No. 124690

In the

Supreme Court of Illinois

WEST BEND MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

GARY BERNARDINO,

Defendant-Appellee,

TRRS CORPORATION and COMMERCIAL TIRE SERVICES, INC.,

Defendants.

On Appeal from the Appellate Court of Illinois,
Twenty-Second Judicial District, McHenry County, Illinois, No. 2-19-0478.
There Heard on Appeal from the Circuit Court of the Twenty-Second Judicial Circuit,
McHenry County, Illinois, No. 2018 MR 798.
The Honorable **Thomas A. Meyer**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT WEST BEND MUTUAL INSURANCE COMPANY

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POINTS AND AUTHORITIES

ARGUMENT

I. The Circuit Court's Stay Order Does Not Turn the Primary Jurisdiction Doctrine on Its Head

BERNARDINO adopts as a principal theme of his Brief, the appellate court's statement that the circuit court's stay order turns the primary jurisdiction doctrine on its head. (App. at A13, ¶ 19). The flaw in this argument is that the basis for the circuit court's authority to issue the stay is not derived from the primary jurisdiction doctrine. Rather, the primary jurisdiction doctrine provides the rational for concluding that the circuit court, not the IWCC, should decide WEST BEND's declaratory judgment action. But lost in BERNARDINO's argument, and the Amicus' overheated rhetoric, is the fact that BERNARDINO wants the IWCC to decide the insurance coverage issue. This was the impetus for WEST BEND to request the stay. Thus, BERNARDINO's argument that the IWCC's actions in connection with BERNARDINO's claim will not affect the circuit court's ability to decide the insurance coverage issue (BERNARDINO's Brief, p. 11) is contradicted by his assertion that the IWCC can enter orders against WEST BEND without finding coverage. (BERNARDINO's Brief, p. 12). More importantly, these statements by BERNARDINO show his true intent – to have the IWCC decide the coverage issue. However, the parties, the circuit court and the appellate court all agree that, based on the primary jurisdiction doctrine, the insurance coverage issue should be decided by the circuit court. [1]

[1] In addition to disputing the application of the primary jurisdiction doctrine, BERNARDINO's Brief engages in an unfocused discussion of the *Skilling* Court's use of the term "paramount," (BERNARDINO's Brief, p. 7), and seems to question the circuit court's ability to "refer" an issue to an administrative agency. (BERNARDINO's Brief, p. 8). Neither of these arguments is pertinent to the issues

Contrary to BERNARDINO's contention, the primary jurisdiction doctrine, while supporting the circuit court's decision to retain jurisdiction over the insurance coverage issue, does not provide the authority for the circuit court's stay order. This authority is found in the Illinois Constitution's grant of jurisdiction to the circuit courts found in Article VI, §.9 of the Illinois Constitution, (Ill. Const. 1970, art. VI, §9), and the circuit courts' inherent equitable powers that cannot be abridged by the legislature. *Ardt v. Illinois Department of Professional Regulation*, 154 Ill.2d 138 (1992). BERNARDINO and the Amicus attempt to distinguish *Ardt* by arguing that the circuit court in *Ardt* had jurisdiction to review the sanctions imposed against the plaintiff by the Illinois Department of Professional Regulation, but, in this case, the circuit court did not have jurisdiction over BERNARDINO's worker's compensation claim. This argument exposes a critical flaw in BERNARDINO's and the Amicus' arguments; a flaw which undercuts their entire jurisdictional argument. BERNARDINO admits that the circuit court has subject-matter jurisdiction to determine WEST BEND's declaratory judgment action. However, the declaratory judgment action does not determine or affect BERNARDINO's rights under the Workers Compensation Act. The circuit court, in deciding the declaratory judgment action, will not decide any issue relating to BERNARDINO's entitlement to worker's compensation benefits. The stay arises from the circuit court's equitable powers and subject-matter jurisdiction over the declaratory judgment action, and is not dependent upon jurisdiction over BERNARDINO's claim for benefits under the Workers' Compensation Act.

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on appeal, nor do they tend to support BERNARDINO's argument that the circuit court erred in issuing the stay order. Therefore, they should be disregarded.

For this reason, BERNARDINO's assertion that the stay violates the IWCC's exclusive jurisdiction to decide workers' compensation claims is erroneous. This argument loses sight of the primary jurisdiction doctrine as applied in *Employers Mutual Companies v. Skilling*, 163 Ill.2d 284 (1994). In *Skilling,* the question was not whether the circuit court had concurrent jurisdiction over all aspects of the employee's worker's compensation claim. The issue was whether the circuit court had concurrent jurisdiction over the insurance coverage issue. There is no dispute that the IWCC has exclusive jurisdiction over BERNARDINO's entitlement to workers' compensation benefits. Courts applying *Skilling* have made this point clear. See *Continental West Ins. Co. v. Knox County EMS, Inc.*, 2016 IL App (1st) 143083, ¶ 19; *Bradley v. City of Marion*, 2015 IL App (5th) 140267, ¶¶ 25, 32. But the declaratory judgment action and the stay order do not extend the circuit court's jurisdiction over BERNARDINO's worker's compensation claim. Therefore, BERNARDINO's argument, and that of the Amicus, that BERNARDINO's rights under the Workers Compensation Act are being denied, is wrong.

Neither BERNARDINO nor the Amicus can put forth a cogent argument for why the circuit court was wrong for relying on *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC,* 2012 IL App (1st) 101751 to issue the order staying the IWCC proceedings until the Court decided the coverage issue. Nor have they cited a case which supports their argument that the circuit court lacked authority to issue the stay. Finally, while it is understandable that BERNARDINO would repeat the appellate court's assertion that the stay order turns the primary jurisdiction on its head, the assertion does not stand up to critical analysis when it is recognized that

the primary jurisdiction provides the rationale for ordering the stay, but does not provide the basis for the circuit court's authority to order the stay.

II. The Amicus' Veiled Attempt to Overturn *Skilling* Should be Rejected

Neither BERNARDINO nor the Appellate Court question the *Skilling* court's determination that the circuit court has concurrent jurisdiction over an insurer's declaratory judgment action. Nor do they dispute the fact that the primary jurisdiction doctrine, as applied in *Skilling,* and by the circuit court here supports the conclusion that the coverage issue should be decided by the circuit court. The Amicus takes a different view, arguing that *Skilling* needs clarification. Further, when the Amicus asserts that the "[p]rimary jurisdiction is a doctrine without a purpose in the compensation setting," (Amicus Brief, p. 9), it can only be presumed that what is being suggested is that *Skilling* should be overturned. But the assertion that the primary jurisdiction doctrine has no purpose in the context of an IWCC proceeding is unsupportable considering this Court's conclusion that the purpose of the doctrine is to promote the proper relationship between the courts and the IWCC. *Skilling,* 163 Ill.2d at 288. (the doctrine of primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." quoting *Kellerman v. MCI Telecommunications, Inc.,* (1986) 112 Ill.2d 428, 444. Thus, the implication that *Skilling* should be overturned should be ignored.

The Amicus' argument that *Skilling's* concurrent jurisdiction ruling was drawn too broadly is itself an overly-broad reading of the opinion. The Amicus reads *Skilling* as holding that the circuit court has concurrent jurisdiction over all

aspects of an IWCC claim. (Amicus brief, p. 7). This is clearly a misreading of the *Skilling* opinion. Nowhere in the opinion did this Court suggest that the circuit court has concurrent jurisdiction over all aspects of an IWCC claim. Rather, the analysis is limited to the insurance coverage issues raised in the underlying declaratory judgment action. This point is made abundantly clear by *Skilling's* reliance on *People v. NL Industries*, 152 Ill.2d 82 (1992).

In *NL Industries,* the state brought suit against NL Industries to recover clean-up costs, damages and penalties for violating the Illinois Environmental Protection Act. The circuit court and appellate court applied the exhaustion of remedies doctrine to hold that the state's claim must first be brought in the Pollution Control Board. This Court reversed the lower courts, and held that the circuit court had concurrent jurisdiction over the state's cost recovery action. This Court first discussed the difference between the primary jurisdiction doctrine and the exhaustion of remedies doctrine, and found that the appellate court had improperly combined them. This Court went on to say:

> "With few exceptions, circuit courts have original jurisdiction over all justiciable matters. (Ill.Const.1970, art.VI, § 9) While the legislature generally cannot deprive courts of this jurisdiction, an exception arises in administrative actions. Because it establishes administrative agencies and statutorily empowers them, the legislature may vest exclusive jurisdiction in the administrative agency. "Where the legislature enacts a comprehensive statutory scheme, creating rights and duties which have no counterpart in common law or equity, the legislature may define the 'justiciable matter' in such a way as to preclude or limit the jurisdiction of the circuit courts." (*Warren Township*, 128 Ill.2d at 165). In resolving this issue, we must therefore determine whether the legislature intended to divest the courts of jurisdiction to hear cost-recovery actions." 152 Ill.2d at 96-97.

To determine whether the Legislature intended to divest the circuit court of jurisdiction to hear cost-recovery actions, this Court first looked to the language of the Illinois Environmental Protection Act, 415 ILCS 5/1, et seq., and stated:

> "[I]t would appear that the legislature intended that cost-recovery actions could be filed before the Board. However, no language in this section explicitly excludes the circuit courts from hearing such cases." 152 Ill.2d at 97.

In *Skilling,* this Court relied on *NL Industries* to find that the Workers Compensation Act did not divest the circuit court of jurisdiction to hear insurance coverage issues. In this regard, this Court stated:

> "The Workers Compensation Act's pronouncement that 'all questions arising under this Act . . . shall . . . be determined by the Commission' (820 ILCS 305/18 (West 1992)) is insufficient to divest the circuit courts of jurisdiction. In *NL Industries,* the state brought an action on behalf of the Illinois Environmental Protection Agency against the owners and operators of a manufacturing facility. This court determined that the circuit court and the Pollution Control Board had concurrent jurisdiction to decide the issues presented in that case, finding that no language in the Environmental Protection Act specifically excluded the circuit courts from deciding such cases. (*NL Industries,* 152 Ill.2d at 97). Since exclusionary language is similarly absent from the Workers Compensation Act, we reach the same conclusion herein." 163 Ill.2d at 287.

Skilling's reliance on *NL Industries* makes clear that the concurrent jurisdiction inquiry was restricted to the insurance coverage issue presented in the declaratory judgment action. In *Bradley v. City of Marion,* 2015 IL App (5th) 140267, it was recognized that *Skilling* did not extend the circuit court's jurisdiction over all aspects of a worker's compensation claim. The *Bradley* court stated:

> "We believe that the *Skilling* court's holding with respect to the circuit court's concurrent jurisdiction was limited to 'the issues presented in that case,' i.e., 'the insurance coverage issue raised.' *Id.* The construction of an insurance contract is not a determination of an employee's right to seek benefits under the Act or an employer's

> defenses to an employee's claim to benefits. It is a collateral issue governed by the principles of contract construction." *Bradley,* at ¶ 32.

Thus, the Amicus' request that this Court clarify *Skilling* by limiting its application to insurance coverage issues is unnecessary. The only way to read *Skilling* is as it was read by the court in *Bradley*, that it is limited to insurance coverage issues. Further, the Amicus' citation to *J&J Ventures Gaming, LLC v. Wild, Inc.,* 2016 IL 119870, must be balanced against *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.,* 2011 IL 111611, where this Court cited *Skilling* for the proposition that "the legislature may divest the circuit courts of their original jurisdiction through a comprehensive statutory scheme, but it must do so explicitly." *Crossroads Ford,* at ¶¶ 27, 44. *Crossroads Ford* confirms the continued vitality of the *Skilling* Court's application of the concurrent jurisdiction doctrine, and the appellate court opinion in *Bradley* shows that the Amicus' request for clarification of *Skilling* is unnecessary.

Additionally, when considering the Amicus' attack on *Skilling*, it should be remembered that the opinion is 25 years old. If, during the intervening decades the Legislature felt that *Skilling* misread its intent concerning the circuit court's authority to hear insurance coverage cases which involved matters pending in the Illinois Workers Compensation Commission, the Legislature has had ample time and opportunity to amend the Workers Compensation Act. No such amendments have been enacted. In *R.D. Masonry, Inc. v. Industrial Commission*, 215 Ill.2d 397, 404 (2005) this Court stated, "[W]here the legislature chooses not to amend terms of the statute after judicial construction, it will be presumed that it has acquiesced

in the court's statement of legislative intent." Thus, there is no reason to presume that this Court misinterpreted the Legislature's intent when it decided in *Skilling* that the circuit court had concurrent and primary jurisdiction to decide insurance coverage issues involving workers' compensation claims.

The importance of the foregoing discussion of *Skilling* is that it undercuts BERNARDINO and the Amicus' arguments that *Skilling,* and the circuit court in this case, interfered with the IWCC's exclusive jurisdiction to decide claims under the Workers Compensation Act and invaded BERNARDINO's rights to benefits under the Act. It is clear from *Skilling* and its progeny that the application of the concurrent jurisdiction doctrine and primary jurisdiction doctrine, as they relate to matters pending in the Workers Compensation Commission, are limited to insurance coverage issues. In this case, WEST BEND is not asking the circuit court to decide issues relating to BERNARDINO's right to workers compensation benefits. If it was, cases such as *Knox County* and *Bradley* have interpreted *Skilling* to hold that jurisdiction over such issues rests exclusively with the Commission. For this reason, *Hartlein v. Illinois Power Co.,* 151 Ill.2d 142 (1992) and *Gunnels v. Industrial Commission,* 30 Ill.2d 181 (1964) cited by BERNARDINO and the Amicus are distinguishable because in both *Hartlein* and *Gunnels* the issues involved the employees' rights to benefits under the Workers Compensation Act, not insurance coverage for those benefits.

BERNARDINO and the Amicus choose to ignore the nature of the issues WEST BEND asks the circuit court to decide to support their claim that the circuit court exceeded its authority and violated BERNARDINO's rights. This choice

highlights the weakness of their arguments. The circuit court was clearly correct when it determined, in accordance with *Skilling* and *Hastings Mutual Insurance Co. v. Ultimate Backyard LLC*, 2012 IL App (1st) 101751, that a stay of the IWCC proceedings was necessary to allow the circuit court to decide the insurance coverage case. Nothing in the arguments raised by BERNARDINO and the Amicus supports the appellate court's reversal of the circuit court's stay order.

III. The Amicus' Equitable Arguments Do Not Support Reversal of the Circuit Court's Stay Order

By making the equitable arguments, the Amicus essentially concedes that the circuit court has authority to issue the stay order. But these arguments fall back on the same false premise that permeates its Brief and that of BERNARDINO, that BERNARDINO's rights are being denied by the stay. This is not the case. Neither the WEST BEND declaratory judgment action nor the stay deny BERNARDINO any rights which he may have under the Workers Compensation Act. The stay merely puts a hold on the IWCC proceeding while the circuit court decides whether WEST BEND will be liable for any workers' compensation benefits awarded to BERNARDINO. Under the Workers Compensation Act, TRRS is liable to pay worker's compensation benefits, and will remain liable regardless of the outcome of the declaratory judgment action. However, it is WEST BEND's liability under the Workers Compensation Act that makes this an unusual case. In most circumstances, the insurer cannot be made a party to an injury case, since Illinois is not a direct action state. See *Richardson v. Economy Fire & Casualty Co.,* 109 Ill.2d 41 (1985); *Zegar v. Sears Roebuck and Co.,* 211 Ill.App.3d 1025 (1st Dist. 1991); *Scroggins v. Allstate Insurance Co.,* 74

Ill.App.3d 1027 (1st Dist. 1979). However, in the workers' compensation setting, the insurer can be, and in this case, was, made a party to a worker's compensation action pursuant to Section 4(g) of the Workers Compensation Act. 820 ILCS 305/4(g). Further, BERNARDINO sought to have WEST BEND found liable for worker's compensation benefits and penalties in his Section 19 Petition, which prompted WEST BEND to request the stay in the circuit court. (R.C 186, R.C 192, R.C 242, R.C 250). Since BERNARDINO was attempting to have the IWCC impose liability on WEST BEND before it was determined whether coverage existed, WEST BEND sought the stay. The Amicus' equitable arguments ignore this critical fact.

The Amicus (not BERNARDINO) argues that the equities do not favor WEST BEND because BERNARDINO's survival hangs in the balance, and he may perish if the IWCC proceedings do not go forward. (Amicus Brief, p. 17). This over-blown rhetoric is not supported by citations to the Record. In this regard, the Record shows that BERNARDINO's Application for Adjustment of Claim filed in the IWCC describes his injury as "shoulder and other bodily parts." C39. A report from Centegra Hospital dated April 18, 2017, the date of injury, described BERNARDINO's injuries as "minor closed head injury, concussion, no loss of consciousness, traumatic left rotator cuff sprain and incomplete tear, cervical strain." C210. Clearly, the Record does not support the Amicus' hyperbole, but it should also be recognized that Judge Meyer in the circuit court is acutely aware of the need to resolve the coverage case promptly so BERNARDINO's claim before the IWCC can proceed. The multiple appeals and BERNARDINO's failure to

answer the declaratory judgment complaint have prevented the declaratory judgment action from going forward.

The Amicus' failure to support its equitable argument by citations to the Record is not its only flaw. The Amicus cites the Rule 23 Order in *Hastings Mutual Ins. Co. v. Ultimate Backyard, LLC,* 2016 IL App (1st) 151976-U, to argue that allowing the coverage case to stay the IWCC proceeding results in an unconscionable delay. Citing the Rule 23 Order is improper but, more importantly, it provides no insight or explanation for the delays that may have been encountered in that case.

In addition to citing a Rule 23 Order to support its argument, the Amicus raises such irrelevancies as the attorneys' fees available to attorneys representing employees in the Commission, the insurers' loss ratios on workers' compensation business and WEST BEND's earnings, all in an effort to portray WEST BEND in a bad light. But any time there is an insurance coverage issue in an injury case, the injured claimant faces the possibility that there may not be a source of funds available to pay a judgment or award obtained against the insured. This case is no different from the myriad of other insurance coverage declaratory judgment actions routinely filed in the circuit courts. The possibility that the injured claimant may not have a source of funds from which to recover does not, and should not, prevent the insurer from pursuing its right to have the insurance coverage issue decided by the circuit court. Therefore, the Amicus' efforts to cast WEST BEND in the role of heartless villain should be disregarded.

The Amicus dismisses WEST BEND's reasons for seeking the stay of the IWCC proceedings, as either unsupported or insignificant. WEST BEND is criticized for not providing proof of the extra cost that will be incurred if the insurer is required to litigate the coverage issue in the IWCC before the issue reaches the circuit court. However, it is not disputed that extra costs will be incurred by all parties if the coverage matter must first be decided by an arbitrator and the Commission, before it reaches the circuit court. Just as important, these extra steps delay the resolution of the insurance coverage issue.

In response to WEST BEND's argument that the circuit court, not the Commission, is the forum best suited to hear the insurance coverage case, the Amicus provides data on the disposal rate of cases pending before the Commission, and chides WEST BEND for failing to provide similar statistics on the life expectancy of coverage actions pending in the circuit court. But the Amicus' efficiency argument misses the point. The reason the primary jurisdiction doctrine dictates that the coverage case should be decided by the circuit court is that the circuit court judges are well-versed in handling insurance coverage cases. *Kellerman v. MCI Telecommunications Corp.,* 112 Ill.2d 428, 446 (1986)("The legal and factual issues that are involved in these cases are standard fare for judges, and consequently, must be deemed to be 'within the conventional competence of the courts.', quoting *Nader v. Allegheny Airlines, Inc.,* (1976), 426 U.S. 290, 305-06). Further, the coverage issues do not call upon the IWCC's expertise in determining the benefits available to an employee. *Continental West Insurance Co. v. Knox County, EMS, Inc.,* 2016 IL App (1st) 143083, ¶ 18 ("The construction

of Continental's insurance policy is not a determination of the factual issues related to a determination of workers' compensation benefits, such as the nature or extent of the injury or the potential defenses to the worker's compensation claim."). As stated above, Judge Meyer is keen to move the declaratory judgment case to resolution, but the efficiency of his courtroom versus Arbitrator Glaub's disposal rate of claims pending before him is not the point. The point is the coverage issue belongs before Judge Meyer, not Arbitrator Glaub, and WEST BEND should not be criticized for seeking a resolution of the issue by Judge Meyer.

The Amicus argues that it is unfair to require the employee to litigate the coverage issue in the circuit court and that the IWCC has the means to punish insurers who raise frivolous coverage disputes. But, as pointed out above, BERNARDINO is no different from any other injured party who, because he is a necessary party, must be named as a defendant in an insurance coverage case. See *Chandler v. Doherty*, 299 Ill.App.3d 797 (4th Dist. 1998). Since the insured has the direct interest in the insurance coverage, the injured claimant will often stand on the sidelines and allow the insured to make the arguments for insurance coverage. Further, if it is shown that the insurer's coverage position was vexatious and unreasonable, Section 155 of the Insurance Code, 215 ILCS 5/155 provides a means to punish such conduct. Therefore, the Amicus' claim that it is unjust to require the injured employee to litigate coverage in the circuit court does not stand up to the reality that BERNARDINO is no different from any other injured party involved in coverage litigation.

Finally the Amicus denigrates WEST BEND's concerns relating to permitting the Commission to decide coverage issues while the insurer pursues a declaratory judgment action in the circuit court. The Amicus' arguments on this subject are inconsistent with its assertion that it is unfair to require the employee to litigate the coverage case in the circuit court. More importantly, the Amicus' response to WEST BEND's concerns about conflicting decisions, which it believes can be addressed either by estoppel or the circuit court's ability to review the Commission's coverage decisions, ignores the obvious: neither estoppel nor circuit court review come into play if the circuit court is allowed to decide the coverage case first. Furthermore, statistics are not necessary to establish what is obvious; there will be added costs, delay and the potential for conflicting decisions if the coverage issue is "dual-tracked" as advocated by the Amicus.

The Amicus' rhetoric does not support its conclusion that equity will never permit an insurer to obtain a determination of its coverage obligations before the IWCC decides an employee's right to worker's compensation benefits. Rather, the circuit judges sitting in equity have the ability to move the coverage case to a quick resolution, thereby causing minimal "interference" with the employee's IWCC claim.

CONCLUSION

For the reasons set forth herein, as well as for the reasons set forth in West Bend's initial Brief, Plaintiff-Appellant, West Bend Mutual Insurance Company,

requests that the Appellate Court Opinion reversing the circuit court stay order be reversed, and the circuit court order be affirmed.

Respectfully submitted,

By:

/s/ Thomas F. Lucas
One of the Attorneys for
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

/s/ Thomas F. Lucas
Thomas F. Lucas

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

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Defendant-Appellee,	)	
	)	
TRRS CORPORATION, et al.,	)	
	)	
Defendants.	)	

The undersigned, being first duly sworn, deposes and states that on August 28, 2019, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Plaintiff-Appellant West Bend Mutual Insurance Company. Service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, File and Service Illinois, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Thomas F. Lucas
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Thomas F. Lucas
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