

The State of South Carolina
In the Court of Appeals

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-02-00868

Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela,..... Respondent

v.

Sam English Grading, Inc., Appellant

Respondent's Brief

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Statement of the Issues

1. Is there any evidence that the Company was more at fault than Valenzuela in causing his wife Christie's death?
2. Must the Court reverse because the jury heard evidence that the Company caused Christie's death by breaching its contract to provide a flagman and maintain road crossing signs at an intersection?
3. Must the Court reverse because the jury heard evidence that the Company's failure to provide a flagman, maintain road crossing signs, or require that its drivers stop at a stop sign threatened others who were more familiar with the intersection?
4. Is the Company's argument about the opening statements preserved and, if so, did counsel say what the Company infers?
5. Does the *Allen* charge require a new trial?

Statement of Facts

On August 7, 2009, Christie Valenzuela wanted to buy a lawn-mower belt and asked her husband to take her to Lowes on her motorcycle. R. 462 ll.5-6 and ll.15-18, 465 ll.14-18. He decided to take back roads so that they could enjoy the beautiful fall day and because he thought these roads were safe. R. 462 ll.15-16, 465 ll.22-25, 467 ll.16-

18. The trip took them down Redd's Branch Road. Though well traveled by school buses and others, Valenzuela had not been down the road for 10 years and did not know that heavy equipment crossed the highway. R. 404 l.25 - 405 l.9, 466 ll.3-9, 1009 ll.23-25, 1018 ll.2-8.

Sam English Grading Inc. ran this equipment. Since 1982, the Company operated an Owens Corning landfill located on the road and at various times hauled dirt across the highway. R. 804 ll.15-24, 808 ll.8-13. To haul the dirt across, the Company used a 12 foot tall, 73,450 pound "pan scraper." R. 615 ll.9-24. The scrapers have a front cab that is hinged in a way that allows the cab to double back on itself. R. 383 ll.4-8, 617 ll.1-10; Respondent's Addendum (photographs of the scraper).

Owens Corning furnished the Company a stop sign and required it to use a flagman and other precautions when crossing the road. R. 819 ll.23-24; 1222 l.3 - 1223 l.16. The Company knew that these precautions were to protect the road's motorists, and used a flagman and warning signs during Owens Corning's pre-announced safety inspections. R. 780 ll.11-21, 1223 ll.3-16, 1253 l.3 - 1254 l.24.

In May 2009, the Company contracted to construct a berm which again required it to haul dirt across the highway. R. 806 ll.12-21, 807 ll.18-25, 1266. The contract required the Company to "provide a

flagman; maintain road crossing signs and other road crossing safety measures to comply with Owner's South Carolina Highway Department Encroachment Permit." R. 1220 ll.19-24, 1221 ll.6-10, 1222 ll.3-11, 1308. Owens Corning required a flagman and signs even though the encroachment permit earlier expired, and explained that the Company knew from its previous projects where to place the flagman and signs. R. 1217 l.17 - 1218 l.3, 1222 ll.16-24, 1241 ll.3-16, R.p. ____.

To complete the contract, the scraper crossed Redd's Branch Road 50 or more times a day, nearly every day, without the required flagman or signs. R. 417 ll.11-21, 536 l.14 -537 l.1, 538 ll.18-24, 743 ll.12-20, 779 ll.6-19, 780 ll.3-6, 794 ll.15-24, 795 ll.2-7, 811 ll.2-12, 813 ll.17-22, 825 ll.10-17, 840 l.23 - 841 l.3, 1028 ll.17-23. To save eight to ten seconds, a spotter would also have the scraper run the stop sign. R. 400 ll.9-16, 402 ll.2-7, 819 ll.13-22, 1026 ll.6-25, 1028 ll.8-12.

Valenzuela did not know any of this as he and Christie headed down the highway at 40-45 miles per hour. R. 466 ll.6-9, 469 ll.21-24, 742 ll.2-6. He would have slowed or stopped had there been a flagman or warning sign. R. 474 l.6 - 475 l.9, 475 l.19 - 476 l.14. As it was, the spotter, who was sitting in a tractor off the road, waived the scraper across before he noticed the motorcycle and threw up his hands for the

scraper to stop. R. 408 l.10 - 409 l.19, 560 ll.20-25, 737 l.23 - 738 l.5, 1021 l.20 - 1022 l.8.

When the spotter waived him across, the scraper driver sped up to 17 miles per hour to run the stop sign. R. 409 ll.2-3, 436 l.22 - 437 l.19, 620 ll.7-12. When the spotter then motioned to stop, the driver slammed on brakes about 20 feet from the intersection and ran over the stop sign as he jerked the scraper's hinged, front cab 90 degrees. R. 412 l.22 - 413 l.10, 440 ll.17-20, 563 ll.22-23; Respondent's Addendum (photographs of the scraper). If the machine had not been able to double back on itself, the scraper would have crossed over Valenzuela's lane. R. 628 ll.18-25, 630 l.20 - 631 l.7.

Trees blocked Valenzuela's view of the approaching scraper until he was 58 feet away from the intersection. R. 406 ll.12-16, 634 l.24 - 635 l.24, 640 ll.9-15, 962 ll.20-22. When he saw it, it "just like if you shot two bullets at each other." R. 468 ll.4-12. With only one or two seconds to react, Valenzuela first hit his back brakes. R. 468 ll.4-12, 470 ll.14-17, 471 l.19. As the scraper kept coming, he then laid the motorcycle down because he was convinced that there was no other way to avoid a crash into him and his wife. R. 468 ll.13-19, 469 ll.12-13, 470 ll.17-22. Valenzuela laid the motorcycle down before the scraper began braking.

R. 471 ll.24-25, 634 ll.14-18.

Christie died from the wreck. She was only 35 years old. R. 478 ll.17-18, 1124 l.25 - 1125 l.8.

Valenzuela could not understand how the scraper could stop. R. 469 ll.8-11. There was no way for him to know that the scraper could or would stop in time, or that it could double back on itself. R. 469 ll.12-17, 650 ll.3-13. A truck driver, in the opposite lane waiting to make a left turn, also thought that the scraper would completely cross over, Valenzuela's lane. R. 562 ll.18-23, 564 ll.12-14. The scraper driver agreed that Valenzuela had to react in seconds and could not know that the scraper was going to brake or could avoid the road by jerking the hinged cab back on itself. R. 411 ll.17-22, 412 ll.17-21, 437 ll.20-25.

The Company's expert described this as "an emergency situation" that required "panic stopping," and testified that Valenzuela did not cause the position that he found himself in. R. 948 ll.12-24, 966 ll.16-21. Valenzuela's expert opined that Valenzuela reacted reasonably to an "imminent hazard." R. 649 ll.5-7, 659 ll.6-20. The MAIT investigator added that rear-wheel braking "is common" for motorcycles in emergencies because front-wheel braking causes you to spill right away. R. 720 ll.19-23, 742 ll.7-16. And the scraper's driver testified that he

would have laid the motorcycle down too. R. 413 ll.18-22.

Prior to the wreck, the scraper almost hit three other motorists who live near the intersection and travel by it frequently. R. 338 l.21 - 339 l.8, 340 ll.4-14, 341 l.12 - 342 l.12, 352 ll.8-10, 353 ll.9-15, 357 l.1 - 358 l.22, 366 ll.2-12, 367 l.4 - 368 l.7. They and others who live near the intersection confirmed that nothing warned those less familiar with the road about the scraper crossing without stopping. R. 342 l.22 - 343 l.12, 344 l.23 - 345 l.4, 358 l.23 - 359 l.8, 361 ll.8-22, 368 ll.8-12, 1009 ll.8-16, 1010 ll.8-9, 1018 l.16 - 1019 l.1.

Argument

The Company asks the Court to reweigh evidence, throw out evidence of its wilfulness, rely on an unpreserved misdescription of counsel's opening statements, and eliminate *Allen* charges. None of this justifies a reversal. The Court should affirm.

1. Evidence supports the jury's allocation of fault.

The Company's appeal rests largely on its failed jury argument that none of this is its fault. The jury eyeballed the witnesses, however, and found that the Company was 65% at fault. R. 7. This allocation is a question of fact for the jury; to reverse, this Court must conclude that

the only inference from the evidence is that the Company was less than 50% at fault. *Hurd v. Williamsburg County*, 353 S.C. 596, 615-616, 579 S.E.2d 136, 146 (Ct.App. 2003). The Company cannot satisfy this narrow standard of review.

The jury, for example, could have based its verdict on the scraper driver's failure to keep a proper lookout and the Company's decision to save eight to ten seconds by having him run the stop sign. R. 400 ll.9-16, 402 ll.2-7, 408 l.10 - 409 l.3, 819 ll.13-24, 1026 ll.6-23, 1028 ll.8-12, 1114 l.23 - 1115 l.19, 1117 l.2 - 1118 l.5. The scraper driver left it up to a spotter to look for traffic and did not stop at the stop sign. He knocked it down. R. 409 ll.2-3, 412 l.22 - 413 l.10, 563 ll.11-23; Respondent's Addendum (photographs of the scraper).

The Company's expert also admitted that this put Valenzuela in "an emergency situation" that required "panic stopping," and that Valenzuela did not cause the position that he found himself in. R. 948 ll.12-24, 966 ll.16-21. The jury was charged that it could consider this as a sudden emergency, and that persons forced to act in the face of sudden and imminent perils are not to be judged in light of hindsight or later events. R. 1120 l.13 - 1122 l.10.

On appeal, the Company does not challenge the charges on keeping

a look out, stop signs, or sudden emergencies. It instead wants the Court to ignore its role in Christie's death and Monday-morning quarterback her husband's decision to hit the rear brakes and lay the motorcycle down. Even so, the MAIT investigator explained that motorcyclists who face emergencies commonly hit their rear brakes because front-wheel braking causes immediate spills. R. 742 ll.7-16. And the Company's scraper driver admitted that he would have laid the motorcycle down too. R. 413 ll.18-22.

2. The Owens Corning contract was properly admitted to show the Company's awareness of the danger and need for precautions.

The Company's broken promise to have a flagman and crossing signs also supports the jury's allocation of fault. R. 1220 ll.19-24, 1221 ll.6-10, 1222 ll.3-11, 1308. Had the Company kept its promise, Christie would have never died. R. 474 l.6 - 475 l.9, 475 l.19 - 476 l.14. With a flagman, "this becomes a minor inconvenience instead of a fatality." R. 653 ll.9-24.

The trial court enjoyed "wide discretion" in ruling that this evidence was relevant and was not unduly prejudicial. *Busillo v. City of North Charleston*, 404 S.C. 604, 610, 745 S.E.2d 142, 145 (Ct.App. 2013). The trial court did not abuse this discretion because tortfeasors may be

liable for injuries to third parties that arise out of the tortfeasor's contract with others. *Dorrell v. South Carolina Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004). In that case, the Supreme Court held that a contract to pave a highway obligated the contractor to protect the highway's motorists.

The Company likewise obligated itself to protect Valenzuela and other motorists when it took on a contract that required it to cross the highway. The Company earlier disagreed, arguing that *Dorrell* does not apply because its contract does not say that the purpose of having a flagman and crossing signs is to protect the public. R. 1394-1397. The distinction was destroyed with testimony that the Company knew that the precautions it promised were necessary to protect the highway's motorists. R. 780 ll.11-21, 1223 ll.3-16. The Company does not cite *Dorrell* on appeal or repeat the discredited distinction.

Other testimony similarly rebuts the Company's related argument about the encroachment permit. Owens Corning explained that the May 2009 contract required the Company to use a flagman and crossing signs even though the permit earlier expired. R. 1217 l.17 - 1218 l.3, 1241 ll.3-16. The Company knew about the requirements' further details, Owens Corning added, from the Company's prior construction

projects. R. 1222 ll.16-24. And the Company knew enough to have a flagman and properly-placed warning signs during Owens Corning's pre-announced inspections. R. 1253 l.3 - 1254 l.24.

Still other testimony shows that admitting the contract is not reversible error. The Company's expert testified that you should have at least two warning signs in construction situations. R. 981 ll.11 - 983 l.5. Valenzuela's expert testified that a flagman is necessary from a purely engineering perspective. R. 653 ll.9-24, 654 l.15 - 656 l.19. The Trooper who investigated the scene testified that construction zones typically have crossing signs, and that one would expect the Company to have a flagman. R. 539 l.15 - 540 l.24, 542 ll.3-12. And the scraper driver admitted that these precautions are just "common sense." R. 402 l.18 - 403 l.12.

So the contract was not the only evidence on the need for signs and a flagman. Even if improper, admitting cumulative evidence is not reversible error. *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997).

3. The course-of-conduct evidence was properly admitted to show a sudden emergency and the Company's wilfulness.

The trial court likewise did not abuse its discretion by admitting evidence of the Company's prior course of conduct at the intersection. The Company argues that this is inadmissible because past acts do not prove that the actor later did the same thing the same way. But that is not why the testimony was admitted.

The challenged testimony is from three witnesses who live near the wreck scene and pass it frequently. R. 338 l.21 - 339 l.8, 352 ll.8-10, 353 ll.9-15, 366 ll.2-12. They testified that prior to the wreck the intersection never had any warning signs, flagman signs, or flagman — and that the scraper had on different occasions almost hit them after running the stop sign. R. 340 ll.4-11, 341 l.12 - 342 l.12, 342 l.22 - 343 l.12, 357 l.1 - 359 l.8, 367 l.4 - 369 l.3. Two of the witnesses added that there was nothing to warn those less familiar with the road about the scraper crossing without stopping at the stop sign. R. 344 l.23 - 345 l.4, 361 ll.8-22.

The trial court ruled that the evidence was admissible for three reasons, none of which involve using the Company's past acts to prove its future conduct.

The evidence first rebutted the claim that Valenzuela did not keep a proper lookout. R. 332 ll.16-17, 1095 ll.20-21. Unlike those living near the intersection, Valenzuela had not traveled the road in years and had no idea about the crossings. R. 466 ll.3-9. The court reasoned that the alleged danger from the intersection is more unexpected by someone who has never been there than by those who live nearby. R. 298 ll.16-19. The evidence thus goes to show that Valenzuela faced a sudden, unexpected peril.

The Company's decision to blame Valenzuela also put in issue its willfulness. Comparative negligence is not a defense to willfulness. S.C. Code § 15-38-15(F). So the jury was asked in the liability phase to decide whether the Company was willful, and found that it was. R. 8, 1109 l.11- 1110 l.2. The trial court ruled that the course-of-conduct evidence was relevant to show this willfulness. R. 299 ll.6-20.

The trial court lastly ruled that the evidence was relevant on the punitive damages claim to show the Company's alleged pattern of conduct, the duration of the conduct, and the degree of culpability. R. 299 ll.10-13.

None of these rulings is an abuse of discretion. The law governing similar act evidence is "simply a rule of relevance, logic, and common

sense.” *Reed v. Clark*, 277 S.C. 310, 314-315, 286 S.E.2d 364, 387 (1982). The testimony passes this common sense test because it shows that the Company’s decision to continually run the stop sign — without posting warning signs or a flagman — was not an isolated inadvertence. It was a *modus operandi* which continued to surprise those who traveled the road much more frequently.

This evidence is also cumulative. The Company called witnesses who live near the intersection and testified — without objection — that the Company never used a flagman or warning signs, and that someone unfamiliar with the road wouldn’t have any idea what was going on. R. 1009 ll.8-16, 1010 ll.8-9, 1018 l.16 - 1019 l.1. So this also falls under the rule that cumulative evidence is not reversible error. *Creech*, 328 S.C. at 35, 491 S.E.2d at 576.

4. The issue over the opening statement is new and without merit.

The Company next argues that none of this is its fault because its opposing counsel admitted that its employees were not negligent. This mischaracterization was never raised below.

This Court recently declined to rule on the significance of an opening statement because the issue was raised for the first time on appeal.

Stephens v. CSX Transp., Inc., 400 S.C. 503, 519-520, 735 S.E.2d 505,

514 (Ct.App. 2012). So too here. The Company never mentioned this issue in its motions for a directed verdict or a new trial. R. 865 l.25 - 880 l.23, 1038 l.23 - 1039 l.10, 1385-1419.

And the Company cannot resurrect the issue by mislabeling it as an additional sustaining ground. Winners raise additional sustaining grounds to affirm. To reverse, trial-court losers like the Company must raise the issue below and get a ruling or ask for one. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000)(distinguishing respondents who raise additional sustaining grounds from appellants who raise unpreserved claims).

The unpreserved point also lacks merit. To bind, such statements must be deliberate, clear, and unambiguous. *See Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010)(Posner, J.). Otherwise, “trials would be turned into minefields.” *Id.*

In this case, counsel never hinted that the employees were not negligent. Counsel said that the failure to have a flagman or warning signs was not their fault because they “were doing exactly what they were told” and “doing as we all do when you listen at work — your boss says do it, you do it. You’re on a job. You do it, it’s not their fault. They were doing their job, you know, but it was the fault of Sam English

Grading Company. ” R. 313 l.22 - 314 l.10. At trial, everyone agreed that the scraper driver and spotter were only following orders. R. 403 ll.13-25, 796 ll.5-7, 1027 ll.22-24.

Following orders does not imply a lack of negligence. It means that the employees were negligent because the Company required it.

5. The *Allen* charge was not coercive.

The final attack is on the standard *Allen* charge and the trial court’s decision to tell the jury that it could decide for itself when to eat, take a break, and resume deliberations. These instructions properly fulfill the Supreme Court’s command that trial courts encourage verdicts.

a. Trial courts must encourage verdicts.

The Company first complains that the trial court told the jury that the court had to encourage a verdict. R. 1137 l.24 -1138 l.8. But this accurately states the law.

“A trial judge has a duty to urge, but not coerce, a jury to reach a verdict.” *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). This duty is over 100 years old. *See Nickles v. Seaboard Air Line R.R.*, 74 S.C. 102, 54 S.E. 255, 268 (1906)(“It is important that the trial of causes should be ended. A circuit judge is but discharging his duty to

the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.”).

This case highlights the wisdom of requiring trial courts to encourage verdicts. After hearing testimony for over four days, the jury thought it was hung after deliberating less than six hours. R. 132 l.3, 135 l.6, 1130 l.16, 1137 ll.4-23. The Supreme Court has upheld an *Allen* charge where the jury deliberated far longer before suggesting a deadlock. *State v. Lynn*, 277 S.C. 222, 228-29, 284 S.E.2d 786, 790 (1981)(upholding an *Allen* charge where the jury suggested a deadlock after deliberating nine hours).

b. An *Allen* charge properly fulfils this duty.

The trial court next gave what the Company admits is a verbatim *Allen* charge. R. 1138 l.9 - 1140 l.5. The Company argues that the charge is itself coercive.

The Supreme Court recently disagreed. In 2010, the Court described the charge as the “typical judicial mechanism” for trial courts to encourage indecisive juries — and upheld its use in the sentencing phase of a capital case. *State v. Williams*, 386 S.C. 503, 509-510, 690 S.E.2d 62, 65 (2010). If the charge is proper when the stakes are literally life and death, it is proper here too.

c. Accommodating the jury's needs is not coercive.

The Company lastly complains about the trial court offering the jury supper and allowing it to decide when to eat; how long to work; and, if necessary, whether to resume deliberations Saturday or come back Tuesday. R. 1140 l.6 - 1142 l.3.

Letting the jury know that the court will meet the jury's needs is not coercive. Coercion is telling the jury that it will not get food or breaks until it reaches a verdict. The trial court did the opposite. *See State v. Hughes*, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999)(asking the jury when it would like to break is not coercive); *State v. Williams*, 344 S.C. 260, 265-266, 543 S.E.2d 260, 263-264 (Ct.App. 2001)(same; telling the jury that the court would make arrangements if the jurors got tired or hungry); *State v. Ayers*, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct.App. 1985)(same; telling the jury that the court would make hotel arrangements if necessary).

The complaints about the additional comments also fail to grapple with the four factors that the Supreme Court held must be considered. *Williams*, 386 S.C. at 512, 690 S.E.2d at 66-67. On two of the four factors, the trial court neither spoke specifically to the minority jurors nor made any inquiry to the jury's numerical division. The comments

were instead even-handed, favoring neither party over the other.

Next, the jury deliberated three more hours, and asked several questions, after it resumed deliberations. R. 1142 l.4, 1143 l.7 - 1145 l.12, 1149 ll.8-9, 1383. This confirms a lack of coercion. *See Lynn*, 277 S.C. at 229, 284 S.E.2d at 790 (upholding a verdict where the jury asked questions two hours after the *Allen* charge); *Nelson v. Atlantic Coast Line R.R.*, 191 S.C. 345, 4 S.E.2d 273, 280 (1939)(upholding a verdict where the jury came back less than a half hour after resuming deliberations).

Lastly, the court never told the jury that it had to reach a verdict. While the Company says the judge did, the most it cites is the judge's plea that the jury "please consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case." R. 1141 ll.19-20.

The "let's reach a verdict" phrase came in the context of the earlier charge that the jurors "should not give up your firmly held belief merely to be in agreement with the other jurors," and instruction that the Court would indeed declare a mistrial if the jury could not agree. R. 1138 l.23 -1139 l.2, 1139 ll.10-11. In this context, "let's reach a verdict" urges a verdict without requiring one. That is how the trial court meant

it. R. 1142 ll.9-18.

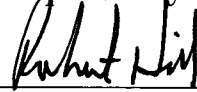
Besides, the Supreme Court has upheld verdicts where the trial judge used more forceful language. *See State v. Gebert*, 196 S.C. 306, 13 S.E.2d 451, 454 (1941) (“And it is your duty to write a final verdict in this case; you are not expected to make a mistrial, the law expects you to reach a verdict.”); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305, 308 (1923) (“[T]his work is just analogous to a situation in time of war, when a regiment is called on to perform a certain duty and they say, ‘We can’t do it, you will have to get some one else.’”); *Terry v. Richardson*, 123 S.C. 319, 116 S.E.2d 273, 275 (1923) (“You have been assigned as citizens to do this duty. It is a public duty you owe your country. Are you going to say we are not capable or competent to do it and you must call on some one else to do it? I don’t think so.”); *State v. Drakeford*, 120 S.C. 400, 113 S.E. 307, 309-310 (1922) (“Oh, but you must agree, we wouldn’t consider a mistrial in this case.”); *Dover v. Lockhart Mills*, 86 S.C. 229, 68 S.E. 525, 528 (1910) (“It seems absurd that a jury of 12 men cannot agree upon a case like that, and find a verdict one way or the other.”).

If these statements do not warrant a new trial, the trial court’s much milder urging here does not either.

Conclusion

A wife and mother is dead. Her husband has faced his role in her death. It is now time for the Company to face its role. The judgment should be affirmed.

Respectfully submitted,



Robert N. Hill

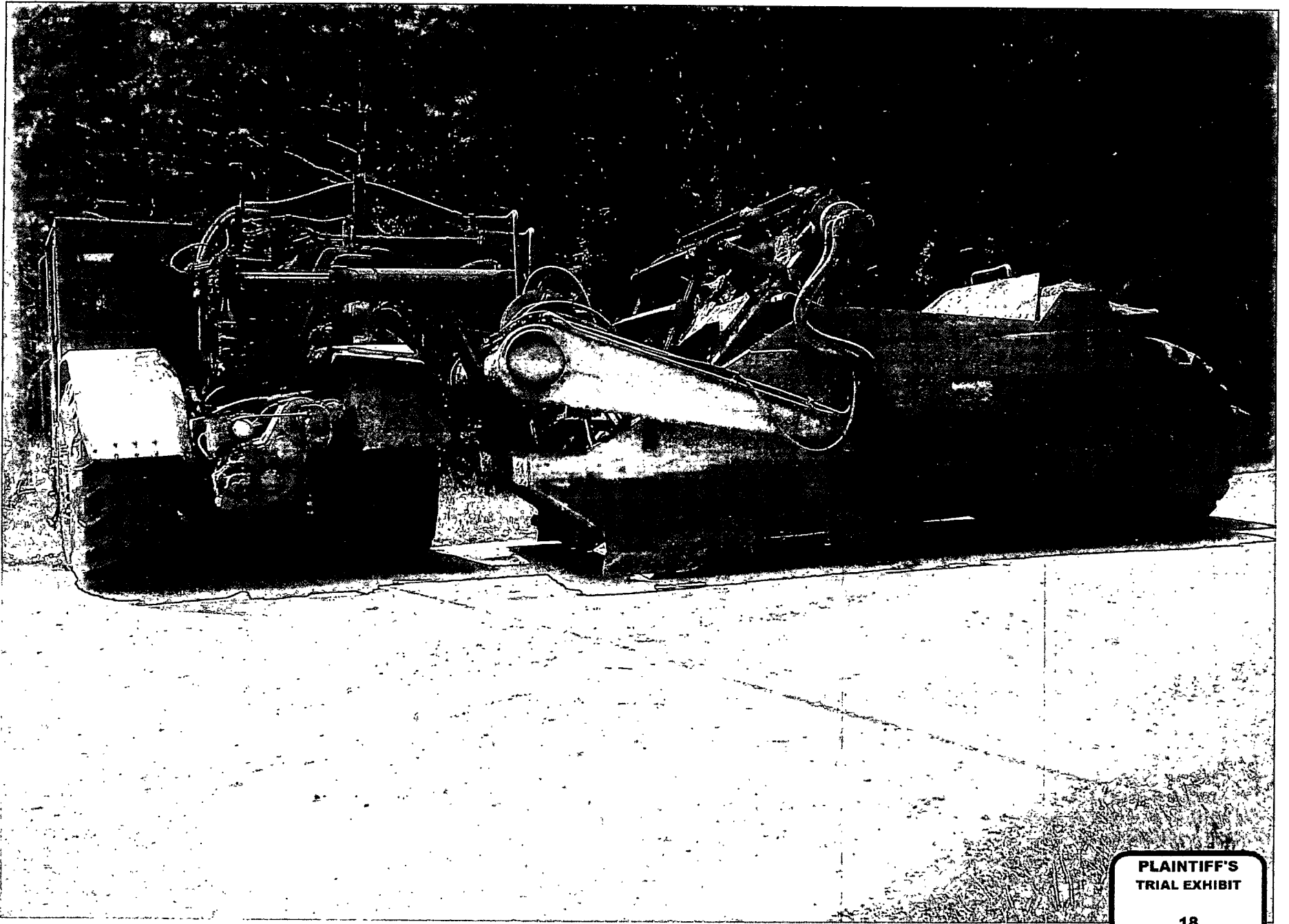
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**PLAINTIFF'S
TRIAL EXHIBIT**



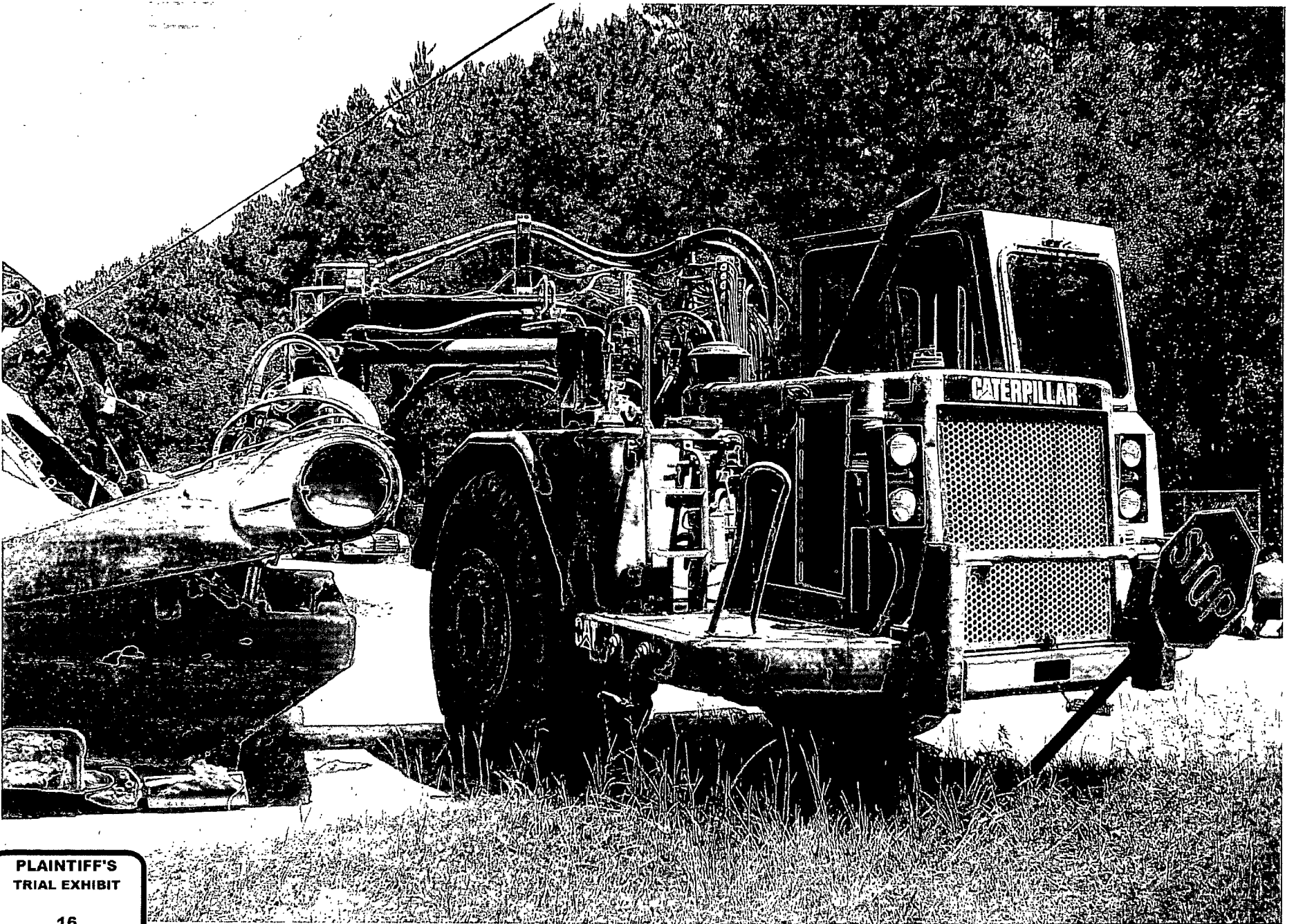
PLAINTIFF'S
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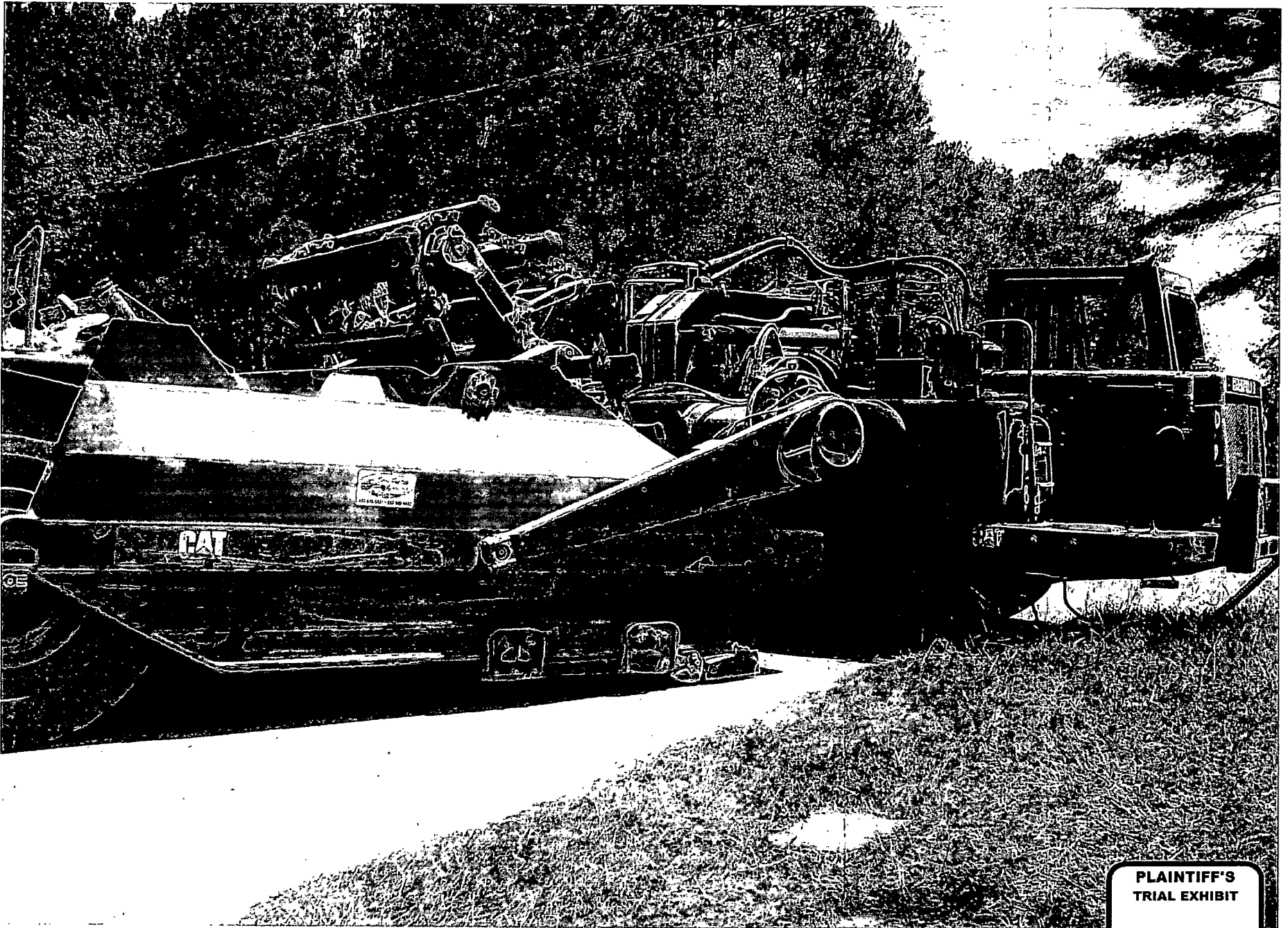
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TRIAL EXHIBIT

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PLAINTIFF'S
TRIAL EXHIBIT

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PLAINTIFF'S
TRIAL EXHIBIT

The State of South Carolina
In the Court of Appeals

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-02-00868

Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela,..... Respondent

v.

Sam English Grading, Inc., Appellant

Rule 211, SCACR, Certificate and
Certificate of Service

I certify that the Respondent's Final Brief complies with Rule
211(b), SCACR, and that I on April 9, 2014 served the Respondent's
Final Brief and this Certificate by first class mail, post prepaid,
addressed to:

Charles E. Carpenter, Jr.
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