To Be Argued By:
Michael P. Kenny, Esq.
Time Requested:
30 minutes

APL-2023-00096

Court of Appeals
State of New York

MICHAEL SABINE,

Claimant,

- vs -

THE STATE OF NEW YORK,

Defendant.

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This action was commenced by the Claimant-Appellant's filing and service of a Notice of Claim on or about March 12, 2015 in the New York State Court of Claims by Claimant-Appellant, Michael Sabine, with respect to injuries he sustained as a result of a motor vehicle collision which occurred on December 17, 2013 while he was driving northbound on State Route 96A in the Town of Waterloo, County of Seneca, and another driver, Linzy Patrick, an office manager at Seneca Lake State Park and an employee of Defendant, State of New York, chose to pass the Claimant-Appellant's vehicle on his left hand side, subsequently losing control of her vehicle, and crossing into Claimant-Appellant's lane of travel, causing the subject collision. Issue was joined by service of a Verified Answer on or about October 29, 2015.

Claimant-Appellant filed a Motion on or about August 8, 2017, in which Claimant-Appellant requested an Order granting summary judgment in Claimant-Appellant's favor as to the issue of liability, and striking the Defendant-Respondent's first, second, fifth, and seventh affirmative defenses.

On December 5, 2017, the Decision and Order of the Honorable Diane L. Fitzpatrick, dated November 8, 2017, was filed, and said Decision and Order indicated the following: (1) Claimant-Appellant's Motion for summary judgment was denied; (2) Claimant-Appellant's Motion to strike the Defendant-

Respondent's second affirmative defense as to the existence of negligence and/or culpable conduct on the part of the Claimant-Appellant was granted; and (3) Claimant-Appellant's Motion to strike the Defendant-Respondent's first, fifth, and seventh affirmative defenses was granted, as to the State's immunity from liability, Claimant-Appellant's alleged failure to utilize available seat belt(s), and Claimant-Appellant's alleged commencement and settlement of other claims for the same injuries as set forth in the within claim, respectively.

On or about June 27, 2018, after the Court of Appeals Decision in Rodriguez v. City of New York, 31 N.Y.3d 312 (Apr. 3, 2018), Claimant-Appellant filed a Motion to Renew Claimant-Appellant's prior Motion seeking summary judgment as to the issue of liability.

On November 7, 2018, the Decision and Order of the Honorable Diane L. Fitzpatrick, dated September 26, 2018, was filed. Said Decision indicated that Claimant-Appellant's Motion to Renew was granted, as was Claimant-Appellant's underlying Motion for summary judgment as to the issue of liability. The Judge further indicated that the Court would confer with counsel to determine when the issue of ***damages*** would be heard at trial and entered interlocutory judgment in favor of Claimant-Appellant.

Thereafter, a trial as to the issue of damages was scheduled to take place on November 18, 2019. Said trial was subsequently adjourned to March 16, 2020,

and said date was cancelled as a result of the COVID-19 public health emergency. The parties thereafter agreed to participate in a virtual trial, which was held on January 11th through 14th of 2021.

On October 27, 2021, the Decision of Hon. Diane L. Fitzpatrick was filed with respect to Claimant-Appellant's damages, finding that the Claimant-Appellant's injury qualified as a "serious injury" as defined by Section 5102(d) of the New York State Insurance Law and awarded the Claimant-Appellant $375,000.00 for past pain and suffering and $175,000.00 for future pain and suffering for a total award of $550,000.00.

Thereafter, on December 23, 2021, Judgment was entered by Eileen F. Fazzone, Chief Clerk of the New York State Court of Claims in the amount of $556,187.50, plus recovery of the Claimant-Appellant's filing fee in the amount of $50.00. In computing the amount of the Judgment, the Chief Clerk found that prejudgment interest at the rate of nine percent per annum is owed from October 27, 2021, the date of decision establishing serious injury and damages, to December 22, 2021, the date of entry of judgment, for a gross sum of $6,187.50.

Claimant-Appellant respectfully submits this brief in opposition to the Court's determination that prejudgment interest runs from the date of decision establishing serious injuries and damages. Instead, as will be demonstrated herein, both the record and law establish that prejudgment interest should properly run

from the date that common-law liability attached by summary judgment in Claimant-Appellant's favor, that being September 26, 2018.

Accordingly, it is respectfully submitted that this Court should modify the Judgment filed and entered by Eileen F. Fazzone, the Chief Clerk of the Court of Claims pursuant to the Decision signed by Hon. Diane L. Fitzpatrick on October 27, 2021 and filed by the Clerk of the Court of Claims on November 29, 2021 to establish that prejudgment interest pursuant to CPLR § 5002 begins on the date that common-law liability attached by summary judgment in Claimant-Appellant's favor (that being September 26, 2018) and all other findings as the interest of justice may require.

QUESTIONS PRESENTED

1. Whether the Appellate Division, Fourth Department, erred in determining that Claimant-Appellant's contention that is the subject of this appeal (particularly, that prejudgment interest should begin to run as of the date upon which a determination as to common-law liability (e.g., negligence) is made), falls under a "recognized exception to the preservation rule," in that it involves an issue of law only?

Brief Answer: No. The Court correctly held that Claimant-Appellant's contention regarding the date or event upon which prejudgment interest attaches is a question of law alone, and not one of fact, and therefore this matter is appropriately presented to the Court of Appeals. *See*, Oram v. Capone, 206 A.D.2d 839, 840 (4th Dept., 1994) [internal quotation marks omitted].

2. Whether the Court of Claims (Eileen F. Fazzone, Chief Clerk) erred in setting the date upon which prejudgment interest begins to run as the date of decision establishing serious injury and damages (that being October 27, 2021).

Brief Answer: Yes. The Court erred in setting the computation date for prejudgment interest as the date of decision establishing serious injury and damages (that being October 27, 2021). The Court improperly relied upon the decision of Ruzycki v. Baker, 301 A.D.2d 48 (4th Dept., 2002), which this brief will demonstrate is no longer good law given the more recent decision of Van

Nostrand v. Froelich, 44 A.D.3d 54, 59, 61-62 (2nd Dept., 2007) that found that serious injury is decidedly an issue of damages, and not liability, and that prejudgment interest runs from the date on which common-law liability (e.g., negligence) was established. This 2nd Department rule is in line with the rule on this issue in the 1st and 3rd Departments. *See, e.g.*, Kelley v Balasco, 226 A.D.2d 880 (3rd Dept., 1996); Ives v Correll, 211 A.D.2d 899 (3rd Dept., 1995); Reid v. Brown, 308 A.D.2d 331 (1st Dept., 2003). Therefore, prejudgment interest in this case should run from the date of that common-law liability was found; to wit, the date of the liability decision (of September 26, 2018) of the Court of Claims (Hon. Diane L. Fitzpatrick, Syracuse) in this matter.

The 1st, 2nd and 3rd Department rules on this issue are also in line with prior precedent of the Court of Appeals, as established in Love v. State of New York, 78 N.Y.2d 540, 541 (1991), in which this Court held that, "[i]n a bifurcated personal injury action prejudgment interest under CPLR 5002 should be calculated from the date of the liability determination, rather than the date of the verdict fixing damages." In Love, another case *involving an automobile collision,* this Court explained that "[o]nce a judicial determination has been made that a party has been wrongfully injured by another, it will, except in rare cases, trigger the commencement of the period for which interest is awarded as a matter of law,"

linking the commencement of this interest period to a determination of fault. Love v. State of New York, 164 A.D.2d 155, 561 N.Y.S.2d 945, 946 (4th Dept., 1990).

STATEMENT OF FACTS

Claimant-Appellant was awarded summary judgment as to the issue of common-law liability against Defendant-Respondent on or about September 26, 2018 by Decision and Order of Hon. Diane L. Fitzpatrick (Court of Claims, Syracuse, New York) (R. at 432-436.) as a result of a result of a motor vehicle collision on December 17, 2013 when he was driving northbound on State Route 96A in the Town of Waterloo, County of Seneca, when Linzy Patrick, an office manager at Seneca Lake State Park and an employee of Defendant-Respondent, chose to pass the Claimant-Appellant on his left hand side, subsequently losing control of her vehicle, and crossing into Claimant-Appellant's lane of travel, causing the subject collision.

Thereafter, following a bench trial, Claimant-Appellant obtained a damages verdict by Decision of Hon. Diane L. Fitzpatrick (Court of Claims, Syracuse, New York) on or about October 27, 2021 in the amount of $550,000.00. (R. at 7-30).

A Judgment was thereafter filed on or about December 22, 2021 by Eileen F. Fazzone, Chief Clerk of the Court of Claims setting interest from the date of the damages verdict on October 27, 2021. (R. at 31-34). A Notice of Entry of said

Judgment was served by counsel for Defendant-Respondent on or about January 10, 2022. (R. at 6). It is from this Judgment that Claimant-Appellant appeals.

ARGUMENT

POINT I

THE APPELLATE DIVISION CORRECTLY HELD THAT CLAIMANT-APPELLANT'S CONTENTION THAT IS THE SUBJECT OF THIS APPEAL (PARTICULARLY, THAT PREJUDGMENT INTEREST SHOULD BEGIN TO RUN AS OF THE DATE OF A DETERMINATION AS TO COMMON-LAW LIABIILTY), FALLS UNDER A RECOGNIZED EXCEPTION TO THE PRESERVATION RULE IN THAT IT INVOLES AN ISSUE SOLELY OF LAW.

The Appellate Division, Fourth Department, in its decision of March 17, 2023, correctly held that the question being raised by Appellant on appeal involved a question of law in the Fourth Department with respect to the calculation of prejudgment interest in automobile accident cases that could not "have been obviated or cured by factual showings or legal countersteps in the trial court." Oram v. Capone, 206 A.D.2d 839, 840 (4th Dept., 1994) [internal quotation marks omitted].

In this case, the majority of the intermediate Appellate Court panel correctly found that, under the facts and posture presented, particularly the fact that the appealable issue was one of pure law that did not relate to the merits of the underlying decision of the lower court, but rather related to the computation of prejudgment interest by the Clerk of Court ***after*** the Decision was rendered by the

trial judge (see, CPLR § 5002), this case fits squarely within this exception to the preservation rule.

Moreover, despite Defendant-Respondent's arguments in the motion for leave to appeal to this Court, it is clear that this issue would not have been cured at the trial court level as when the issue was raised with the Court, the trial judge, through her clerk, ***invited*** counsel to proceed directly to an appeal, advising that counsel "may want to have the Fourth Department revisit this issue," relying on Ruzycki and reiterating the trial court's belief that "interest begins to run when liability is established and liability is not established until serious injury has been demonstrated." (R. at 466-467). As such, it was apparent to Appellant that taking that "legal counterstep," (e.g. a post-trial motion), would have served only to delay this matter further and result in the same need to proceed with the appellate process.

Moreover, Telaro v. Telaro, 25 N.Y.2d 433, 439, *rearg denied,* 26 N.Y.2d 751, cited by the concurring justices, supports the liberal application of the "preservation exception," and allowed the plaintiff-appellant in that case to raise an issue that had not been raised at either the trial or at the intermediate appellate court.

Based on all of the foregoing, again, it is Appellant's contention that the Appellate Division, Fourth Department, correctly found that the issue raised by

Appellant on appeal (that of whether interest under CPLR §5002 should run from the date of the decision determining the liability as opposed to the date that serious injury is established), is an issue solely involving a matter of law, which is a recognized exception to the "preservation rule, " and therefore the same is properly before this Court.

POINT II

THE INTERMEDIATE APPELLATE COURT INCORRECTLY AFFIRMED THE DECISION OF THE LOWER COURT WHERIN IT RULED THAT PREJUDGMENT INTEREST RUNS FROM THE DATE OF THE DECISION ESTABLISHING SERIOUS INJURY AND DAMAGES AS OPPOSED TO THE DATE OF THE DECISION ESTABLISHING COMMON-LAW LIABILITY, A DETERMINATION THAT IS AT ODDS WITH COURT OF APPEALS PRECEDENT AND WITH ALL OTHER JUDICIAL DEPARTMENTS, AND UNDERMINES THE PURPOSES OF THE NO-FAULT LAW.

The decision of the lower court should be overturned because interest should run from the date that common-law liability attached by summary judgment in Claimant-Appellant's favor (that being September 26, 2018) instead of the date of the decision establishing serious injury and damages (that being October 27, 2021).

In Love v. State of New York, 78 N.Y.2d 540, 541 (1991), the Court of Appeals held that, "[i]n a bifurcated personal injury action prejudgment interest under CPLR 5002 should be calculated from the date of the liability determination, rather than the date of the verdict fixing damages." In affirming the Fourth Department decision in Love, a case involving an automobile collision, this Court

explained that "[o]nce a judicial determination has been made that a party has been wrongfully injured by another, it will, except in rare cases, trigger the commencement of the period for which interest is awarded as a matter of law," linking the commencement of this interest period to a determination of fault. Love v. State of New York, 164 A.D.2d 155, 561 N.Y.S.2d 945, 946 (4th Dept., 1990).

Despite this procedural history, subsequent to the Court of Appeals' decision in Love v. State of New York, *supra*, there emerged a split of authority between the judicial departments as to when prejudgment interest begins to run in automobile cases, specifically in "threshold" cases where plaintiffs are required to prove and sustain the "serious injury" threshold to become entitled to damages.

The Appellate Divisions of the 1st, 2nd, and 3rd Departments have all held that prejudgment interest attaches at the time that a decision is rendered establishing the existence of common-law liability (e.g. negligence), and the Fourth Department Appellate Division is left standing alone in declining to attach such prejudgment interest until the date that "serious injury" is established. See, *e.g*, Ruzycki v. Baker, 301 A.D.2d 48 (4th Dept., 2002); Manzano v. O'Neil, 747 N.Y.S.2d 813, 814 (4th Dept., 2002); Van Nostrand v. Froelich, 44 A.D.3d 54, 59, 61-62 (2nd Dept., 2007); Kelley v Balasco, 226 A.D.2d 880 (3rd Dept., 1996); Ives v Corell, 211 A.D.2d 899 (3rd Dept., 1995); Reid v. Brown, 308 A.D.2d 331 (1st Dept., 2003).

1. The Current Fourth Department Rule Setting the Date of Prejudgment Interest in Automobile Cases Is Not Consistent With The Purposes Of The No-Fault Law And The Findings of All The Other Departments That Treat Serious Injury As A Component Of Damages, Not Liability.

In setting the date that prejudgment interest begins to run in the instant case, the lower Court relies on Ruzycki v. Baker, 301 A.D.2d 48 (4th Dept., 2002), a case that, like Manzano, *supra*, has also been declined to be followed by Van Nostrand v. Froelich, *supra*. In Van Nostrand, the Second Department extensively discussed the split between the departments which, they note, leaves the Fourth Department standing alone on this issue as of the date of that decision. Van Nostrand, 44 A.D.3d at 60-62.

The lower court, (e.g., the Court of Claims in this case), argued, in support of their position setting the start date for pre-judgement interest in the instant case, that Ruzycki still continues to be cited by the Fourth Department as authority for the necessity of demonstrating serious injury before liability can attach for purposes of pre-judgment interest, citing Bush v. Kovacevic, 140 AD3d 1651 (4th Dept., 2016), as an example. (R. at 466-467). However, that issue was not decided nor discussed in the Bush case beyond the mere reference of the "Ruzycki rule" as the Bush plaintiff did not raise this issue in her summary judgment motion. Id. at 1652.

In Ruzycki, the 4th Department held that the term "liability" in motor vehicle collision cases encompasses both negligence and serious injury and that a

defendant is not "liable" for noneconomic loss under Insurance Law §5104 unless the plaintiff proves that he or she suffered a serious injury. This decision was heavily based upon the existing precedent of all of the other departments *at that time*. Ruzycki, 301 A.D.2d at 51-52. Ruzycki acknowledged that the Second and Third Departments did not include the issue of serious injury within the term of "liability," but sided with the First Department that did include the issue of serious injury in the term "liability." Id. Notably, Ruzycki is *not* a case dealing with pre-judgment interest under the CPLR, or when said interest attaches, and found only that "[i]f a plaintiff moves for summary judgment on liability and establishes negligence or fault by the defendant as a matter of law, but the issue of serious injury is either not raised or not established as a matter of law, then the court should grant summary judgment on the issue of *negligence*," agreeing with the Second Department that serious injury will not be "presumed" if not raised in the motion. Id. at 52 [emphasis added].

As discussed in Van Nostrand, the split of case law regarding this issue is not found in decisions addressing CPLR interest awards but, rather, is found in automobile cases and center on the question as to whether plaintiffs who have been granted summary judgment are required to establish serious injury at their damage trials. Van Nostrand, 844 N.Y.2d at 60. In citing Perez v. State of New York, 215 A.D.2d 740 (2nd Dept., 1995) and Zecca v. Riccardelli, 293 A.D.2d 31 (2nd Dept.,

2002), the Van Nostrand court determined that "the serious injury threshold is decidedly an issue of damages, not liability." Id. at 59. Referencing the Pattern Jury Instructions, Perez explained that "juries in liability trials are routinely instructed to apportion fault among parties and to determine proximate cause without regard to injuries or medical treatment." Perez, 215 A.D.2d at 741. The Zecca court discussed Perez and went further to find that "by holding that the issue of serious injury is 'necessarily' resolved in favor of the plaintiff [as part of liability] even where no evidence of such injury is presented, the courts may be authorizing recovery for minor injuries, which is contrary to the purpose of the No-Fault Law [Insurance Law § 5102(d)]." Zecca, 742 N.Y.S.2d at 79. The Zecca court further held that the Fourth Department (and at that time, First Department) rule to include serious injury as part of liability would result in the court "abdicating its duty by allowing a plaintiff to recover for minor injuries, merely because defendant failed to, or chose not to, respond to a motion for summary judgement on liability." Id. Moreover, the Zecca court reasoned that "[t]he practical effect of the First and Fourth Department rulings is that more unnecessary motions will occur" (e.g., in cases where there is no real dispute regarding fault such as in a rear-end collision as defendants will be forced to cross-move on the issue of serious injury even if not raised in the summary judgment motion). Id.

Critical to the case herein, by the time that the Second Department heard and ruled on Van Nostrand, *supra*, the First Department had already changed their position on this issue, in the case of Reid v. Brown, 308 A.D.2d 331 (1st Dept., 2003). In Reid, the First Department overruled its prior precedent of Porter v. SPD Trucking, 284 A.D.2d 181 (1st Dept., 2001) and Maldonado v. DePalo, 277 A.D.2d 21 (1st Dept., 2000), and held that, while serious injury still must be established before a plaintiff can collect damages under the No-Fault Act and a prior default judgement on the issue of defendant's liability did not settle the question of serious injury, plaintiff was not precluded from proceeding to damages under the No-Fault Law on the basis of the prior default judgment. Id. at 331-332.

The Third Department also treats serious injury as a component of damages, not liability. In both Ives v. Correll, 211 A.D.2d 899 (3rd Dept., 1995) and Kelley v. Balasco, 226 A.D.2d 880 (3rd Dept., 1996), the defendants had conceded liability and both cases proceeded to a jury on the question of serious injury and damages.

The rulings of the First, Second and Third Departments are consistent with the history and intent of the Court of Appeals who, in Love v. State of New York, *supra*, reasoned that CPLR 5002 interest is not a penalty but is, rather, "intended to indemnity successful plaintiffs 'for the nonpayment of what is due to them.'" Love, 78 N.Y.2d at 544 [additional citations omitted]. In a bifurcated trial, Love finds that point to be fixed when liability is established. Id. While Love does not

deal with the precise exception that has developed here, e.g., the interplay of CPLR 5002 and Insurance Law §5102(d), Denio v. State of New York, 7 N.Y.2d 159, 163 (2006), another Fourth Department Court of Claims case involving an automobile collision, is instructive as to this matter as the Court endorsed the decision to impose interest starting on the date of the liability determination, citing to Love, stating that "[i]nterest is designed to compensate for the loss that results when a claimant is 'deprived of the use of money to which he or she was entitled from the moment that liability was determined.'" Id. at 167. Should the plaintiff be unsuccessful at proving serious injury at trial, or a plaintiff in another type of case (such as a case under the Labor Law) be unsuccessful at proving causation of injuries, a jury could certainly return a damages verdict of $0, and there is no consequence to defendant as no interest would, obviously, run from a damages verdict of $0.

In the instant case, the lower Court's decision awarding summary judgment to Claimant-Appellant, which was postured as a motion to renew a prior motion for summary judgment on the issue of liability after the Court of Appeals decision of Rodriguez v. City of New York, 311 N.Y.2d 312 (2018), the lower Court granted Claimant-Appellant's motion and, more importantly to the issue here, stated that the case would be conferenced with counsel as to when the *issue of damages* would be heard. (R. at 432-436). Further, in Rodriguez, "[t]o be entitled to partial

summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault," thereby reducing the issues that must be proven for a finding of *liability*. Rodriguez, 311 N.Y.2d at 324-325. The Rodriguez court further explained that "[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or *extent of damages* . . . the court may, when appropriate for expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion." Id. at 318 (*citing* CPLR §3212(c)) (emphasis added).

As such, it is consistent with both the verbiage of the Court's decision awarding summary judgment herein, and the precedent of the First, Second and Third Departments and the Court of Appeals decisions of Love v. State of New York, Denio v. State of New York, and Rodriguez v. City of New York, *supra*, that prejudgment interest should run from the date of the decision awarding common-law liability (that being September 26, 2018).

2. The Split On This Issue Between the Departments Creates a Fairness Issue And, As Such, This Court Must Address This Issue As A Matter Of Public Policy.

Persuasively, in their decision, the Van Nostrand court, *supra*, frames this issue as one of fairness, explaining that the "Fourth Department rule" places motor vehicle plaintiffs on unequal footing from all other plaintiffs who seek damages for

injuries not involving motor vehicle collisions and are awarded liability either by summary judgment, verdict or default (and therefore who can avail themselves to the computation of interest from the date of the liability determination) and, even more specifically, creates additional "subclasses" of motor vehicle collision plaintiffs whose serious injuries are clearly-defined and those that are not and that require more development of the record. *See*, Van Nostrand, 44 A.D.3d at 64-65.

Since Van Nostrand, Ives, Kelly, and Reid, *supra,* there is an additional arbitrary level of inequity between motor vehicle plaintiffs whose claims accrue within the Fourth Department and those whose claims accrue within the First, Second and Third Departments. To illustrate this inequity, imagine a motor vehicle collision that accrues along Route 92 in Manlius, New York (within the 4th Department) to an Onondaga County resident and another that accrues five minutes away also on Route 92 in Cazenovia, New York (within the 3rd Department) to a Madison County resident. In the first situation, the plaintiff would not be entitled to interest until he or she proves both serious injury and damages, while in the latter situation, the plaintiff becomes entitled to interest when common-law liability is established, a potential difference of months or, more likely, years.

In addition, this issue also creates an inequity between motor vehicle plaintiffs in this department and plaintiffs in other actions whose verdicts are reversed on appeal due to damages not established at trial, as the appellate remedy

is to dismiss said plaintiffs' complaints rather than reduce to $0, in similar fashion to the serious injury requirement of Insurance Law § 5104. *See*, Van Nostrand, 44 A.D.3d at 63-64.

As such, it is imperative that this Court revisit this issue as a matter of public policy and fairness and find that prejudgment interest becomes due as of the date that common-law liability is established, whether it be by summary judgment, verdict, or default.

CONCLUSION

Accordingly, it is respectfully submitted that this Court should **MODIFY** the Judgment filed and entered by Eileen F. Fazzone, the Chief Clerk of the Court of Claims pursuant to the Decision signed by Hon. Diane L. Fitzpatrick on October 27, 2021 and filed by the Clerk of the Court of Claims on November 29, 2021 to establish that prejudgment interest pursuant to CPLR § 5002 begins on the date that common-law liability attached by summary judgment in Claimant-Appellant's favor (that being September 26, 2018) and all other findings as the interest of justice may require.

Dated: January 22, 2024
Syracuse, New York

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 500.13(c) is 4,401, as calculated by the word processing system used to prepare the brief.

Dated: January 22, 2024
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