THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Opinion No. 350 (S.C. Ct. App. Filed July 15, 2015)

Ebony Bethea.....Petitioner,

v.

Derrick Jones, John Doe, Individually and
As employee/agent of Citi Trends, Inc., Citi
Trends, Inc., and Palmetto Properties, Inc.
Of Whom Citi Trends, Inc., and Palmetto
Properties, Inc. are.....Respondents.

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR
PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 8, 2015.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in finding Respondents owed no duty to protect Petitioner from the criminal acts of a third party and therefore err in affirming the Trial Court's grant of summary judgment?

II. Did the Court of Appeals err in finding Petitioner presented no evidence that either Respondent was a proximate cause of her injuries and therefore err in affirming the Trial Court's grant of summary judgment?

STATEMENT OF THE CASE

Petitioner Ebony Bethea ("Ms. Bethea" or "Petitioner"), was shot in a Citi Trends store by Derrick Jones ("Mr. Jones") a long time significant other who entered with his face obscured and carrying a gun. As a result of the shot, Ms. Bethea is now paraplegic. The evidence shows that Respondents Citi Trends and Palmetto Properties failed to spend a dollar on security to protect their patrons despite being in a high crime neighborhood, and failed to follow internal policies requiring Citi Trends employees to greet customers within 20 seconds. Mr. Jones testified that if any of the inexpensive security measures Respondents declined to put in place – including placing signs, making certain that visitors knew of the possibility that there would be a police presence, that they would be shown on a video camera, or that a security guard or store employee would approach them, then he would never have left his car with a firearm, would never have entered Citi Trends while carrying a gun, and would never have accosted Petitioner. Mr. Jones further testified under oath that had he been greeted pursuant to Citi Trends internal policy, that he never would have confronted or shot Ms. Bethea.

Ms. Bethea filed this suit on July 16, 2012. R. 25–41. Citi Trends and Palmetto Properties moved for summary judgment on July 15, 2013 and August 22, 2013, respectively. R. 62–65; R. 1:95–99. The Trial Court granted summary judgment on February 3, 2014. R. 3–24. The Court of Appeals heard arguments May 12, 2015, and affirmed the Trial Court ruling on July 15, 2015. Bethea v. Jones, Unpublished Opinion No. 2015-UP-350, also available at 2015 S.C. App. Unpub. LEXIS 430, *1 (S.C. Ct. App. July 15, 2015).

Petitioner timely filed a petition for rehearing, but was denied on October 8, 2015. Petitioner now seeks review by the Supreme Court.

STATEMENT OF FACTS

On December 27, 2010, Petitioner Ebony Bethea ("Ms. Bethea" or "Petitioner") visited Respondent Citi Trends store in Dillon, South Carolina. R. 1:341:4–7. Citi Trends is a retail clothing chain with some 500 individual stores primarily located east of the Mississippi with its headquarters in Savannah, Georgia. R. 1:172:9–21. Citi Trends specifically targets areas identified as "distressed urban markets" when selecting store locations. R. 1:179:19–20. Respondent Palmetto Properties owned the Dillon Plaza Shopping Center where Citi Trends is located. R. 1:251:19–25; 1:252:1–2.

While shopping at Citi Trends, Ms. Bethea was confronted by her long time significant other, Mr. Jones. R. 1:329:1–8. Mr. Jones had no intention to shoot Ms. Bethea as he entered the store, but he was carrying a gun and wore a baseball hat that partially obscured his face. R. 1:428:4–6. While Citi Trends' company policy requires each customer to be greeted within twenty (20) seconds of that customer entering the store, no Citi Trends employee approached, acknowledged or spoke to Mr. Jones as he entered the store. R. 1:466; 1:426:8–24.

A Citi Trends corporate representative testified under oath that local stores are given no leeway to deviate from the greeting policy. R. 1:177 & 1:193. The Citi Trends store had a camera at the door and above the cash register, but customers were given no indication that the camera existed. R. 1:425:9–23. The cameras are maintained primarily as a loss-prevention tool and not for the safety of Citi Trends' customers. R. 1:204:6–8. Citi Trends admitted that it does not consider proximate criminal activity when scouting

locations for new stores or when making security-related decisions in existing ones. Id. Instead their entire security focus is on inventory control. Id.

There were only two employees on duty at Citi Trends on December 27, 2010. R. 2:491–494. Mr. Jones passed the two employees unimpeded and began a loud altercation with Ms. Bethea. R. 2:493–94. At no point during the altercation did any of the two employees approach them or call law enforcement. Id. As the argument became more heated, Mr. Jones lifted his shirt, pulled out his gun, and shot Ms. Bethea in the back as she attempted to run away. R. 2:493–94; 1:331:4–10. As a result of the gunshot, Ms. Bethea is now permanently paralyzed.

Mr. Jones stated under oath "it wasn't nobody really paying attention" and that if there had been "employees keeping a better watch on the store" or greeting him that he "wouldn't have [shot Ebony Bethea]." R. 1:426–29.

ARGUMENT

Petitioner hereby moves and petitions, pursuant to Rule 242 of the South Carolina Appellate Court Rules, as well as other applicable law, for a writ of certiorari to the South Carolina Supreme Court. This Court should grant certiorari because this case presents novel questions of law and the Trial Court's and Court of Appeals' decisions are in conflict with Supreme Court precedent. SCACR 242(b)(1) & (3).

In affirming the Trial Court's grant of summary judgment, the Court of Appeals held that Respondents owed Petitioner no duty, and therefore, could not be negligent. Petitioner respectfully requests that the opinion of the Court of Appeals be reversed, based upon argument made below. Petitioner further wishes to incorporate all of her prior arguments in order to preserve those arguments for later review.

I. Petitioner requests a writ of certiorari because consideration by the South Carolina Supreme Court is necessary to maintain uniformity of its decisions and this matter involves a question of exceptional importance.

A. Certiorari is necessary for this Court to maintain uniformity of its decisions.

This case is the progeny of Bass v. Gopal, a case without a lot of interpretative citations at the appellate level, but a case that changed the test by which a business owners' duty to provide security measures is guided. The sole exception known to Petitioner of a case that does interpret the balancing test is Lord v. D&J Enterprises, Inc., 757 S.E.2d 695, 407 S.C. 544 (S.C. 2014), which held that there was evidence of a duty since "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a

heightened risk." Id., at 700, 556 (citing McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 901 (Tenn. 1996)). Instead, in that case the Court found that there was no evidence that preventative security measures were unreasonable, a basis upon which neither the Court of Appeals nor the Trial Court reached its decisions in this case, and which Petitioner's expert's affidavit here clearly contradicts and provides evidence to refute.

Importantly, the Trial Court's application of Bass drifts far away from the actual opinion. For example, the Trial Court stated that Bass required foreseeability to be based on "violent crimes in or around the premises." R. 1:14; also see R:1:6 ("using the ½ mile radius for the known crimes (which is not consonant with the dictates of Bass v. Gopal . . . ")). R. 1:11 ("no prior criminal incidents involving shooting or other types of violent crimes at Citi Trends."), R. 1:11 ("no prior criminal incidents involving shooting or other types of violent crimes in the Dillon Plaza Shopping Center.").

Due this illusory geographic restriction, the Trial Court discounted Petitioner's expert testimony and evidence of crimes within the one-half mile area surrounding the Citi Trends and Palmetto Properties' location. R. 1:17. The Trial Court failed to find foreseeability because it found there were no previous violent crimes inside the Citi Trends store or Dillon Plaza Shopping Center. R. 1:16.

However, a strict geographic scope is not found anywhere within Bass's actual language. The Trial Court actually quoted the geographic restrictions from McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996). R. 1:14. McClung was one of four cases that Bass cited from other jurisdictions that utilized the balancing approach. Bass, 395 S.C. at 138, 716 S.E.2d at 915. Bass did not incorporate or adopt the

geographic limitations in McClung. Admittedly, the facts of Bass involved a CRIMECAST report about a specific Super 8 motel in Orangeburg, but the court's opinion did not measure foreseeability within strict geographic guidelines. Bass, 395 S.C. at 140, 716 S.E.2d at 916. Nevertheless, this Court did discuss what might be the outer-limits of reasonableness, "We do not believe evidence of an elevated crime rate covering the expanse of an entire county, on its own, is sufficient to prove foreseeability by a preponderance of the evidence." Bass, 395 S.C. at 140, 716 S.E.2d at 916.

The Trial Court's narrow interpretaton of Bass is further evidenced by this Court's holding in Lord v. D & J Enterprises, Inc., 407 S.C. 544, 757 S.E.2d 695 (2014). In Lord, another business failed to use reasonable care to protect its patron from third party criminal activity. Lord, 407 S.C. at 549, 757 S.E.2d at 697. The case arose after a string of seven robberies in York County between October 2007 and February 2008. Lord, 407 S.C. at 548, 757 S.E.2d at 697. In the seventh robbery, the robber shot the Lord plaintiff as she picked up a Western Union cash transfer. Id.

Lord did not even consider whether there were similar violent crimes that occurred on the defendant business owners' property. Lord, 407 S.C. at 558–59, 757 S.E.2d at 702. Instead, the court focused the foreseeability inquiry on the business owners' awareness of the previous robberies throughout the county as the factor at issue under the facts of the case. Id. The court found "Lord produced at least some evidence that the shooting was foreseeable" due to media coverage about the robberies. Lord, 407 S.C. at 558, 757 S.E.2d at 702. If nothing else, the Lord opinion demonstrates that the Trial Court, here, misinterpreted Bass and incorrectly confined its foreseeability analysis

to "violent crimes in or around the premises [of the Respondents]." Indeed, multiple factors may lead to a finding of foreseeability under this Court's test.

As a result, and in order to maintain uniformity of decisions under the balancing test adopted in Bass, this Court should grant certiorari, in order to draw on the wisdom of the South Carolina Supreme Court.

B. Certiorari is necessary because this matter involves a question of exceptional importance.

This case essentially involves the issue of whether a business can disregard its own policies, fail to consider taking any security measures at all, and then escape liability when a criminal act, which there is evidence that otherwise would not have occurred, does occur against one of its patrons. The same is an issue of exceptional importance in a state where the crime rate is more than 50% greater than the national average, and criminal acts in public places are not rare occurrences. As a result, this matter should be heard before the Court, on the basis of its exceptional importance to the state and its governing law.

II. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because the foreseeability of crime in a location is based upon a multitude of factors and Petitioner showed that a scintilla of evidence exists as to foreseeability making summary judgment improper.

At the heart of this case is the question of whether Respondents, as the owner of the shopping center in which Citi Trends is located, and the operator of the store itself, owe patrons such as Petitioner a duty to protect them from foreseeable dangers. In answering this question, the Court of Appeals cited to Bass v. Gopal for the proposition that "[A] business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm." 395 S.C. 129, 135, 716 S.E.2d 910, 912

(2011)(emphasis in original).

Importantly, in reaching its decision, the Bass court examined, extensively, the state of the law with regard to the duties of business owners to their invitees in other jurisdictions before rejecting the primary theories which had been adopted both previously in this state, and elsewhere. First, Bass concluded that the prior or similar incidents test, and the imminent harm rule, both of which had been employed in earlier cases such as Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000), were either outmoded or violated public policy.

Under the imminent harm rule, used as the basis for denying liability in Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977), the business owner owed no duty to protect an invitee from third party assault. The Bass court specifically rejected this doctrine. It further held that the prior incidents rule, enunciated in cases such as Taylor v. Hocker, 101 Ill. App. 3d 639, 428 N.E.2d 662 (Ill. App. 1981), violated public policy; because recovery was predicated upon the occurrence of an identical or nearly similar prior event, the first victim of any crime would always lose. Finally, it rejected as overly burdensome to business the "totality of the circumstances" doctrine. This Court settled instead on a balancing test, first adopted in Ann M. v. Pacific Plaza Shopping Cntr., 6 Cal. 4th 666, 25 Cal. Rptr. 137, 863 P.2d 207 (Cal. 1993) and since accepted in several other jurisdictions. See, e.g., McClung v. Delta Square Ltd. P'ship, 937 S.E.2d (Tenn. 1996).

Under the balancing test, although the presence or absence of prior criminal activity is a significant factor in the analysis, the absence alone does not foreclose the duty to provide some level of security if other factors exist. As an initial matter, common

sense would seemingly suggest that operations, which intentionally target, and establish facilities in areas of urban distress, like Respondents, are more likely to suffer violent crimes than businesses outside city limits. As Petitioner's expert, Mr. Hodge attests, this fact alone, would tend to make it more foreseeable to such businesses that crime would occur on their premises. R. 1:436 & 438, ("formal corporate statement of placing stores in 'urban distressed areas'"). As Mr. Hodge also notes, Respondents either knew, or should have known, of the significantly higher incidence of violent crime in Dillon, and in the neighborhood in which they were located. R. 1:438. They had a duty to take reasonable steps to protect their invitees from becoming the victims of such crimes on their premises. This attestation under oath by Petitioner's expert witness, standing alone, provides a scintilla of evidence on a factor of foreseeability thereby creating a duty from Respondents to Petitioner making summary judgment on this issue improper.

As held in Bass and Lord foreseeability of criminal activity can be demonstrated by expert testimony, by criminal activity reports prepared by law enforcement agencies, or by another method acceptable to the Court. In the present action, Petitioner produced the Affidavit of Michael A. Hodge, Board Certified in Security Management, certified as a Security Officer by the Department of Defense, and a retired Secret Service Agent. R. 1:434–35. Mr. Hodge reviewed both town of Dillon police records/incident reports, and the FBI's Uniform Crime reporting statistics in order to reach his conclusions regarding the level of safety, the extent of violent crime, and the foreseeability of criminal activity in the vicinity of the store at which Petitioner was shot.

Mr. Hodge's research revealed that violent crime is prevalent in the area in which the particular Citi Trends store at issue is located. In a general sense, FBI statistics show

that the violent crime rate of the State of South Carolina is 56% greater than the national average, and the rate within Dillon is 359% higher than the State as a whole. Specifically, Mr. Hodge studied actual crime reports from the police department and concluded that the area within one half-mile of the Citi Trends store had a high record of police incident reports of violent crime. These figures, especially when combined with Citi Trend's corporate policy of locating its stores in "distressed urban neighborhoods," led him to draw one conclusion: **in his expert opinion, the lack of security measures taken by Defendants falls well below the standard of reasonable care within the industry**. R. 1:436. This statement under oath by Petitioner's expert witness, provides more than a scintilla of evidence as to duty since foreseeability and breach are so inextricably intertwined as the Bass court noted.

The Trial Court's focus on the foreseeability of a violent attack by Mr. Jones on Ms. Bethea as individuals is a red herring. It is highly unlikely that any particular event, any singular attack by one individual on another, would ever be foreseeable – in other words the first victim would always lose, a standard that has been explicitly rejected by this Court. That violent crime of **some** type would occur is, however, highly foreseeable here, and Respondents had a duty to ensure that they took reasonable measures to protect the public pursuant to this Court's holding in Bass. As demonstrated above and throughout Petitioner's briefing, at least a scintilla of evidence exists as to foreseeability and thereby duty, and as a result the grant of summary judgment should be reversed, and this matter returned to the Trial Court for a trial on the merits.

III. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because the duty of a business owner under the balancing test requires that the business owner spend a dollar on increased security until the last dollar buys a dollar in reduced safety to its guests, and Respondents did not consider security for their guests at all.

The balancing test adopted by this Court requires a business owner to weigh the relative gain of each dollar spent in security against the economic feasibility of spending each additional dollar. It **permits the business to balance** the foreseeability of criminal activity against the cost of heightened security measures intended to protect invitees. While the balancing test does not establish any kind of bright line that would determine what type or how much security must be provided, let alone what the cost of the security must be, the court stated that the appropriate point was that at which the business owner "increase[ed] its expenditures on security until the last dollar buys a dollar in reduced expected crime costs... to the [owner's] guests." Bass at 139, 716 S.E.2d at 915 (quoting Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 514 (7th Cir. 2007)).

The duty then is **not a duty that permits a business owner to do nothing at all**. In fact, a business owner must actually examine the prevalence of crime and based upon that spend money to protect its patrons such that the last dollar spent buys a dollar in reduced expected crime costs to the owner's guests.

The significance of the balancing test in the instant action cannot be understated, and does not appear to have been fully considered by the lower courts. Rather than looking to the presence of reasonable security in light of the foreseeable level of criminal activity in the shopping center and Citi Trends store, the Trial Court focuses exclusively on the possibility that, on December 27, 2010, Mr. Jones might decide to shoot Petitioner, and the Court of Appeals seemingly also made its decision based upon that analysis.

However, were the duty of business owners dependent on a showing that the owner might be able to predict whether or not any specific individual would commit a particular crime on a given day, there would never be any duty, under any circumstances. Such an argument essentially mirrors the old "prior incidents" rule that has been specifically rejected by this Court.

At most, under the balancing test set out in Bass, a Plaintiff need only show – and certainly all she need demonstrate in order to withstand summary judgment – is that Respondents failed to provide adequate security to protect patrons, generally, in light of known risks existing within half a mile of the situs if using that factor to demonstrate foreseeability. Here, Respondents did not take patron safety into account when making financial decisions at all. See R. 1:110–15. Therefore, Respondents failed to meet their duty under the balancing test if any crime at all was foreseeable, which of course it was considering the higher incident of crime in the surrounding area and their preference for locations in areas of urban distress. That along with the facts above create a scintilla as to the duty owed to Petitioner and subsequent breach thereof irrespective of the other arguments presented *supra*.

IV. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because duty can also be created by a company's own policies and guidelines, and in this case Respondent Citi Trends had policies it failed to follow which would prevent crime and this crime in particular.

"The standard of care in a given case may be established and, defined by the common law, statute, administrative regulations, industry standards, or a defendant's own policies and guidelines." Madison ex rel. Bryant v. Babcock Center, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006); Tidwell v. Columbia Ry. Gas & Elec. Co., 109 S.C. 34, 95

S.E. 109 (1918) (relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury); Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct.App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages).

In this case, Citi Trends has an internal procedure requiring its employees to greet all customers within 20 seconds of the customers entering the store, and Citi Trends' corporate representative testified under oath that local stores are given no leeway to deviate from this policy. R. 1:177 & 1:193. The video, photographs, and statement of the assailant in this matter indicate he was not greeted in any way upon entering the store. In fact, the assailant stated under oath "it wasn't nobody really paying attention" and that if there had been "employees keeping a better watch on the store" or greeting him that he "wouldn't have [shot Ebony Bethea]." R. 1:426–29. Moreover, Petitioner's expert witness attested based upon his review of the evidence, and his experience and training, that Citi Trends "violated their own internal policies of greeting customers within a reasonable amount of time of entering the premises, which, if abided by would have deterred the shooter . . ." R. 1:436.

Therefore, and in addition to the above, this provides at least a scintilla of evidence as to Respondent Citi Trends' duty through its own policies, breach thereof, and proximate cause.

V. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment as to Palmetto Properties as it was based on an argument that the Trial Court did not rule upon, and was therefore misapprehended.

The issue that the parties presented to the Trial Court, with respect to duty, was whether a business owner under these facts owed a duty to an invitee to protect her from the acts of a third party given the foreseeability of criminal acts in the location at issue. The controlling law on that issue is the balancing test under Bass v. Gopal, 395 S.C. 123, 716 S.E.2d 910 (2011).

The Court of Appeals' decision as to the duty of the landlord is based upon Jackson v. Swordfish Inves., L.L.C., where a grant of summary judgment was upheld in a negligence action against a commercial landlord, stating absent an exception, a landlord owes no duty to protect a tenant's customers from the criminal acts of third parties. 365 S.C. 608, 613–14, 620 S.E.2d 54, 56–57 (2005). Importantly, Jackson was decided prior to Bass, and as a result Petitioner would contend that the Bass court created such an exception with its adoption of the balancing test six years after Jackson. In any event, the argument under Jackson was not relied upon by the Trial Court, as that court considered the Respondents' duty under the balancing test set forth in Bass, and this Court should analyze the duty owed to Petitioner through the same lens, albeit with a different result given the evidence demonstrated in the record and *supra*.

CONCLUSION

Petitioner is required to show no more than a scintilla of a genuine issue of material fact in order to withstand a motion for summary judgment. She has done considerably more. Respondents asked the Trial Court to focus on whether or not they could have foreseen that, on December 27, 2010, Mr. Jones would enter onto their

property and shoot Ms. Bethea. In granting summary judgment, the Trial Court deviated from the legal standard as set forth in Bass. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment. The applicable question is whether Respondents should have foreseen that there was a likelihood of violent crime occurring on their property, and whether they could have taken reasonable and cost-effective measures to prevent it.

Petitioner set forth evidence demonstrating the high incidence of violent crime in the neighborhood where was injured. She has also provided evidence showing that Respondents neither investigated these statistics nor took steps to prevent crime from entering upon their own land and injuring business invitees on the property. Most tellingly, the Mr. Jones' testified that had any of the inexpensive security measures Respondents declined to put in place – including placing signs, making certain that visitors knew of the possibility that there would be a police presence, or that they would be shown on a video camera, or that a security guard or store employee would approach them existed, he would never have left his car with a firearm, would never have entered Citi Trends while carrying a gun, and never have accosted Petitioner. Moreover, he has testified that had Citi Trends followed its own internal greeting policy, the injury to Ms. Bethea would not have occurred.

Petitioner has presented facts sufficient to demonstrate that Respondents owed her a duty and breached it, and that their breach was the proximate cause of her injuries. Therefore, the Court of Appeals' erred in affirming the Trial Court's grant of summary judgment, and the matter should be reversed and remanded to the Trial Court for a full trial by jury. [SIGNATURE ON FOLLOWING PAGE]

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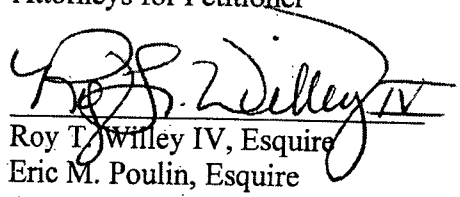

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THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

The undersigned certifies that I have served a copy of Petitioner's Petition for Certiorari on the individuals named below by hand delivery or by depositing a copy in a first class pre-paid envelope in the United States mail at Charleston, South Carolina as follows:

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