

STATE OF MICHIGAN
IN THE SUPREME COURT

SHAKEETA SIMPSON, as Personal
Representative of THE ESTATE OF ANTAUN
SIMPSON,

Supreme Court No. 152036

Plaintiff-Appellee,

Court of Appeals No. 320443

and

Wayne County Circuit Court
No. 13-000307-NH

SHAKEETA SIMPSON, Individually,

Plaintiff.

-vs-

ALEX PICKENS, JR. AND ASSOCIATES, M.D.,
P.C., a Michigan corporation, d/b/a PICKENS MEDICAL
CENTER, BRIGHTMOOR GENERAL MEDICAL
CENTER INCORPORATED, a Michigan corporation,
d/b/a BRIGHTMOOR-PICKENS MEDICAL CENTER,
ALEX PICKENS JR., M.D., and LINDA S. HARTMAN, P.A.,

Defendants-Appellants,

PLAINTIFFS-APPELLEE'S BRIEF SUBMITTED
PURSUANT TO THE COURT'S APRIL 6, 2016 ORDER

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STATEMENT OF FACTS

In July 2015, the defendants filed an application for leave to appeal in this Court, seeking review of the Court of Appeals June 16, 2015 decision, *Simpson v Pickens*, 311 Mich App 127; 874 NW2d 359 (2015). That decision reversed a circuit court ruling granting summary disposition with respect to the medical malpractice claim filed by the Estate of Antaun Simpson under Michigan's wrongful death act, MCL 600.2922.

On April 6, 2016, the Court issued an order directing the Clerk to schedule oral argument on defendants' application for leave. *Simpson v Pickens*, 499 Mich 897; 876 NW2d 80 (2016). The Court's April 6, 2016 order also instructed the parties to file supplemental briefs "addressing whether, in order to bring a wrongful-death action under MCL 600.2922 for the death of a fetus or embryo, the plaintiff must meet the affirmative-act requirement of MCL 600.2922a."

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED IN THIS CAUSE OF ACTION BASED ON THE WRONGFUL DEATH ACT THAT THE PLAINTIFF WAS NOT REQUIRED TO MEET THE AFFIRMATIVE ACT REQUIREMENT FOUND IN MCL 600.2922a.

A. The Statutory Framework

As plaintiff laid out in her response to the defendants' application for leave to appeal, resolution of the issues raised in this case requires consideration of three Michigan statutes. The first of these statutes is MCL 600.2921, which provides that "[a]ctions or claims for injuries which result in death shall not be presented after the death of the injured person except pursuant to the next section."

The "next section" referred to in §2921 is MCL 600.2922, the statute commonly referred to

as Michigan's wrongful death act. Based on §2921, this Court has recognized that the wrongful death act "provides the exclusive remedy under which plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). The first subsection of the wrongful death act, MCL 600.2922(1), provides:

(1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

MCL 600.2922(1).

The third statute of importance in this case is MCL 600.2922a, a statute that was originally enacted in 1988. In its present form, that statute provides:

(1) A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, §2922a. or physical injury to or the death of the embryo or fetus.

(2) This section does not apply to any of the following:

(a) An act committed by the pregnant individual.

(b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.

(c) The lawful dispensation, administration, or prescription of medication.

(3) This section does not prohibit a civil action under any other applicable law.

B. The History Connecting MCL 600.2922 and MCL 600.2922a

The central issue in this case concerns the interrelationship between §2922 and §2922a. As plaintiff has detailed in her original response to the defendants' application for leave to appeal, the history behind these two statutes, particularly the events that led to the 2005 amendment of §2922(1) is of considerable importance in understanding that relationship. Plaintiff's Response, at 5 - 10. Plaintiff will not repeat that entire history here.

What is significant is that the 2005 amendments to §2922(1) was largely a response to the Michigan Court of Appeals 2003 decision in *McClain v University of Michigan Board of Regents*, 256 Mich App 492; 665 NW2d 484 (2003). That decision cast doubt on the efficacy of the act that the Legislature had passed in 1998, §2922a, that was designed to allow for the recovery of damages arising out of the death of a fetus. To remove any doubt as to the recovery of such damages, the Legislature in 2005 decided to amend the wrongful death act, §2922(1), by expanding the types of deaths which that act would encompass to include "death as described in section 2922a.

C. The Court's Decision in *Johnson v Pastoriza*

Four years ago, this Court decided the case of *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 275 (2012). Plaintiff's cause of action in *Johnson* accrued prior to the 2005 amendment of §2922(1). As a result, one of the Court's holdings in that case was that these amendments were not retroactive and would not govern the case. Because the Court found in *Johnson* that the 2005 amendments were not retroactive, it was not called upon to address the interrelationship between §2922(1) and §2922a.¹

¹The Court did note in *Johnson* that, "the Legislature amended the wrongful-death statute in 2005 to specifically incorporate and cross-reference MCL 600.2922a." 491 Mich at 425.

While *Johnson* did not address the question of the interrelationship between §2922 and §2922a, that decision did establish three points of relevance to the legal issues presented in this case. First, *Johnson* held that a claim brought on the basis of §2922a had to be based on the defendant's affirmative act of negligence; it could not be predicated on a mere omission. 491 Mich at 434-440. Second, *Johnson* established that, unlike §2922a, the wrongful death act allows recovery for both negligent acts and negligent omissions. 491 Mich at 437 (“the more expansive terms ‘neglect’ and ‘fault of another’ . . . in MCL 600.2922(1) . . . permit liability on the basis of omissions.”) Third, consistent with the language contained in §2922a(3), which specifies that this statute “does not prohibit a civil action under any other applicable law,” the Court recognized in *Johnson* that §2922a “is separate from the wrongful death statute.” 491 Mich at 422-423.

Shakeeta Simpson, as the Personal Representative of the Estate of Antaun Simpson, brought this action for damages exclusively under the wrongful death act. Despite *Johnson*'s recognition of the fact that the wrongful death act makes negligent omissions actionable and despite *Johnson*'s recognition that §2922a is separate from §2922, the defendants contend that the entirety of §2922a, including its qualification that it applies only to affirmative acts of negligence, has been incorporated into §2922. Thus, defendants maintain that a wrongful death action brought under §2922 arising out of the death of a fetus is not actionable unless the plaintiff can demonstrate an affirmative act of negligence.

To encompass deaths of a fetus or embryo within the coverage of the wrongful death act, the 2005 amendment to §2922(1) twice incorporated the phrase “or death as described in section §2922a.

Because it found that the wrongful death act in its amended form did not apply to that case, the Court in *Johnson* was not called upon to decide the extent of §2922's incorporation of §2922a. That is the question presented in this case.

It is the meaning of that phrase that separate the parties in this case. The defendants take the position that the phrase “or death described in section §2922a” incorporates into the wrongful death act the entirety of §2922a, including that statute’s requirement that the death or injury to a fetus be the product of an affirmative act of negligence.

The Court of Appeals adopted a more narrow reading of the phrase “or death as described in section §2922a.” The Court of Appeals ruled that this language in §2922(1) incorporates only the types of death outlined in §2922a. The Court of Appeals ruled: “There is no ambiguity; the ‘death as described in section §2922a’ is the death of an embryo or fetus. No other ‘death’ is described in §2922a. The statutory language is not equally susceptible to more than this single meaning.” *Simpson*, 311 Mich App at 134-135.

There are multiple reasons why the Court of Appeals interpretation of this critical language in §2922(1) was correct.

D. The History Of The 2005 Amendment Supports The Court Of Appeals Ruling.

The history of the events that led to the 2005 amendment of §2922(1) reveals that the Michigan Legislature first attempted to extend the reach of the wrongful death act to cover the death of a fetus by expanding the *lives* that this statute would apply to, *i.e.* fetal life. When that effort proved politically unfeasible, the Legislature decided to reach the same goal by simply expanding the types of *deaths* that this statute would cover.

Thus, viewed in its historical perspective, the 2005 amendment to §2922(1) did precisely what the Court of Appeals ruled that it did - it extended the coverage of the wrongful death act by adding to it the types of death identified in §2922a - the death of an embryo or fetus.

What the Legislature intended to do through the 2005 amendment to §2922(1) was to insure that the types of deaths identified in §2922a would be incorporated within the coverage of the wrongful death act and that these deaths would be treated like all other deaths under that statute. This intent was explicitly recognized in the Senate Fiscal Agency's Bill Analysis of the 2005 amendment of §2922(1). That analysis stated:

Under the bill, the death of an embryo or fetus as described in Section 2922a *would be treated as any other death for purposes of a wrongful death action*. Since the courts evidently do not recognize a wrongful death action on behalf of a nonviable fetus, the legislation would do so in statute.

Legislative Analysis (Defendants' Application Exhibit 4-E), at 3 (emphasis added).²

The intent of the Legislature in amending the wrongful death act in 2005 was to insure that this statute covered fetal deaths and that fetal deaths would receive the same treatment as any other death under that act. The central theme of the defendants' arguments in this case, however, is that fetal deaths that are the subject of a wrongful death action must be treated differently from all other

²It is interesting to note that in their application for leave to appeal, the defendants cited to another portion of this same Legislative Analysis and they asserted that it was supportive of their interpretation of §2922(1). The portion of the Legislative Analysis that defendants relied on indicated that the 2005 amendments of §2922(1) were being proposed because "it has been suggested that the wrongful death statute . . . should encompass the death of an embryo or fetus caused by the negligent or wrongful conduct of another." Legislative Analysis (Defendants' Application Exhibit 4-E), at 1. Defendants assert that this statement in the legislative history reflects the fact that §2922(1) "incorporated" the types of negligence that could give rise to a claim under §2922a, *i.e.* that statute's requirement of an affirmative act of negligence. However, the language in the legislative history defendants point to does not equate with that in §2922a, which was the subject of this Court's decision in *Johnson*. MCL 600.2922a speaks of a defendant *committing* a wrongful or negligent *act*. This Court held in *Johnson* that this language in §2922a required an affirmative act of negligence, not a mere omission. The operative language in the Legislative Analysis to which the defendants have cited speaks of "negligent or wrongful *conduct*." The fact that this language differs from that contained in §2922a is reflected in the definition of the word "conduct" in Black's Law Dictionary (10th ed): "personal behavior, *whether by action or inaction*." (Emphasis added).

deaths giving rise to such a claim. According to the defendants, despite the fact that the wrongful death act authorizes the recovery of damages on the basis of negligent omissions, only affirmative acts of negligence could give rise to such a claim where the death involves a nonviable fetus.

E. The Text Of §2922(1) Supports The Court of Appeals Ruling.

The text of §2922(1) further supports the conclusion reached by the Court of Appeals. The defendants assert that through the 2005 amendment of §2922(1), the wrongful death act incorporated the entirety of §2922(1), including that statute's prescription of the *manner* in which a fetal death must occur, *i.e.* whether that death was the result of an affirmative act of negligence or an omission. But, the text of the 2005 amendment does not support the view that anything other than the deaths that are described in §2922a were to be incorporated into the wrongful death act.

It is "death as described in section 2922a" that is incorporated into §2922(1); it is not the *manner* in which that death is caused that has become part of §2922(1). The Legislature could have written §2922 in such a way that it would have included within its coverage "a death as caused in a manner described in section 2922a." Such language would offer support for defendants' argument since it would have established that the mechanism by which a death occurs under §2922a - *i.e.*, through the commission of an affirmative wrongful or negligent act - would be incorporated into the wrongful death statute.

But, that is not how the 2005 amendment to the wrongful death statute was drafted. That amendment was not written as a wholesale incorporation of §2922a, nor did that amendment require that the *manner* of death be as prescribed in §2922a. All that §2922(1) provided after its amendment in 2005 is that any death "as described in section 2922a" would now become actionable in a wrongful death action.

The text of §2922(1) refutes the argument that defendants would have this Court adopt in one other respect. It is significant that the language from the first clause of §2922(1) that defendants ask this Court to construe broadly is actually used twice in that statute. The same phrase is used a second time in §2922(1) and, when it is, there is no question that this language refers *only* to the types of death set out in §2922a, and has nothing to do with the nature of the negligence that might have caused a fetal death.

This second use of the phrase “or death as described in section §2922a” occurs in the final clause of §2922(1). Prior to the 2005 amendment of that statute, the final clause of §2922(1) expressly set aside common-law restrictions on a cause of action following the injured party’s death by indicating that a wrongful death action survived “notwithstanding the death of the person injured.”

In the 2005 amendment of §2922(1), the Legislature added to this language so that the final clause of that subsection now indicates that a wrongful death action survives “notwithstanding the death of the person injured *or death as described in section 2922a . . .*” This second use of the phrase “or death as described in section 2922a . . .” in §2922(1) is significant because it is obviously only a reference to the *fact* of a fetus’s death; a cause of action arising out of a fetal death survives despite the fetus’s death. This second use of the same phrase that is in the first clause of §2922(1) has nothing to do with the question of whether that death may have been the product of an affirmative wrongful act.

Thus, what cannot be contested is the fact that the second reference to “death as described in §2922a” within §2922(1) represents only a reference to the types of death referred to in §2922a. This Court has recognized that, when the Legislature “repeatedly uses the same phrase in a statute,

that phrase must be given the same meaning throughout the statute.” *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010); *Hannay v Michigan Dep’t of Transportation*, 497 Mich 45, 62, n. 40; 860 NW2d 67 (2014). Since the second use in §2922(1) of the language that is at issue in this case unquestionably refers only the *deaths* identified in §2922a, the same has to be true with respect to §2922(1)’s use of this same phrase in the initial clause of that statute.

It is in plaintiff’s view worth noting that this argument as to the significance of §2922(1)’s second use of the phrase “death as described in section 2922a” was prominently featured in her response to the defendants’ application for leave to appeal. The defendants have now had an opportunity to respond to this argument both in a reply brief that they filed in support of their application and in the supplemental brief they submitted pursuant to the Court’s April 6, 2016 order. In both of these submissions, the defendants have elected to ignore this argument. There is, in plaintiff’s view, a very good reason why the defendants have not offered a response to this argument based on the text of §2922(1) – the defendants simply have no legitimate response to this argument.

Finally, as explained in plaintiff’s response to the application for leave to appeal, the defendant’s argument with respect to the “complete” incorporation of §2922a into §2922(1) creates what amounts to a causation thicket. In her response, plaintiff pointed out how §2922(1) would read if the “complete incorporation” of §2922a into §2922(1) that defendants advocate were actually accomplished. This is how §2922(1) would have to be read if the defendants were correct in their argument:

Whenever the death of a person, injuries resulting in death, or a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that

would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act, and although the death was caused under circumstances that constitute a felony.

This rendering of §2922(1) creates a significant problem. Since defendants' "incorporation" argument does nothing to negate the fact that the wrongful death act allows for recovery based on a negligent omission, if defendants were correct in their arguments, one would have to accept that the Legislature passed a statute which provides that a cause of action in wrongful death may be brought for a fetal death whenever fetal death results from a "wrongful or negligent act" (as indicated in §2922a(1)) where that fetal death "shall be caused by a wrongful act, neglect or fault of another . . ." (as provided in §2922(1)). Thus, if defendants were correct in their interpretation of the wrongful death act, §2922(1) would have to be read as incorporating both the affirmative act requirement of §2922a as well as §2922(1)'s more expansive coverage of both affirmative acts of negligence as well as negligent omissions.

F. Defendants' Claim That This Is A Cause of Action Under §2922a Being "Filtered Through" The Wrongful Death Act.

The defendants and their supporting amicus propose what appears to be an alternative basis on which the affirmative act requirement of §2922a might be imposed in a cause of action for a fetal death brought pursuant to the wrongful death act. The defendants claim that plaintiff's underlying cause of action is actually based on §2922a itself and that this cause of action is merely "filtered" through the wrongful death act. Thus, defendants contend that the affirmative act requirement in §2922a is part of the plaintiff's underlying cause of action and that this requirement remains part of the plaintiff's case even when that case is processed under the wrongful death act. There are a number of errors in this argument.

It is, first of all, somewhat strange to speak of §2922a as Ms. Simpson’s “underlying cause of action” when she does not even have a cause of action under that statute post-*Johnson*. In light of the fact that this statute requires an affirmative act of negligence and no such negligence exists in this case, Ms. Simpson does not have a claim under §2922a. What the defendants are apparently arguing is that a cause of action for fetal death *must* proceed under §2922a.

Such a construction of §2922a does violence to the one provision of that statute that defendants would very much prefer this Court ignore. MCL 600.2922a(3) specifically provides that “[t]his section does not prohibit a civil action under any other applicable law.” By its express terms, the passage of §2922a was not meant to prohibit a separate action under any other statute. This must include the wrongful death act itself. As the Court expressly held in *Johnson*, §2922a is a statute that is separate and distinct from the wrongful death act. Outside the incorporation into §2922(1) of the “death described in §2922a,” there is nothing in either of these two statutes to suggest that an action arising out of a fetal death *must* proceed under §2922a.

There is another obvious error in the defendants’ contention that Ms. Simpson’s “cause of action” in this case is premised on §2922a. Ms. Simpson does not even have a “cause of action” under §2922a. So much is clear from this Court’s decision in *Wesche v Mecosta County Road Comm.*, 480 Mich 75; 746 NW2d 847 (2008). In *Wesche*, this Court overruled its prior decision in *Endykiewicz v State Highway Commission*, 414 Mich 377; 324 NW2d 755 (1982), because that case had misconstrued the relationship between the wrongful death act and the underlying tort supporting a wrongful death action. The Court indicated in *Wesche* that *Endykiewicz* “was incorrectly decided because it erroneously treated a wrongful-death claim as a ‘new’ cause of action rather than a continuation of the decedent’s underlying claim.” 480 Mich 91. *Wesche*, therefore, stands for the

proposition that the wrongful death act “does not comprise an independent cause of action.” *Thorn v Mercy Memorial Hospital*, 281 Mich App 644, 658; 761 NW2d 414 (2008).³

Since this Court has ruled that the wrongful death act is not a separate “cause of action,” precisely the same thing has to be said of §2922a. Like the wrongful death act, passage of §2922a was necessary to eliminate a limitation imposed by the common law. The wrongful death act had to be enacted over 160 years ago because the common law would not recognize the right to bring a suit for damages after the death of an injured party. Similarly, §2922a had to be enacted because the common law would not allow suit on behalf of a nonviable fetus.

But while both §2922 and §2922a were needed to overcome common law restrictions on the ability to pursue certain claims, neither one of these statutes is itself an independent “cause of action.” One must look to the substantive basis of the claim, not §2922(1) or §2922a to determine the underlying “cause of action.” The actual cause of action involved in this case is plaintiff’s claim of medical malpractice. Indeed this Court has expressly declared this is so in *Jenkins*. In *Jenkins*, the Court, in a wrongful death action predicated on medical malpractice, specifically identified the plaintiff’s “underlying claim” as malpractice. 471 Mich at 165. *See also Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) (plaintiff’s underlying claim of ordinary negligence governs the statute of limitations in a wrongful death act); *Shinholster v Annapolis Hospital*, 471 Mich 540, 559; 685 NW2d 275 (2004) (in a wrongful death action once again identifying plaintiff’s “underlying

³Both the defendants and their amicus curiae concur on this point. The defendants acknowledge in their supplemental brief that the wrongful death act “is not a separate cause of action.” Moreover, the defense amicus, the Michigan Defense Trial Counsel, citing this Court’s earlier decision *Maiuri v Sinacola Construction Co.*, 382 Mich 391; 170 NW2d 27 (1969), concedes that “[t]he Wrongful Death Act, itself, does not establish a cause of action.” MDTC Brief, at 6.

claim of medical malpractice.”)

The defendants’ argument that plaintiff’s argument that Ms. Simpson’s cause of action must be based on §2922a also completely ignores the history that led to the 2005 amendment of the wrongful death act. Defendants insist that the scheme that the Legislature has left in place dictates that plaintiff pursue her claim under §2922a as “filtered through” the wrongful death act. But, as already discussed, in 2005 the Legislature deemed it necessary to expand the scope of *the wrongful death act*, by incorporating into that statute “a death as described in §2922a. The Legislature took this step precisely because, in the wake of the Court of Appeals decision in *McClain*, it was concerned that §2922a was proving inadequate for providing an appropriate remedy for fetal deaths.

To remedy this concern, the Legislature expanded the reach of the wrongful death act and it is that act that forms the basis for Ms. Simpson’s claim in this case, not §2922a. Despite defendants’ best efforts to make Ms. Simpson’s claims rest on a statute which provides her no remedy, the fact is that her claim is based on the post-2005 wrongful death act, not §2922a.

The history leading to the 2005 amendment of §2922(1) demonstrates that the Michigan Legislature first created §2922a in 1998, later found it wanting in some respects, and it determined that the recovery of damages for the death of a nonviable fetus would have to be enshrined in another statute, the wrongful death act. The defendants would have the Court ignore this history in which the Legislature made §2922(1) the principal vehicle for the recovery of damages arising out of the death of a fetus. They ask this Court to rule that plaintiff’s cause of action must instead be based on the statute that the Legislature was concerned was not adequate for protecting the deceased fetus’s interests.

Finally, the defendants have argued that Ms. Simpson's cause of action, which in their view is based on §2922a, must be "filtered through" the wrongful death act. This Court has on several occasions used this "filtering through" terminology in describing the interrelationship between a wrongful death action and the underlying cause of action supporting a wrongful death claim. *See Wesche*, 480 Mich at 88-89; *Jenkins*, 471 Mich at 165.

But, for the reasons just discussed, this "filtering through" does not apply here since Ms. Simpson's underlying "cause of action" is not based on §2922a. Rather, as the Court's decision in *Jenkins* demonstrates, Ms. Simpson's underlying claim is one of medical malpractice and it is that claim that is "filtered through" the wrongful death act such that her medical malpractice claim governs the applicable limitations period, *see Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987), as well as the qualifications of expert witnesses, *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), and the scope of recoverable damages. *Shinholster*, 471 Mich at 559; *Jenkins*, 471 Mich at 165-168.⁴

There is no "filtering" to be done between §2922 and §2922a in the sense that this Court described in such cases as *Wesche*. These are, instead, two distinct statutes that, except for the "incorporation" into §2922 of the types of deaths described in §2922(1), operate independently of

⁴This brief discussion of the substantive law applicable in four wrongful death medical malpractice cases decided by this Court raises several significant questions that defendants simply have no answer to. If the defendants were actually correct and Ms. Simpson's underlying cause of action is based on §2922a, what is the statute of limitations governing such a cause of action? And, are there any restrictions on the experts that Ms. Simpson would be able to call in this "cause of action" under §2922a? And, if this is actually a cause of action under §2922a and not one for medical malpractice, what are the scope of the damages that a plaintiff could collect in such a wrongful death case?

each other. *See* MCL 600.2922a(3).

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, The Estate of Antaun Simpson, deceased by his Personal Representative and mother, Shakeeta Simpson, respectfully requests that this Court deny defendants' application for leave to appeal in its entirety.

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