apply to Plaintiff Regina Newsome's claim for Intentional Infliction of Emotional Distress because her claim is based, not on the Defendant's duty to her as his patient or on any medical injury caused to her by him, but on his separate duty to her not to commit outrageous acts inflicting extreme emotional distress on her in the treatment of her dying babies.

Because the AMLA does not apply to her claim, she, like her husband, has a valid outrage claim. This claim under Alabama law has traditionally encompassed outrageous conduct involving the bodies of the dead, indicating the meaning society attaches to death. The Defendant's conduct in refusing to treat the Plaintiffs' newborn babies, simply allowing them to die in front of their parents' eyes, all based on his dislike for the mother's ethnicity and supposed religion, is just the type of outrageous conduct this Court has found to give rise to an outrage claim, and the Plaintiffs should be allowed to present their claims to a jury.

Furthermore, the trial court committed multiple procedural errors, improperly granting a protective order preventing Plaintiff Burton Newsome from conducting a deposition and erroneously granting summary judgment in favor of Defendant based on the improper consideration of an affidavit previously excluded. The trial court granted the witness's protective order despite the fact that normal deposition procedures are available for known employees of a corporation under Ala. R. Civ. P. 30, the testimony sought was relevant under Ala. R. Civ. P. 26, the witness would not have been burdened any more than any other witness, and she was properly served with process. There were no valid grounds to grant the protective order.

Lastly, the affidavit upon which the trial court based its grant of summary judgment had previously been excluded for failure to follow the dictates of Rule 56, Ala. R. Civ. Pro., and was never properly re-admitted; therefore, it was not properly before the court on the Defendant's Renewed Motion. As such, the Plaintiffs should have been allowed to present their claims to a jury and, therefore, respectfully request that this Court reverse the trial court's orders and remand the case for trial.

ARGUMENT

This case involves the Plaintiff's claims for intentional infliction of emotional distress for the failure of Defendant Gunnells to provide medical care to their newborn children, instead letting the babies slowly die in front of their parents' eyes. The trial court held that Plaintiff Regina Newsome, the mother in this case, had failed to sufficiently support her claim because it fell under the Alabama Medical Liability Act (AMLA), and that Plaintiff Burton Newsome, the father, failed to sufficiently support his claim because he did not respond to an affidavit. Both holdings are erroneous.

The first fails to comprehend the nature of the claim in this case and how it is affected by the AMLA's application to "patients" and "medical injuries." The second is based on the improper consideration of the affidavit in question and the court's erroneous prevention of the very discovery efforts the Plaintiff intended to use to support his claim.

I. Both Plaintiffs should be allowed to pursue their Intentional Infliction of Emotion Distress claims against the Defendant because the AMLA does not apply to Regina Newsome and this factual situation fits within the type to which this Court has previously applied outrage claims.

The trial court's misapprehension of the issues of this case are preventing the mother of two twin babies from recovering for the emotional distress their doctor intentionally caused her during their birth and final hours of life. The AMLA does not apply to Mrs. Newsome's claim because it only applies to the "patient" receiving the medical treatment and to a "medical injury" arising from that treatment. Because the AMLA does not apply and the facts of this case fit within the type of cases to which this Court has traditionally applied outrage claims, both Plaintiffs in this case have valid outrage claims unaffected by the AMLA.

A. Plaintiff Regina Newsome's claim does not fall under the AMLA because the injury upon which the claim is based is not a "medical injury" caused during the provision of medical services to her as a "patient."

In its September 9, 2010, Order granting summary judgment against Regina Newsome, the trial court held that the AMLA applied because Mrs. Newsome was a "patient" receiving medical care at the same time the claims arose and, therefore, the Defendant was entitled to summary judgment because Mrs. Newsome did not provide the requisite expert testimony under the Act. (C. at 631-32.) This

holding, however, illustrates a basic misunderstanding of the connection of the facts to the claims and the Act: Mrs. Newsome was not the "patient" under the Act for the purpose of her Intentional Infliction of Emotion Distress claim because it did not arise out of the care rendered to her, but to her babies, who were separate "patients" under the Act.

This Court has held that "[t]he AMLA applies '[i]n any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care.' Ala.Code 1975, § 6-5-548(a)." George H. Lanier Mem'l Hosp. v. Andrews, 901 So. 2d 714, 720 (Ala. 2004). However, despite such a broad-sounding application, this Court has imposed certain limitations on the Act: the standard of care, mentioned above, only addresses the duty of care "to the patient" and the Act only covers "medical injuries" to those patients. Id. (citing Ala. Code § 6-5-484(a) and Taylor v. Smith, 892 So. 2d 887, 893 (Ala. 2004)).

Under these holdings, the Court has held that the Act does not apply to other doctors (because they are not patients to whom the duty of care is owed), see Thomasson

v. Diethelm, 457 So. 2d 397, 399 (Ala. 1984), or to dead bodies (because they are no longer patients and cannot be "medically injured"). See Andrews, 901 So. 2d at 721.

In a similar vein, in Ex parte Addiction & Mental Health Services, Inc., 948 So. 2d 533 (Ala. 2006), this Court held that the plaintiff's claim of emotional damages for disclosure of confidential information did not fall under the AMLA, despite the breach of duty being one that was "derived from, and dependent upon, the health-care provider/patient relationship," because the injury upon which the plaintiff sought redress was not a "medical injury" arising directly from the relationship. Id. at 536. In that case, the claims were for invasion of privacy, breach of contract, and breach of fiduciary duty (all duties owed to the plaintiff separate from the defendant's duty of due care owed to the plaintiff as his physician). Similarly, here, Mrs. Newsome's claim is for Intentional Infliction of Emotional Distress for the Defendant's failure or refusal to call in a Neonatologist treat and attempt to save her newborn babies (a duty owed to the Plaintiffs separate from the Defendant's duty of due care owed to Mrs. Newsome as her physician).

Indeed, the children, who were born alive despite the Defendant's pre-birth assurances that they would be born dead, could have brought their own suits, if they had survived, under the AMLA for any "medical injuries" caused by the Defendant. In this case, the Plaintiffs are not suing for redress of "medical injuries" to themselves arising from medical services provided to them but are suing on a separate duty owed to them by the Defendant not to inflict severe emotional distress on them through extreme and outrageous conduct. In essence, this is not a medical malpractice claim the Act was intended to cover (because that claim would either belong to the twins); it is a claim based on breach of a separate duty owed to their parents. Where the plaintiff does not seek redress for medical injuries that are a direct result of the doctor-patient relationship, the Act's provisions are not intended to apply to the claim, regardless of whether the plaintiff is a patient of the doctor regarding separate medical treatment.

Essentially, the Defendant is trying to tie the medical treatment (which the Plaintiffs allege he should have provided to their children) into his treatment of Mrs.

Newsome for the labor shortly beforehand. Conflating the two, however, denies the children who were born alive and lived for several hours unattended by the Neonatology Department at St. Vincent due to Dr. Gunnels singular decision to perform an involuntary abortion on them their own individuality as human beings. The fact that the Defendant was providing their mother medical services at their birth does not deprive them of a separate duty of care owed to them. In fact, this Court has held that "from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother." Hamilton v. Scott, No. 1100192, 2012 WL 1760204, at *8 (Ala. May 18, 2012) (quoting Wolfe v. Isbell, 280 So. 2d 758, 761 (1973)).

Because of this separate duty to the children, a legally identical (yet less easily conflated situation) would be where the twins are older and, after some sort of accident, Mrs. Newsome was the Defendant's patient for an injury to her knee and the twins were the Defendant's patients for severe internal injuries that would be fatal unless treated. Allowing the children to bleed out before their parents' eyes would not have brought the parents'

outrage claim under the AMLA just because the mother was the doctor's patient on a separate injury, even one flowing from the same precipitating situation. This is the legal and moral equivalent of what occurred.

As such, Mrs. Newsome holds the same legal status with regard to the AMLA as her husband on their IIED claims, which the trial court had already held was a viable claim because Mr. Newsome was "not a patient." (C. at 632.) Because neither Plaintiff is a patient under the AMLA, its provisions do not require them to present expert testimony on the standard of care under the Act and, therefore, the trial court erroneously granted summary judgment against Plaintiff Regina Newsome on that basis.

B. The Plaintiffs were entitled to bring their intentional infliction of emotional distress claims because, as the judge held in her original summary judgment order, these facts fall squarely among the types of claims to which this Court has applied that claim.

Under Alabama law, the tort of Intentional Infliction of Emotional Distress/Outrage is viable when the conduct is "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Little v. Robinson, 72 So. 3d 1168,

1173 (Ala. 2011), rehearing denied (June 10, 2011). The trial court has already ruled that Plaintiff Burton Newsome has a viable claim for Intentional Infliction of Emotional Distress despite the fact that the particular details of this case have never come before this Court. (C. at 634.) The trial court's reasoning is very instructive.

In her order, the trial court noted that the outrageousness and severity of conduct necessary to support an outrage claim have generally been found only in a few contexts, one of which is society's connection to its dead. Quoting an Alabama Circuit Court's discussion of American servicemen retrieving the bodies of the slain as "a powerful illustration of the symbolic importance that the bodies of the dead have for the hearts and minds of the living," Wadley v. St. Vincent's Hosp., No. CV-2004-1257-RSV, 2006 WL 2061785, at *6 (Ala. Cir. Ct. July 20, 2006), the trial court noted that the emotional connection to the dead and dying could only be "amplified by the relationship present here - that of a parent and his dead or dying children." (C. at 633.)

Although this Court has not directly held that such a situation creates the sort of distress recoverable under an

outrage claim, the Defendant's have alleged conduct (refusal to treat their newborn children despite the duty and ability to do so and the Defendant's regular treatment and sometimes life saving treatment of babies in similar situations) that amounts to an unrequested, after-birth abortion. The Plaintiffs request that this Court uphold the trial court's reasoning on both their counts and allow them the chance to redress their outrage at what a reasonable jury could certainly determine was conduct exceeding the bounds of decency established by civilized society.

II. The trial court also made two procedural errors in preventing Plaintiff Burton Newsome from pursuing certain discovery in support of his claim and in dismissing his claim for failure to support it against an affidavit that was improperly before the court.

In the case of the Plaintiff Burton Newsome's claim, the trial court made additional procedural errors that ultimately prevented Mr. Newsome from asserting his own outrage claim for the circumstances surrounding the death of his twins. With no grounds to support its decision, the trial court prevented him from taking a deposition to which he was entitled under the Alabama Rules of Civil Procedure. Thereafter, it dismissed his claim based on the failure to

sufficiently support his claim against an affidavit he understood to be improperly before the court. Together and separately, these errors worked to deprive the Plaintiff of his right to assert his claim at trial, and the trial court's holdings should be reversed, allowing Mr. Newsome to proceed with discovery and the prosecution of his claim.

A. The trial court abused its discretion by denying the Plaintiff's deposition of the neonatologist, lacking any showing that the Plaintiff had not followed the correct procedure or that justice so required.

In the Defendant's Renewed Motion for Summary Judgment, the Defendant asserts that the Plaintiff conducted no new discovery on the issue of the babies' post-mortem handling, (C. at 760), and the trial court also relied on that in its March 16, 2012, Order. (C. at 816.) However, the Plaintiff had attempted to acquire just such evidence, but the trial court erroneously prevented him from doing so. The whole point of noticing the deposition of the neonatologist, Dr. Terry Bierd, was to acquire such evidence about the Defendant's outrageous conduct in the handling of the babies.

The trial court, however, granted the neonatologist's protective order without opinion "[a]fter consideration of the pleadings and submissions and arguments of the parties." (C. at 754.) The arguments made by the parties upon which the court based its November 2, 2011, Order did not support denial of the

Plaintiffs' Motion to Compel: (1) under the Alabama Rules of Civil Procedure, the deposing party is not required to serve the company where the deponent is known; (2) the testimony sought was relevant and, where potentially inadmissible, reasonably calculated to lead to the discovery of admissible evidence; (3) Dr. Bierd would not have been saddled with undue burden or expense; and (4) she was properly served with the subpoena.

As to the first point raised by the witness (i.e., that the corporate deposition procedure must be used where the party might ask questions about the company for which the witness works), Rule 30(b)(6) of the Alabama Rules of Civil Procedure explicitly states:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation . . . and describe with reasonable particularity the matters on which examination is requested.

Ala. R. Civ. P. 30(b)(6) (emphasis added). Nowhere in the Rule does it state that this procedure is required. Actually, the last sentence of the rule also states explicitly, just in case it was not clear from the permissive language in the first sentence, that "[t]his subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules." Id.

Moreover, the comments to the rule directly address this situation:

> Of course, the subject matter designation is not required in discovery from organizations and regular deposition procedure is available when the natural person having the information is known to the party seeking discovery.

Id., Committee Comments on 1973 Adoption. As such, the Plaintiff could clearly notice the deposition of Dr. Bierd despite the fact that she works for a company and her personal knowledge of that company's policies might arise in the deposition.

Furthermore, the testimony sought from Dr. Bierd fell within the scope of discovery set out in Rule 26(b)(1). That Rule states in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Ala. R. Civ. P. 26.

Dr. Bierd's Motion for Protective Order asserted that she had no personal knowledge of the events of the suit and that she could "only base such testimony on hearsay and offer speculation." (C. at 700.) Nevertheless, any such hearsay and speculative testimony would refine the Plaintiffs' further discovery even though it might not be admissible at trial. Furthermore, her direct knowledge of the abilities and inner workings of St. Vincent's neonatology practice would provide direct evidence for Dr. Gunnell's intent (by showing the usual

circumstances for a consult with neonatology) and the outrageousness of his conduct (by showing the options he had, which he ignored, simply leaving the babies, unattended, to die on a table in front of their parents' eyes). She could further testify to any knowledge she has of hospital procedures regarding the interaction between obstetrics and neonatology. Dr. Bierd in fact stated in her motion for protective order that she only wanted to testify as to the policy at St. Vincent's regarding the treatment of premature babies and not the specifics of this case - clearly because Gunnels in fact violated hospital policy in this case. The reasons behind this failure to follow policy by Gunnels clearly form the basis for an intentional infliction of emotional distress and outrage claims by Plaintiffs. The testimony sought from Dr. Bierd clearly fell within the scope of discovery under the Rules.

The judge may have granted the Motion for Protective Order under Rule 26(c) as well, which provides that the court may "make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"; however, Dr. Bierd showed none of the named reasons for protecting a person from deposition. Indeed, Dr. Bierd would have endured no burden of any of the aforementioned reasons greater than that endured by any other person with a day job. She presented no evidence at all that would have entitled

her to such protection. Her support of such a burden was the ridiculous argument that the Plaintiff noticing her as a lay witness would somehow force her to prepare as if she were an expert witness. (C. at 700.) The Plaintiffs never asked her to take on such a burden so, if she had, it would have been of her own volition. If this were the basis of the trial court's ruling, it was an abuse of discretion.

Lastly, Dr. Bierd put forth the unsupported assertion that she had not been properly served with the subpoena. The subpoena was actually served on Dr. Bierd at her permanent residence on the night of August 24, 2011. (C. at 752.) Proof of service was sent to the clerk's office on August 25, 2011, and it appears on the case action summary in the record. (C. at 23.) As such, no plausible reason existed for the trial court to grant the witness's Motion for a Protective Order and deny the Plaintiff's Motion to Compel, and the judge abused her discretion by denying the Plaintiffs of evidence to which they were entitled under the Rules.

B. The Defendant's affidavit upon which the trial court ultimately relied was not properly considered upon the Defendant's Renewed Motion because the trial court had previously excluded it from evidence and, despite the judge's erroneous allusion thereto, the Defendant never resubmitted it.

The trial court ultimately based its grant of summary judgment in favor of the Defendant and against Plaintiff Burt Newsome on the supposed fact that the Defendant had presented an affidavit as evidence, which the Plaintiff failed to contradict. However, the affidavit referred to in the judge's order was not, in fact, attached to the Defendant's Renewed Motion and therefore remained excluded and outside the evidence before the court for its consideration on the Renewed Motion.

The Defendant originally filed the affidavit at issue on October 1, 2010, attached to a Motion for Reconsideration and well after the September 9, 2010, ruling on the original Motion for Summary Judgment. Because of this fact, the trial court duly excluded it, making reference thereto in its November 22, 2010, Order denying the Motion to Reconsider. (C. at 654.) Furthermore, because the affidavit had been excluded from evidence upon its original submission, the trial court had to make reference to its re-admission in its March 16, 2012, Order granting the Defendant's Renewed Motion. (C. at 816.) The problem with the evidence's "resubmission" is

that it was not, in fact, attached to the Renewed Motion as stated by the trial court.

While the Defendant did attach his previous Motions for Summary Judgment and for Reconsideration, (C. at 763-791), he did not include the affidavit the trial court relied on in its holding. Nor did the Renewed Motion incorporate by reference the arguments of those Motions but merely addressed them in a footnote as support for its factual paragraph. (C. at 760.) Because the evidence was never resubmitted with the Renewed Motion, the Defendant's reference to the affidavit in that motion, in effect, referred to nothing in the record, and the trial court could not have properly considered it on the Renewed Motion.

CONCLUSION

This case has reached this Court based on multiple errors by the trial court, both substantive and procedural. However, because the Plaintiffs' claims are valid claims under Alabama law and are not subject to the AMLA, the Plaintiffs should be allowed to conduct discovery--and not prevented from doing so on baseless, hollow grounds--and ultimately present their claims at trial. Therefore, the

Plaintiffs respectfully request that this Court reverse the orders of the trial court and remand this case for further discovery and trial on the claims of both Plaintiffs.

Respectfully submitted this the 31st day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 31st day of August, 2012.

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