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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001980-MR

PADUCAH HEALTH FACILITIES L.P. D/B/A MCCRACKEN NURSING AND REHABILITATION CENTER; PADUCAH HEALTH FACILITIES GP, LLC; PREFERRED CARE PARTNERS MANAGEMENT GROUP, L.P.; PCPMG, LLC; PREFERRED CARE, INC.; AND MARILYN INGRAM, IN HER CAPACITY AS ADMINISTRATOR OF MCCRACKEN NURSING AND REHABILITATION CENTER — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 13-CI-00421

MARY NEWBERRY, AS EXECUTRIX OF THE ESTATE OF TOM CALDWELL, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Appellants, Paducah Health Facilities, *et al.* (Paducah Health), appeal the McCracken Circuit Court's October 21, 2013 partial denial of

their Motion to Compel Arbitration. Paducah Health's challenge requires us to consider whether Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §2 (2000), preempts the Kentucky Supreme Court's recent decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 588 (Ky. 2012) *cert. denied*, 133 S. Ct. 1996, 185 L. Ed. 2d 879 (2013). Because the FAA does not preempt *Ping*, we affirm.

I. Background

In June 2011, Tom Caldwell entered the McCracken Nursing and Rehabilitation Center, a long-term care facility located in Paducah, Kentucky. During Caldwell's time at McCracken Nursing, Appellee, Mary Newberry, was appointed as Caldwell's guardian. While acting as Caldwell's guardian, Newberry signed an Alternative Dispute Resolution Agreement (ADR Agreement) with McCracken Nursing specifying that, in the event of a lawsuit, the parties would forego litigation in favor of arbitration.[1] Importantly, Newberry signed the ADR Agreement as Caldwell's guardian and not in her personal capacity.

By its terms, the ADR Agreement applied to a broad scope of potential disputes:

> 4. **Covered Disputes.** This Agreement applies to any and all disputes arising out of or in any way relating to

[1] At the time of Caldwell's admission, the long-term care facility was owned by Extendicare, Inc., Extendicare, L.P., Extendicare Homes, Inc. d/b/a Medco Center of Paducah, Extendicare Health Network, Inc., Extendicare Holdings, Inc., Extendicare Health Services, Inc., and Extendicare Health Facility Holdings, Inc. Appellants, Paducah Health Facilities, *et al*., purchased the facility in 2012. The parties do not dispute that Paducah Health assumed Extendicare's contractual rights and liabilities under the ADR Agreement. The Extendicare parties were originally included in this action; however, Caldwell and Extendicare settled their claims prior to the rendering of this opinion, and have been dismissed from the appeal.

> this Agreement or [Caldwell's] stay at [McCracken Nursing] that would constitute a legally cognizable cause of action in a court of law sitting in the Commonwealth of Kentucky and shall include, but not be limited to. . . negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, healthcare, consumer, or safety standards.

This dispute began when Caldwell died in October 2012. Newberry alleged McCracken Nursing's negligence caused Caldwell's death, and she filed suit in the McCracken Circuit Court for personal injury, wrongful death, and violations of Kentucky's long-term care resident's rights statute.[2]

Citing its ADR Agreement, Paducah Health moved the circuit court to compel arbitration on all of Newberry's claims. The circuit court acquiesced—mostly—and ordered Newberry to arbitrate all but one issue: the wrongful death claim under KRS 411.130.[3]

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[2] Kentucky Revised Statutes §216.515.

[3] KRS 411.130 reads:
(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.
(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:
(a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.
(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.
(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.
(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, "mother" and "father" shall mean the adoptive parents of the deceased.

The circuit court denied Paducah Health's motion to order Newberry to arbitrate her wrongful death claim in light of *Ping*. Relying on *Ping*, the circuit court determined the ADR Agreement could not require Newberry to arbitrate her wrongful death claim because KRS 411.130 grants beneficiaries – not the deceased, his estate, or his guardian – a separate cause of action to recover damages for *their* injuries in the event of a relative's wrongful death. And since such wrongful death claims "never belonged to [Caldwell]," the circuit court reasoned that "[Caldwell and his guardian] could not agree to arbitrate another person's claim." So, because Caldwell's wrongful death beneficiaries were not party to the ADR Agreement between Paducah Health and Caldwell, they remained free to litigate.

Unhappy with the circuit court's ruling, Paducah Health now appeals the partial denial of its motion to compel arbitration.

II. Standard of Review

The trial court's denial of a motion to compel arbitration presents potential questions of both law and fact. We review the trial court's legal conclusions *de novo* and its factual findings for clear error. *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 833 (Ky. 2013).

III. Analysis

(e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

Paducah Health argues that *Ping* evinces an impermissible judicial hostility toward arbitration agreements. Such hostility, says Paducah Health, is forbidden by the FAA in light of a vigorous federal policy favoring arbitral dispute resolution. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d 42 (2012). Thus, Paducah Health claims the FAA preempts *Ping*.[4] In support of this preemption argument, Paducah Health attacks *Ping*'s logic, characterizing it as a radical departure from Kentucky law that constrains its contractual freedom, imposes upon it an inefficient dual-track system of dispute resolution, and forces parties to litigate issues which could later preclude arbitral decisions regarding the same underlying transaction. *Ping*, under Paducah Health's view, represents a new, unprincipled rule of Kentucky law designed solely to frustrate arbitration agreements; therefore, it is forbidden by the FAA.

However, despite Paducah Health's protestations, *Ping* is a sound decision, entrenched in basic principles of Kentucky law, and it is not preempted by the FAA. Thus, Paducah Health's arguments fail.

We begin our analysis of Paducah Health's arguments with a discussion of *Ping*. In that case, the Kentucky Supreme Court encountered a situation similar to the one at bar. A daughter brought a wrongful death claim against her deceased mother's nursing home. As in this case, the nursing home moved to compel arbitration, citing a contract signed by the daughter on the

[4] At the outset, the parties engage in a curious dispute as to whether the FAA even applies in light of the ADR Agreement's terms. Of course it does. The FAA applies to transactions involving interstate commerce, including healthcare. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329, 111 S. Ct. 1842, 1847, 114 L. Ed. 2d 366 (1991).

mother's behalf agreeing to arbitrate any claim.[5] The trial court denied the nursing home's motion and the nursing home appealed.

The *Ping* Court affirmed the denial of the nursing home's motion to compel arbitration, holding that a "decedent [or her agent] cannot bind [her] beneficiaries to arbitrate [her beneficiaries'] wrongful death claim." *Ping*, 376 S.W.3d at 599. In reaching its conclusion, the Court examined Kentucky's wrongful death statute, KRS 411.130, Kentucky's survivor statute, KRS 411.140, and a third provision, KRS 411.133, which permits the joinder of wrongful death *and* survival claims in a single suit. Based on its examination of those three provisions, the Court determined that KRS 411.130 creates an independent, statutory right to recovery that accrues separately "to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss. . . ." *Ping*, 376 S.W.3d at 599. Thus, only the beneficiaries could contract to arbitrate their wrongful death claims because those claims belonged only to them.

By reaffirming in *Ping* that Kentucky law provides wrongful death beneficiaries an independent cause of action under KRS 411.130, our Supreme Court staked its position in a widening state-split. On one side, some states (like Kentucky) read their respective wrongful death laws to grant independent claims,

[5] To be sure, *Ping* differs from the current dispute in a minor respect not at issue in this case. In *Ping*, the daughter who signed the agreement on her mother's behalf did so as an exercise of a power of attorney over her mother's healthcare decisions. Here, Newberry signed the ADR after being appointed Caldwell's legal guardian. Legal guardianship is not synonymous with one's power of attorney – the former represents a broader grant of power than the latter. *Rice v. Floyd*, 768 S.W.2d 57, 59 (Ky. 1989) ("The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability."). However, this difference has no effect on our analysis.

and thus a decedent may not bind his beneficiaries to arbitration. *See, e.g.*, *Peters v. Columbus Steel Castings Co.,* 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007). On another side, however, some states consider such claims to be derivative of a decedent's personal injury action and thus the decedent could consign his beneficiaries just as he could do himself. *See, e.g.*, *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) (holding wrongful death actions under Texas law are "entirely derivative" of the decedent's right to sue prior to his death). On still another side, some states split the difference, holding that while wrongful death claims are independent causes of action, a decedent may still contract for their arbitration. *See e.g.*, *Ruiz v. Podolsky*, 50 Cal. 4th 838, 854, 237 P.3d 584, 594 (2010). In any event, our Supreme Court clarified Kentucky's position, "put[ting] to rest any dispute as to whether the statutory beneficiaries are the real parties in interest to a wrongful death action." *Pete v. Anderson*, 413 S.W.3d 291, 300 (Ky. 2013). They are.

Unhappy with Kentucky's position, Paducah Health alleges that the FAA preempts *Ping* by means of the Supremacy Clause of the United States Constitution. But because *Ping* does not obstruct Congressional objectives set forth in the FAA, Paducah Health's argument fails.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, nullifies state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden,* 9 Wheat. 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.). As a federal statute, the FAA thus displaces any state statutes, judicial decisions, or constitutional provisions that

"stan[d] a[s] obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941).

Congress stated its objective in Section 2 of the FAA that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). Section 2 thus enshrines in the U.S. Code a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.,* 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (U.S.N.C. 1983).

The upshot of this policy is that all courts – federal and state – must place arbitration agreements on an equal footing with other contracts. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). So, courts may not, for instance, "apply state statutes that [categorically] invalidate arbitration agreements." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995). Nor may state courts "rely on the uniqueness of an agreement to arbitrate" as a basis for a state-law contract defenses, such as unconscionability, *Perry v. Thomas*, 482 U.S. 483, 492, 107 S. Ct. 2520, 2527, 96 L. Ed. 2d 426 n.9 (1987), because doing so would place such agreements on unequal footing with other contracts. At bottom, this equal footing principle prevents states from using their respective laws to make an end-run around arbitration agreements when those same state laws

would uphold any other contract. *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 402 (2004).

Contrary to Paducah Health's assertions, *Ping* is simply not a judicial end-run around arbitration agreements that triggers preemption. Rather, *Ping* plainly re-affirms basic, generally-applicable tenets of Kentucky contract law. And, by and large, fundamental state-law principles that do "not affect the enforceability of [an] arbitration agreement itself," do not undermine the FAA's objective. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S. Ct. 1652, 1656-57, 134 L. Ed. 2d 902 (1996).

Ping does not categorically invalidate arbitration agreements, even for wrongful death claims; nor does it apply general rules of contract law in a way specifically designed to frustrate arbitration agreements. Under *Ping*, wrongful death beneficiaries remain as free to contract for arbitration – or decline to do so – as any other party to any other contract. Rather, *Ping* simply reiterates that a wrongful death beneficiary must be party to the arbitration agreements in order to relinquish his right to judicial redress. Despite Congress' clear preference for arbitration, "nothing in the [FAA] authorizes a court to *compel* arbitration of any issues, or *by any parties*, that are not already covered in the agreement." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S. Ct. 754, 762, 151 L. Ed. 2d 755 (2002)(emphasis added). "[I]t goes without saying that a contract cannot bind a nonparty." *Id.* at 294 (citation omitted). In the case at bar, as in *Ping*, the

decedents' wrongful death beneficiaries were not parties to the agreement, thus the FAA does not require them to submit to arbitration.

Our own Supreme Court said as much in *Ping* when it observed that a party could not bind other parties to contracts "merely by referring to each other in them" without the other parties' consents. *Ping*, 376 S.W.3d at 599. A contrary rule would empower individuals (for example, as part of estate planning) to unilaterally surrender or waive not only a third party's constitutional right to a jury trial but also her constitutional right to freely enter into her own contracts including, ironically, agreements to arbitrate.[6] Such a rule could lead to perverse results. For example, if a nursing home patient could bind a third party to an arbitration agreement, why could he not also bind him to pay the balance of the nursing home bill after his demise so as to avoid burdening his estate? The answer is that such a rule not only contradicts specific Kentucky contract law, it undermines the more general principles underlying the contractual freedoms that animate the FAA.

In support of its preemption argument, Paducah Health effectively claims that our high court has resurrected the "ouster" reasoning for rejecting a valid

[6] However, we emphasize that nothing in our decision prevents a decedent from binding his estate, as a third-party, to arbitration. While public policy binds both the decedent's estate and his personal representative to contracts, *Bates v. Starkey*, 212 347, 279 S.W. 348, 349 (Ky. 1926), this rule does not somehow imbue the decedent with authority to generally bind third-parties, *i.e.*, estate beneficiaries, to contracts without their consent.

arbitration agreement.[7] However, Paducah Health's reliance on a few old cases – some of them non-binding – fails to persuade us that their portrayal is accurate.

Contrary to Paducah Health's assertion, Kentucky courts have long considered wrongful death to be a separate claim. Admittedly, early courts struggled with whether the statute created a new cause of action or simply enlarged a remedy, but it appears those concerns focused on whether the new statute permitted double recovery for the same act. *See Louisville Ry. Co. v. Raymond's Adm'r*, 135 Ky. 738, 123 S.W. 281, 283 (1909) ("The rule that a personal representative cannot sue upon both causes of action is based upon the ground that the defendant committed a single wrong, the negligence or wrongful act which caused the injury, and that, while the law gives two remedies for the wrong, it was not contemplated that two recoveries should be had for one wrong."). Later, Kentucky's highest court repudiated the notion that Kentucky's wrongful death statute merely expanded a remedy. *Harlan National Bank v. Gross*, 346 S.W.2d 482, 483 (Ky. 1961)(holding that while Kentucky's wrongful death statute could "be considered as perpetuating a right which existed before death does not necessarily mean that there was not also created a new right independent of a pre-existing one."). And as Kentucky statutes evolved, our General Assembly clearly delineated wrongful death claims as separate by enacting statutes that permit recovery for both the decedent's personal injuries KRS 411.140 *and* the decedent's

[7] Passage of the FAA was followed by a period of judicial hostility during which courts "viewed arbitration clauses as unworthy attempts to 'oust' them of jurisdiction; accordingly, to guard against encroachment on their domain, they refused to order specific enforcement of agreements to arbitrate." *Vaden v. Discover Bank*, 556 U.S. 49, 64, 129 S.Ct. 1262, 1274 (2009).

wrongful death KRS 411.130, as well as a provision allowing for their *joinder* in a single suit. KRS 411.133.

Nor does it matter that Kentucky courts enforce exculpatory provisions between parties, even in instances where those provisions bind third parties who bring *derivative* claims. *See Greenwich Ins. Co. v. Louisville & N.R. Co.*, 112 Ky. 598, 66 S.W. 411, 412 *modified sub nom. Greenwich Ins. Co. v. Louisville & N. R. Co.*, 112 Ky. 598, 67 S.W. 16 (1902)(upholding an exculpatory clause against an insurance company who brought a subrogation action against a negligent railroad). Those cases do not involve separate, independent claims like wrongful death. So, while it is true that a decedent, prior to death, could waive his estate's survival actions, nothing in those cases imbues in him a power to surrender rights he never had.

In making this argument, Paducah Health loses footing by relying on *Estate of Peters by Peters v. U.S. Cycling Federation*, 779 F. Supp. 853, 854 (E.D. Ky. 1991), a federal district court opinion rejecting a widow's wrongful death claim based on the decedent's release of liability for negligence. We need not express any opinion as to whether this decision is correct, for even if it is on solid footing we are not bound by lower federal court opinions. *See Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") (quoted in *Bowling v. Parker*,

882 F.Supp.2d 891, 898 (E.D. Ky. 2012)). Moreover, *Peters* fails to persuade because it did not focus on – or even consider – whether wrongful death actions comprise independent claims under Kentucky law. Our reading of the opinion suggests that neither party brought it to the court's attention. Instead, *Peters* analyzed issues unrelated to this case and only referred obliquely to the plaintiff's complaint as "a diversity action for the wrongful death. . . ." *Peters*, 779 F. Supp. 854. Simply put, *Peters*' lone, passing reference provides little fodder to criticize *Ping*, let alone establish Paducah Health's theory that *Ping* represented a sea change in Kentucky law borne out of hostility to arbitration.

Finally, Paducah Health lobs prudential arguments at us in hopes that we find them persuasive evidence that *Ping* deviated from Kentucky law solely to undermine arbitration contracts. None have merit.

For example, Paducah Health claims that *Ping* impermissibly severs wrongful death claims from other causes of action that arise under the same alleged breach of duty. Forcing such a spilt, under Paducah Health's view, violates KRS 411.133, requires the parties submit to inefficient, dual-track proceedings and potentially subjects parties to inconsistent outcomes (for instance, if a party is found liable in a civil suit but not liable during arbitration or *vice versa*).

First, Paducah Health misinterprets KRS 411.133. The statute only permits, but does not require, that the parties *litigate* both wrongful death and survival claims in the same action: "It shall be lawful for the personal representative . . . to recover in the same action for both the wrongful death of the decedent and for the

personal injuries from which the decedent suffered prior to death . . . ." KRS 411.133. Because parties remain free to contract, they can choose to arbitrate any or all claims instead of going to court, even though they may result in dual-track proceedings. The United States Supreme Court has accepted the possibility of dual-track proceedings, "when necessary to give effect to an arbitration agreement" despite their potential for inefficiency. *Moses H. Cone*, 460 U.S. at 20, 103 S. Ct. at 939.

Finally, Paducah Health's concerns regarding *res judicata* and collateral estoppel are unsound. To assert either doctrine requires a final judgment from a *court*, not an arbiter, on the merits. *Moore v. Commonwealth*, 954 S.W.2d 317, 318 (Ky. 1997). Additionally, arbitration cannot bar claims that fall outside the scope of the arbitration agreement, nor are courts obliged to defer to an arbitration award that exceeded its authority. *See Williams v. E.F. Hutton & Co.*, 753 F.2d 117, 119 (D.C. Cir. 1985). Further, in instances where a party obtains a judgment on a wrongful death claim but then arbitrates claims with related issues, arbitrators are not bound by precedent, and thus are free to ignore those judgments in favor of more informal, holistic decision-making. *See* Randy D. Gordon, *Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration*, 18 Fla. J. Int'l L. 549, 560 (2006)(commenting that "arbitrators are not bound by the law, substantive or procedural," and may render compromise rather than engage in the zero-sum

adjudication inherent in adversarial judicial proceedings).[8] And since arbitration agreements stem from the parties' rights to contract, they remain free to include terms in their agreements specifying what preclusive effect, if any, litigation of related issues will have on their arbitration. Such effects are simply one more issue to be resolved in the arbitration agreement. Any outcome, even unexpected or mistaken, is simply "part of the price of agreeing to arbitration." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070, 186 L. Ed. 2d 113 (2013). By contracting for arbitration, parties concede they will enjoy arbitration's intended benefits (faster, more cost-effective proceedings) but also suffer its costs (risk of inconsistent outcomes, fewer procedural protections, and diminished access to judicial review). Thus, if these issues concern Paducah Health, it remains free to accommodate them by revising its arbitration agreements.

Furthermore, forcing wrongful death claimants into involuntary arbitration is not the only solution to Paducah Health's concerns about incongruity. If those concerns are unacceptably troubling, there is the option to waive arbitration and litigate all issues before a judge and jury. But that is not the only other solution. Paducah Health can always seek an order abating the wrongful death action until arbitration ends. We deem unwarranted Paducah Health's concerns about the preclusive effects of litigation on arbitral proceedings.

[8] As a simple example, an arbitrator may (depending upon the arbitration agreement's terms regarding their procedural rules of arbitration) consider evidence that, while credible, would be inadmissible at trial to allocate fault, leading him to reach a different result than a jury.

In a final argument, Paducah Health attempts to avoid *Ping* by claiming its ADR Agreement with Newberry was executed before *Ping* was rendered and thus does not bind the parties. This argument lacks merit because, as we have discussed, *Ping* simply reiterated longstanding principles of Kentucky law; it did not create a new rule and thus did not "impermissibly impair" the parties' bargain.

IV. Conclusion

For the reasons discussed above, we affirm the McCracken Circuit Court's October 21, 2013 partial denial of Paducah Health's Motion to Compel Arbitration.

ALL CONCUR.

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