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Enid Cosgriff Murphy v. Michael Edward Murphy : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ENID COSGRIFF MURPHY,
Plaintiff-Respondent,

— v. —

MICHAEL EDWARD MURPHY,
Defendant-Appellant.

Case No. 13748

PLAINTIFF-RESPONDENT'S BRIEF

Appeal from the District Court
of Salt Lake County, Utah
Honorable Peter F. Leary, Judge

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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action for divorce.

DISPOSITION IN THE LOWER COURT

Respondent was awarded a decree of divorce, restoring her former married name, confirming her ownership of assets acquired before this marriage or by inheritance or devise afterwards, directing return of a promissory note she held from appellant and rejecting appellant's belated claim that respondent should share in losses purportedly sustained by appellant because of this marriage.

PRELIMINARY STATEMENT

The parties will hereinafter be designated as they appeared in the trial court.

The statement of facts in defendant's brief is not accepted by plaintiff and should not be favorably considered by this court since it is essentially limited to facts defendant emphasized on trial to support his claim for contribution but ignores or minimizes the effect of facts tending to support the findings and decree by the trial court.

Thus, the statement of facts does violence to the long-standing principle that in divorce cases, the Supreme Court will "assume that the trial court believed the evidence which supports the findings" and "will review the whole evidence in the light most favorable to them; . . ." *Stone v. Stone* (1967) 19 Utah 2d 378, 431 P. 2d. 802.

Plaintiff therefore presents, in the following statement of facts, the evidence the trial court reasonably could have believed in reaching its decision.

STATEMENT OF FACTS

This marriage in 1964 was the defendant's first. He was then 46 and plaintiff was 52. They had no children (R. 1,244). Previously, plaintiff had been married for 24 years to Walter E. Cosgriff, President of Continental Bank & Trust Company in Salt Lake City, which marriage terminated in 1961 with Mr. Cosgriff's death in an automobile crash (R. 98).

By her complaint, the plaintiff asked for a divorce and restoration of her former married name. In paragraph 5 of her complaint, plaintiff alleged that neither

she nor the defendant was dependent upon the other for financial support, since defendant was a physician in private practice and plaintiff had independent financial means. Plaintiff therefore waived any right to alimony. Plaintiff also alleged that the rights of the parties to such property as had been acquired by them during the marriage were being adjusted between them and thus, she did not ask the court for assistance on that subject (R. 1,2).

By his answer and counterclaim, defendant denied the allegations of paragraph 5 and alleged instead that the parties were the owners of assets which he estimated had a value "in excess of three million dollars". He demanded judgment against the plaintiff allocating $300,000.00 to himself and requiring payment of more than $37,000.00 in obligations owed on his Minnesota farm properties (R. 5,6).

In a proceeding prior to trial, the trial court ordered, on April 18, 1974, that counsel for the respective parties were to prepare and file with the court by April 29, 1974, a statement of the assets of the respective parties and the assets, if any, of the marital estate, together with a proposed plan of distribution of such assets in the event the court should grant a decree of divorce (R. 38,39). Plaintiff's statement, dated April 29, 1974 listed her assets as of April 17, 1974 as consisting of cash, bank stocks and miscellaneous items of a total value of $1,528,522.18. As shown by the statement, and as conceded upon trial, (R. 111,155) these assets were given to plaintiff by her late husband Walter E. Cos-

griff or were received by her prior to the marriage herein upon the distribution of the estate of J. E. Cosgriff or were received by her upon distribution of estates of other members of the Cosgriff family which estates were in the process of probate at the time of the marriage to the defendant (R. 56 to 60).

Plaintiff proposed that the court confirm her as the owner of those listed assets since all had been acquired from her former husband or from the estates of various members of the Cosgriff family and none of the assets had been acquired from or received from the defendant. Plaintiff also proposed that any sums the defendant had obtained from the sale of his Minnesota farm properties and equipment be confirmed as property of the defendant and she also offered to return to the defendant, without payment, a note for $22,500.00 which note had been carried by her on her statement of assets without value (R. 58, 59, 60).

The statement submitted by the defendant did not show the value of assets at or near the time of trial. Instead, there was submitted an exhibit purporting to show the defendant's net worth immediately prior to the marriage and the value of assets he owned as of a date more than 14 months prior to trial. This exhibit, together with others, purported to demonstrate that defendant had experienced a decrease in net worth during and because of the marriage totalling $133,990.00 and he proposed that the court require the plaintiff to pay to defendant an amount equal to one-half of that loss or $66,995.00 (R. 46-55). Defendant makes the same claim in this court as shown by his brief at pages 19 and 20.

Defendant is a physician who received training at the Mayo Clinic in his specialty of internal medicine. At the time of trial he was in good health and practicing his specialty in Las Vegas, Nevada. He claimed he did not know what his income had been from his practice in previous years because he had not received figures from his accountants since December 1972. When pressed to give the court at least an estimate of his income from the practice of medicine, he snapped "I'm not an economist. I'm a physician." Since he had only been in Las Vegas about one year, he stated it was premature to determine if he was making the kind of income he had hoped to make when he moved to Las Vegas but he finally estimated his income at about $40,000.00 taxable income per year (R. 151 to 53).

Upon trial, defendant repudiated that portion of his counterclaim in which he demanded a $300,000.00 award and he specifically disclaimed any right to share in the assets plaintiff had acquired from her former husband or from the estates of the Cosgriff family (R. 142, 155).

In lieu of the demand in the counterclaim, defendant urged the court to order the plaintiff to contribute to a loss which defendant had purportedly sustained by reason of the marriage totalling $133,990.00. That claim is repeated in this court. The manner in which the claim was computed may be determined by examining the financial exhibit (R. 50) submitted to the court prior to trial. That exhibit shows defendant contends that he sustained a loss in the sale of various real and personal properties and in the sale of his Salt Lake City medical practice.

However, it soon developed on cross-examination that each item of property listed on the exhibit had been sold by the defendant of his own volition and he had received the proceeds of each sale and applied them to his own needs and purposes. During a previous separation of the parties in 1968, defendant sold the Brighton cottage at a price much less than its value and he listed and sold the home on Fortuna Way in Salt Lake City for $53,000.00, a price offered by a willing buyer. Deendant agreed he received and used the proceeds from these sales (R. 252, 253).

After the parties reconciled in late 1968, defendant sold two of his three automobiles and his medical practice because he needed money to pay the farm bills which had been incurred in the operation of the farm he had acquired before this marriage and which he had begun to operate just prior to the marriage (R. 248, 253, 254).

The largest single item of loss claimed by the defendant on his exhibit (R. 50) is the total of $113,600.00 purportedly lost by him because of a sale of the farm property in Minnesota. However, on cross-examination the defendant admitted that he made the sale of that property in late March 1973, about ten months after the parties finally separated and that he felt compelled to sell because he had experienced adverse weather conditions the previous year and when he applied for federal loan assistance for the coming year, he learned that the President had impounded such loan funds and thus he did not believe he could operate the farm through another year without financial assistance. He sold the

entire farm including all equipment, buildings and livestock to a land speculator for an amount which he conceded was substantially less than he could have obtained in other circumstances and at no time did he either inform the plaintiff, consult with her about the wisdom of the sale or offer to account to her for the proceds of the sale after it had been completed (R. 158, 159, 160).

Cross-examination also revealed that in each of the eight years in which defendant filed his Federal Income Tax Return as a married man filing separately, he had shown substantial farm operation losses which exceeded his medical practice income; thus he paid no income tax, did not share any of the farm proceeds with the plaintiff and did not ask her to share the losses (R. 251).

Defendant also conceded that during the course of this marriage, the plaintiff had made gifts to the defendant of cash or property of the total value of $68,994.00 (R. 268).

Much of the foregoing evidence concerning the loss defendant claimed to have suffered by reason of this marriage was received over the vigorous and continued objection of plaintiff. One of the grounds of the objection was that defendant did not seek this relief in his counterclaim and therefore the proof and the theory were outside the issues presented by the pleadings (R. 196). Defendant moved the court for its order permitting him to amend the counterclaim but the court denied the motion "at this time" and thereafter heard much of the evidence just described (R. 197 et seq.). After

hearing all of the evidence, the court again heard argument on the subject and then, by minute entry of May 6, 1974, the motion to amend was denied (R. 44).

As is frequently true in a divorce case, there was conflicting evidence concerning the mental cruelty which plaintiff had alleged in her complaint. Plaintiff testified, and the court apparently believed, that defendant had been vocally critical of her personality, her appearance, her friendships and almost every other aspect of her make up (R. 98). Plaintiff was and is a devout Catholic and attended mass daily and thus, defendant's derogatory remarks about Catholic clergy and lay members of the Catholic order offended her deeply (R. 99) and defendant characterized her belief that Jesus Christ is the son of God as "garbage" which she viewed as blasphemy (R. 100, 199).

Defendant increased his criticism after the parties moved to Minnesota to the point that plaintiff testified his faultfinding, criticism and arrogance became even more frequent and when she remonstrated with him, he would refuse to speak to her for days at a time and all of this conduct, according to plaintiff's testimony, made her constantly upset and nervous and caused her to endure insomnia for several weeks at a time (R. 98, 103, 107).

Defendant, upon cross-examination, agreed that he and the plaintiff had had marked differences of opinion on a great many subjects and he conceded that a continuation of the marriage would be intolerable (R. 245, 246).

Based upon all of the foregoing evidence, the trial court made its findings, reached its conclusions of law and entered a decree awarding plaintiff an interlocutory decree of divorce, confirming her ownership of the assets she had acquired outside of the marriage, confirming defendant's ownership of the proceeds of the sales of his property, restoring plaintiff's former married name, awarding no alimony or costs and directing that plaintiff return to defendant, without payment, a note signed by the defendant and in favor of the plaintiff for $22,500.00. Plaintiff promptly returned the note (R. 78) and after defendant's motion to amend the findings of fact, conclusions of law and decree of divorce was denied by the court (R. 80, 81, 82) this appeal followed.

ARGUMENT

POINT I

DEFENDANT'S CLAIM FOR CONTRIBUTION WAS NEITHER TIMELY NOR SUPPORTED BY THE EVIDENCE AND THE TRIAL COURT PROPERLY REJECTED IT.

In his counterclaim dated and filed February 28, 1973, defendant alleged that both parties had contributed to the accumulation and preservation of substantial assets which were estimated by defendant to have a value of more than three million dollars. Of that total sum, defendant alleged that there were "cash and other liquid assets estimated in the amount of $1,900,000.00" in Utah, Nevada, Montana and Idaho and of that sum, he asked that the court award him $300,000.00 (R. 4, 5).

He made no claim that the marriage had resulted in a decrease in his net worth nor did he claim that the marriage had resulted in a loss to him which plaintiff should be required to share.

In her reply to the counterclaim, plaintiff denied that the parties owned substantial assets and affirmatively alleged that the assets she owned were not part of any marital estate and she denied that defendant had made any contribution of substance "to such marital estate as may be found to exist" (R. 10, 11).

Defendant made no attempt to amend his pleadings or to change the issues framed by the pleadings until the case came on for trial more than a year later. However, upon trial defendant never offered any evidence to support his claim that there was a substantial marital estate or that he had made contributions to it. Instead, shortly after the trial began, defendant conceded that he did not claim any right to the assets which plaintiff had acquired from her former husband or from the estates of members of the family and it was also conceded at that same time that defendant no longer denied plaintiff's allegation that each of the parties was self-supporting and neither required support from the other (R. 155).

By these concessions, defendant effectively destroyed the basis of the allegations in his counterclaim concerning the financial relationship of these parties. He then began his attempt to establish a new and different claim to the effect that during the marriage he

had sustained a decrease in his net worth resulting in a loss of $133,990.00 which plaintiff should share by a contribution of one-half of the loss or $66,995.00 (R. 46-55, 156).

Plaintiff objected to evidence offered in support of this new claim and the objection was at first sustained (R. 145) but after the weekend recess, during which the court presumably reflected upon the matter, the court stated that plaintiff's continuing objection would be recognized but that defendant would be permitted nevertheless to proceed (R. 193).

Defendant therefore proceeded to testify concerning each of the properties and assets which may be found listed on his financial exhibit submitted to the court before trial (R. 50) and attempted to show that as to each of the enumerated assets, a loss had been sustained, reaching the total of more than $133,000.00 (R. 193 et seq.).

Defendant offered testimony concerning the value and disposition of each of the assets which form the financial exhibit (R. 50) and he contended in the trial court, and reiterates here in the first three points in his brief, that the items of personal and real property shown on the exhibit each had a specific financial value and each had been totally lost as a result of this marriage. Defendant's contention ignores a basis principle of evidence that "testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination." *Al-*

varado v. Tucker (1954) 2 Utah 2d 16, 268 P. 2d 986. In the light of that principle, the following paragraph-by-paragraph summary will describe each of these items of real and personal property and show what happened to it:

FORTUNA WAY HOUSE

Defendant sold this house in 1968, during a previous brief separation of these parties, for $53,000.00 which was the price a willing buyer agreed to pay after the property had been listed with a realtor. After payment of mortgages, selling commission and closing costs, defendant received $13,000.00 which he testified he needed to pay farm bills for the Minnesota farm property he had inherited in 1963 and which he had begun to operate as a farm just prior to this marriage (R. 209, 248, 252).

BRIGHTON CANYON COTTAGE

This property is listed on the financial exhibit at a value of $20,000.00 but defendant admitted he made the decision to sell that cottage, prior to the former temporary separation of the parties, and had in fact sold it for $8,000.00 which he then knew was not a reasonable price because he recognized the sale was made at far less than market value. The proceeds of that sale were kept and used by him. (R. 252).

MINNESOTA FARM AND EQUIPMENT

Defendant claimed in his financial exhibit that the Minnesota farm and its equipment had a value of

$113,600.00 immediately prior to this marriage. The farm, known as the Murphy farm, had been inherited by him in 1963 and he had "just barely begun" to operate the farm shortly before these parties were married. Thereafter, an adjoining farm, known as the Sullivan farm, was purchased under a real estate contract with the financial assistance of the plaintiff. As part of the arrangements for reconciliation following the 1968 separation of these parties, defendant gave plaintiff a release of any obligation she might owe on the Sullivan farm (Ex. 22P) and thereafter improvements of the buildings on the two farms were made and additional equipment and stock were acquired. Defendant decided to move to Minnesota to be closer to the farm operation in 1969 and he operated the farm as his sole enterprise and never as a joint enterprise with plaintiff. During eight of the taxable years these parties were married, defendant reported his farm income on his own income tax returns, utilizing claimed losses from the farm operation as deductions against his medical practice income and never once claimed plaintiff was a part of the farm operation. Finally, after a disastrous farm year because of high water and other problems in 1972, defendant applied for federal loan assistance, intending to continue farming in 1973 but when the President impounded funds for such loans, defendant sold the entire farm acreage, all of its buildings and their furnishings, all of the farm equipment including granaries, feeders and silos, plus all livestock to a speculator for a total price of $280,000.00, which defendant conceded was considerably less than he could have obtained if he had

sold the properties to someone other than a speculator. Defendant did not inform plaintiff of the sale nor account to her afterwards for any of its proceeds (R. 156, 157, 160, 251, 258, 259, 260).

AUTOMOBILES

Defendant's exhibit (R. 50) listed three automobiles, two of which he had as of the beginning of the marriage and one which was acquired afterwards. The latter automobile was still in defendant's possession at the time of trial. The first two automobiles, having a value defendant claimed of $6,500.00, were sold by him for an amount he did not disclose but, in any event, he took the money from the sales of those cars and applied it in payment of bills he had incurred on the farm (R. 253, 254).

MEDICAL PRACTICE

Defendant's exhibit showed he valued his former medical practice in Salt Lake City at $15,000.00, consisting of $10,000.00 in accounts receivable and $5,000.00 in equipment and goodwill. At the time of the marriage, defendant had just begun to operate the farm he inherited in Minnesota and he apparently intended to continue his medical practice in Salt Lake City and to visit the farm only periodically to oversee the activities of someone hired to run the farm (R. 248). However, in 1968, he decided it was necessary that he live closer to the farm and he made the decision to move to Minnesota in 1969. He testified that he knew he would be taking a "big financial loss" in his medical practice but "I felt

I could somehow compensate for it by being there close to the farm and running them (sic) more economically" (R. 270). He sold his medical practice in Salt Lake City to Dr. Ron Ward who thereafter paid him for the practice with regular payments over a period of time. The purchaser collected some of the accounts receivable and sent the proceeds to the defendant and the remainder of the accounts were collected by the Continental Bank which forwarded the collected amounts to him (R. 249, 250). Thus, it was demonstrated conclusively that the sale of the medical practice resulted from defendant's own decision to move to Minnesota and that all of the money from that sale was received by the defendant. There was, therefore, no basis for defendant's claim that plaintiff's conduct had forced him to lose the entire value of the medical practice and that plaintiff should help regain that loss by a contribution of one-half.

COUNTRY CLUB MEMBERSHIP AND SECURITIES

Defendant had received the country club membership as a gift from the plaintiff and he admitted he had sold it for his own purposes although the amount he received was not disclosed (R. 254). There was never any testimony concerning the nature of the securities defendant allegedly had owned and later lost and thus the only evidence concerning the assets listed on the final portion of his financial exhibit (R. 50) showed he had converted the assets to his own use.

Although defendant contends the trial court erred in not permitting him to amend his counterclaim to

claim contribution from the plaintiff, it is clear from the record that defendant was not prejudiced by that ruling because defendant was permitted to introduce the evidence concerning that theory and this record conclusively demonstrates that the evidence simply failed to establish the claim so that the court was amply justified in rejecting it.

Defendant also claims the trial court erred in rejecting evidence concerning what defendant might have done with his assets and what his financial position might have been if he had not married the plaintiff (R. 230 et seq.). The following excerpt from the transcript illustrates the nature of the proof which was offered and rejected:

> Q. (By Mr. McMurray) Now, Dr. Murphy, if you had not married Enid Cosgriff, can you state with reasonable certainty whether or not you would have continued your medical practice here in Salt Lake City?
>
> Mr. Snow: Objection. Objected to as immaterial and irrelevant. They did get married, and he was a grown man at the time.
> The Court: Sustained.
>
> . . . . . .
>
> Q. (By Mr. McMurray) Dr. Murphy, can you state with reasonable certainty if it hadn't have been for your marriage to Enid Cosgriff whether or not you would still be owning the basic acreage which you inherited in Minnesota, the 312 acres, the Brighton property that you have described, the cottage, the canyon property, and the house on Fortuna Way?

> Mr. Snow: Objection. Objected to, your Honor, for the reasons previously stated and also because it's pure speculation. It is totally irrelevant and immaterial to the issues in this case.
>
> The Court: Sustained. (R. 239,

These parties had been married ten years at the time of the trial. The proffered evidence, seeking to elicit what might have occurred during that ten year period but for the marriage, constituted pure and unbridled speculation and could have furnished no proper basis for the court to make any finding concerning an alleged loss.

The evidence offered by the defendant appeared to represent an attempt by him to claim that the court should ignore the fact that these parties were properly married in 1964 and had continued to live as man and wife at least the next nine years. Defendant accepted such benefits as were provided by the marriage but would have had the court ignore the fact and attempt to treat the rights of the parties as if the marriage had never occurred. Defendant, having participated in the marriage ceremony and in the married life that followed and, by his counterclaim, having sought to terminate the marriage by a divorce, may not now properly ask to be restored to the condition in which he found himself prior to the marriage.

Neither in the trial court nor in his brief in this court does defendant cite any authority which would lend even remote support to the theory he has advanced

and this is, perhaps, for the very good reason there is no legal precedent for his position.

In the first three points of his brief, dealing with his claim for contribution, defendant pleads for "equitable treatment" and it is thus ironic to note that his financial exhibits completely ignore the substantial financial contributions which, as his testimony reveals, plaintiff had made to him or to his various properties. The record shows that plaintiff gave him $15,000.00 for the down payment on the Sullivan farm purchase contract (R. 202, 203), paid $6,500.00 for remodeling the Sullivan farm home (R. 210), purchased an adjacent woodlot (R. 209) and paid for the remodeling of the main farmhouse (R. 210, 212). Prior to the departure for Minnesota, plaintiff had made substantial contributions to the improvement of the Brighton cottage (R. 194) and it is a reasonable inference from the evidence that she made other substantial and continuing contributions to the payment of the living expenses of these parties because defendant admitted, and his exhibits reveal, that all of the earnings from his medical practice in Minnesota went into the farm (Ex. 20-D, R. 244). Aside from payment of daily living expenses, plaintiff's contributions formed part of her gifts to the defendant of more than $68,000.00 since 1967, which gifts defendant reluctantly conceded he had received (R. 268).

Defendant seeks equity but he is not willing to bestow it. The trial court properly exercised its discretion in rejecting his assorted claims for contribution and its action should be affirmed and endorsed by this court.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE DECREE OF DIVORCE TO PLAINTIFF.

Although defendant contends the evidence respecting the grounds for divorce preponderated in his favor, he has demonstrated no compelling reason why the trial court should have granted the divorce to him, instead of to the plaintiff. He does not contend, in his brief in this court, that no divorce should have been granted at all and he appears to concede, as he did in the trial court, that this marriage is beyond salvation.

As is clearly shown in plaintiff's statement of facts, found earlier in this brief, plaintiff's testimony provided ample grounds for the court to conclude a divorce was required and to award it to plaintiff. Even if the trial court had also found that defendant had produced grounds for divorce, the ultimate result would have been for the court to order a dissolution of this marriage because, in either event, the evidence would have shown clearly that this marriage is at an end.

As this court observed in its 1971 decision in *Mullins v. Mullins* 26 Utah 2d, 485 P.2d 663:

> When a divorce is granted to one, both of the spouses effectively are divorced. There seems to be nothing in our statute or in logic that would prevent a dissolution of the marriage by granting a divorce to both, where the facts fault each equally as respect to grounds therefor — if such procedure would make anybody happy. Whether

one or the other or both should be given a divorce should be left to the sound discretion of the trial court based on the evidence adduced.

Defendant has suggested no reason why this court should substitute its judgment for the studied determination by the trial court that plaintiff should be awarded a divorce. This court has frequently observed that the trial court is in an "advantaged position" because it observes the witnesses as they testify and is thus in a position to judge the credibility of the witnesses and the extent to which their testimony should be believed. *Stone v. Stone supra; Searle v. Searle* (1974) — Utah 2d — 522 P.2d 697 and cases therein cited.

The *Searle* case also repeats the long-standing rule on appeal in this court that "the burden is upon appellant to prove such a serious inequity as to manifest a clear abuse of discretion". The defendant, in his claim that the decree should have been awarded to him or to both of the parties, has failed to carry that burden in this court.

CONCLUSION

Defendant, by his counterclaim, alleged that the "parties are owners of substantial assets" which were estimated to be of a value in excess of $3,000,000.00, of which defendant demanded $300,000.00 as his share. As the trial neared and it became apparent there was no such marital estate, defendant abandoned his counter-

claim demand and conceded that he had no right to share in the assets plaintiff had received by gift before marriage or by inheritance or devise afterward.

Developments upon trial proved that defendant's concession was more illusory than real. While disclaiming any right to plaintiff's assets, defendant sought to obtain a sizeable portion of them by the belated claim that plaintiff should share in losses allegedly sustained by the defendant because of the marriage and because of plaintiff's "enthusiasm and encouragement" (R. 142) as defendant expanded his farm operation. When the evidence revealed the defendant operated the farm as his own, taking such income benefits as it produced and claiming such tax credits as its losses permitted, defendant then attempted to support a claim by offering evidence concerning what his financial condition might have been if he had not entered into this marriage ten years earlier.

The trial court saw this for what it was — a plain attempt to gain indirectly that which the law and the facts would not permit him to gain directly. Defendant is a medical doctor without obligations of any kind and he is presently earning $40,000.00 a year and obviously will make more as he becomes better known in his community. Although defendant's brief would leave the impression that he is without assets, he volunteered to the trial court (R. 176) that if a doctor earns $50,000.00 a year "that's the equivalent of having a million dollars in assets, I guess, the current return rates."

Under these facts and upon this record, the trial court's action was eminently fair and correct and it should be sustained by this court.

Respectfully submitted,

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