

FILED
COURT OF APPEALS

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BY 

No. 34882-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Wm. Dickson Co.,
Appellant,

v.

Thomas and Joanne Urquhart,
Respondents.

BRIEF OF APPELLANT

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Assignments of Error

1. The trial court's finding that the property in question was not intended at the time of purchase to provide access to land outside the short plat was not supported by substantial evidence. (Findings of Fact Nos. 6, 10, 11.)

2. The trial court's implied finding that the private road in question was not intended at the time of creation to provide access to land outside the short plat was not supported by substantial evidence. (Findings of Fact Nos. 6, 10, 11.)

3. The trial court's conclusion that the private road is for the exclusive use and enjoyment of owners of lots within the short plat is inconsistent with substantial evidence and not supported by the law. (Conclusion of Law No. 6.)

4. The trial court's conclusion that the private road may not be used to access land beyond the short plat is inconsistent with substantial evidence and not supported by the law. (Conclusion of Law No. 6.)

5. The trial court erred in entering a permanent injunction to enjoin use of the private road to access land beyond the short plat. (Conclusion of Law No. 6.)

Issues Pertaining to Assignments of Error

1. A finding of fact regarding intent is not supported by substantial evidence when a party's testimony of contrary intent is supported by documents and is not directly contradicted in the record. (Assignments of Error 1 and 2.)

2. A private road "for ingress and egress" referenced on the face of a short plat must be construed to allow access to land beyond the short plat when the party creating the easement intended, at the time of creation, to use the road for access to parcels outside the short plat. (Assignments of Error 3, 4, and 5.)

Statement of the Case

Appellant Wm. Dickson Co.¹ is a contractor and has operated a gravel pit in Tacoma near Waller Road since the 1960s. RP Vol. 1 at 4, 6. Subsequent to the original 20-acre parcel, Dickson acquired additional parcels of land adjacent to the original gravel pit at various times in order to expand its operations. *Id.* at 6-9. Currently, Dickson's gravel pit, including all its additions, is about 50 acres. *Id.* at 4:24. There are other gravel pits in the area as well, including a pit operated by Pierce County and a pit owned by Tucci and Sons.

In approximately 1979, consistent with its pattern of acquiring additional land adjacent to the pit, Dickson purchased a parcel next to Waller Road from Margaret Woempner. *Id.* at 8:14-15. Dickson seized upon the opportunity to acquire the Woempner parcel because it provided both a potential buffer area between the pit and nearby residential property and because it could be used as a second access to the pit. *Id.* at 11:22-12:4, 21:12-14; RP Vol. 2 at 82:21-23.

In order to preserve the secondary access, Dickson executed a deed creating a private road, Exhibit 14, and short platted the parcel into four lots, Exhibit 15. The deed provides that the road may be used "for ingress,

¹ "Dickson" will be used in this brief to refer to the company, Wm. Dickson Co. The principals will be referred to by name: president Bill Dickson or vice president Richard Dickson.

egress, and utilities.” Exhibit 14. The original short plat diagram showed the road at 40 feet wide, but Bill Dickson asked that the road be widened to 60 feet. Exhibits 22 and 23; RP Vol. 2 at 84:15-19, 96:25-97:4. A notation was made on the face of the short plat limiting the number of roads to be created on the Woempner parcel, but the notation did not restrict use of the road: “Access to lots 1, 2, 3, and 4 shall be by way of one and only one private road easement with its entrance as shown.” Exhibit 15.

Dickson sold three of the lots created out of the Woempner parcel, but retained Lot 4. The Urquharts, Respondents in this matter, are the current owners of Lots 1 and 2. Lot 3 is currently owned by Cathy Tollefson-Glenn, who elected not to participate in the suit below, although she was served with a summons and complaint.

Since acquiring the land in 1979, Dickson has used the private road delineated on the short plat as an alternate access route for the pit. Dickson has occasionally used the road for trucks when it was inconvenient or impossible to use the main gate on 48th Street. RP Vol. 1 at 14:10-19, RP Vol. 2 at 86:8-9, 15, 107:2-4. There is a gate at the end of the private road where it enters onto Lot 4, and the Urquharts’ photos of this gate refer to Dickson’s access to the pit. RP Vol. 2 at 179:16-19;

Exhibit 33. Dickson's actions in maintaining the road were consistent with its intent to use the road as a secondary access.

When the Urquharts objected to Dickson's attempt to widen the road, Dickson filed for declaratory relief to determine the parties' rights to use of the road. The trial court ruled that Dickson's use of the private road to access the gravel pit violated the scope of the easement. Dickson filed a timely appeal of that portion of the judgment.²

² Dickson does not appeal the other issue presented at trial, namely, the Urquharts' claim of adverse possession to a portion of Dickson's Lot 4. The adversely possessed portion was not adjacent to the private road, and the determination of that issue has no bearing on the court's decision regarding use of the road.

Summary of the Argument

The trial court's conclusion that the private road in question may not be used to access the gravel pit was based upon an erroneous finding of fact and must be overturned.

The scope of an easement is determined by the language of the grant and by the intent of the parties. The instruments creating the easement in question use broad language that does not limit the purposes for which access is granted across the road. Therefore, the Court must examine the intent of the party creating the easement, or in this case, Dickson.

The finding regarding Dickson's intent is not supported by substantial evidence. The only direct testimony of Dickson's intent was that offered by Bill Dickson. The Urquharts were not involved in creation of the private road, nor did they own any interest in the lot at that time.

The other testimony and documentary evidence at trial supported Bill Dickson's statement that he intended the road to be used to access the gravel pit. Richard Dickson, who was also involved in the acquisition, confirmed that intent, and the preliminary short plat drawings showed the private road being widened to 60 feet to allow for truck access. The Urquharts' notations on their photos acknowledged that the gate at the end of the private road was a gate for access to the pit.

Thus, the trial court's finding of fact was not supported by substantial evidence in the record. The evidence apparently relied on by the court was not sufficient to justify the ruling, because it did not directly pertain to Dickson's intent at the time the road was created.

From the evidence presented at trial, it is clear that Dickson intended the private road to be used for access to land beyond the short plat. Consistent with this intent and the language of the instruments creating the private road, the trial court should have concluded that the scope of the easement is not restricted to access solely the four lots of the short plat. Conclusion of Law No. 6 and the pertinent portions of the judgment must be reversed to allow Dickson to use the private road to access land in addition to its Lot 4, including the gravel pit.

Argument

The trial court erred when it entered judgment prohibiting use of the private road for access to the Dickson gravel pit. Interpretation of an easement is a mixed question, with the parties' intent a question of fact and the legal consequence of their intent a question of law. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The court's findings of fact relating to Dickson's intent in creating the private road were not supported by the evidence offered at trial, and the resulting

injunction and restricted scope of the easement were improper applications of the law.

Generally, a trial court's factual determinations may be overturned if not supported by substantial evidence. *E.g. Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person. *Id.* However, where an appeal "turns on proper conclusions to be drawn from practically undisputed evidence," the appellate court "has a duty of determining for itself the proper conclusions to be drawn from the evidence." *Kingwell v. Hart*, 45 Wn.2d 401, 404-05, 275 P.2d 431 (1954) (citing *Shultes v. Halpin*, 33 Wn.2d 294, 306, 205 P.2d 1201 (1949)).

A. The Plain Language of the Instruments Creating the Private Road Does Not Limit Access.

Prior to examining the record to determine whether the trial court's finding was supported, it is necessary to first examine what facts are relevant to the legal question presented. The issue at trial and on appeal is whether the easement across the private road is limited in its scope. Resolution of this issue depends on the language of the easement and the intent of the parties. *Sunnyside Valley*, 149 Wn.2d at 880.

To determine the scope of an easement, the Court must first look to the language of the instrument creating the easement. *Id.* When the grant is ambiguous, the circumstances surrounding creation of the easement may be considered. *Id.*; *see also Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986); *Green v. Lupo*, 32 Wn. App. 318, 321, 647 P.2d 51 (1982). As with any contract, the appropriate time to evaluate the parties' intent is at the time of creation of the easement.

An easement "for ingress and egress" is broad and must be construed in accordance with the intent of the party creating the easement. 17 William B. Stoebuck, *Washington Practice, Real Estate: Property Law* § 2.9; *see also Green*, 32 Wn. App. 318 (easement for ingress and egress was improperly construed to exclude motorcycles, except insofar as the motorcycles created an actionable nuisance.). In contrast, language specifically limiting an easement to ingress and egress to and from a particular parcel may be used to restrict access to other parcels. *Brown*, 105 Wn.2d 366.

The private road at issue in this case was created by deed dated September 14, 1979 (Exhibit 14), and referred to in the short plat recorded September 21, 1979 (Exhibit 15).³ The statutory warranty deed creates "a

³ The Court could determine that there is no easement, but rather that the four lot owners own the private road in fee simple. This would be consistent with the language on the short plat stating that "all lot ownerships shall include their adjoining portions of

private road for ingress, egress, and utilities” described by metes and bounds. Exhibit 14. The short plat confirms that the private road is for access, but does not specify that the road may be used only to access the lots of the short plat: “Access to lots 1, 2, 3, and 4 shall be by way of one and only one private road easement with its entrance as shown” Exhibit 15. Although the four lots are referenced, this language does not limit access, but rather restricts the number of roads that may be constructed and used for access to the four lots of the short plat.

The instruments creating the easement are broad in scope and do not explicitly prohibit access to land beyond the four lots of the short plat. The quoted language of the short plat does not limit those who may use the road, nor does it limit what land may be accessed from the road. Thus, the plain language of the deed and short plat allow for access to the pit, contrary to the trial court’s conclusion. This determination is supported by the circumstances and intent of the parties at the time the easement was created.

property for the private road easement as shown on the plat.” Exhibit 15. Further, Defendants offered evidence that the road is in fact taxed as though owned by each lot owner as tenants in common. RP Vol. 2 at 104:4-10. The original deed creating the road did not use the word “easement.” If Dickson and the Urquharts each have an interest in the private road as tenants in common, then Dickson’s right of access is not limited. *Butler v. Craft Eng Construction, Inc.*, 67 Wn. App. 684, 696-99, 843 P.2d 1071 (1992) (owner of an interest in a private road as a tenant in common could convey fractional share of that interest to adjacent property owner, and other tenants could not restrict access along the road to additional parcels).

B. The Trial Court's Finding that Dickson Did Not Intend to Use the Private Road to Access the Gravel Pit Was Not Supported by Substantial Evidence.

The trial court found that Dickson's intent at the time of creation was not to provide access to the gravel pit. This finding of fact is not supported by sufficient evidence, and must be overturned.

The recent decision of *In re Welfare of C.B.*, __ Wn. App. __, __ P.3d __, 2006 WL 2686845 (Div. 2, 33500-0, September 20, 2006), illustrates a lack of substantial evidence to support a finding of fact. The Department of Social and Health Services had petitioned to terminate a mother's parental rights. *Id.* at ¶ 2. The trial court found that it was not likely that the parental deficiencies could be remedied in six months to a year, and therefore granted the petition to terminate. *Id.* at ¶¶ 23, 28, 29. On appeal, this finding of fact was overturned as not being supported by substantial evidence. *Id.* at ¶ 46. The mother had presented evidence that she was improving, *id.* at ¶ 33, but "the State failed to introduce any evidence indicating that it would take Bartman [the mother] more than a year to improve enough to be reunited with her children," *id.* at ¶ 34. Due to the lack of evidence produced by DSHS, the trial court's finding of fact was not supportable, and the termination was reversed. *Id.* at ¶¶ 42, 46.

Vavrek v. Parks, 6 Wn. App. 684, 495 P.2d 1051 (1972), also overturned a finding of fact regarding intent. The parties disputed whether

a deed conveyed waterfront land according to its metes and bounds only or whether it included accreted land west of the described parcel, between the meander line and the high tide line. *Id.* at 685-86.

The trial court found as a matter of fact that the parties intended the meander line to be the actual boundary and quieted title to the accreted land in the grantor, based upon the following facts: (1) the grantor had informed the buyers that there was a dispute as to ownership of the accreted land, (2) the grantor offered to sell the land east of the meander line, (3) the four corners of the one-acre parcel were marked with stakes which the buyers saw, and (4) the grantor stated she would be willing to sell one acre described by metes and bounds. *Id.* at 686-87. There was also evidence, however, that the buyers had begun paying taxes on the disputed accreted land. *Id.* at 692. Despite the evidence in support of the trial court's finding, the appellate court found "no clear indication" that the parties intended the meander line to be the boundary and overturned the finding of fact for lack of substantial evidence. *Id.*

As in *Welfare of CB* and *Varek*, there was insufficient evidence offered at trial to support the court's finding of fact regarding Dickson's intent in creating the easement. Finding of Fact No. 6⁴ states:

⁴ This is the only finding that directly addresses Dickson's intent. Finding of Fact No. 11 (cited below) recites the evidence upon which the trial court relied in making this finding, and to the extent that it contains findings of fact, those findings are also not

The property that is now Lots 1 through 4 of Short Plat No. 79-563 was not intended at the time of purchase to provide access to the gravel pit. On the contrary, the property was acquired as a buffer to separate residential development in the area from the noise and dust of the gravel pit.

First, it should be noted that this finding does not explicitly address the ultimate issue: Dickson's intent in creating the easement. Rather, it is a finding regarding Dickson's intent for use of the property. Certainly, Dickson did not intend for the entire parcel to be used for access, but only the fractional portion designated as a private road.

Further, it is significant that the only party involved in creating the easement at issue was Dickson. The short plat was complete before any other parties acquired rights in the property, and the Urquharts admitted that they were not involved in the process. RP Vol. 2 at 160:4-6. Even if the above finding is construed as a finding regarding Dickson's intent in creating the easement, rather than its intent for the use of Lot 4 as it states, it is not supportable by evidence in the record.

The *only* direct evidence offered at trial regarding Dickson's intent in purchasing the land and creating the easement was Bill Dickson's own

supported by substantial evidence. Finding of Fact No. 10 ("The private road easement shown on Short Plat 79-563 is for the exclusive use and enjoyment of owners of lots within the short plat.") is more properly a conclusion of law: a legal conclusion regarding the scope of the easement based upon the court's finding regarding intent. *E.g. Sunnyside Valley*, 149 Wn.2d at 880 (intent is a question of fact, but "the legal consequence of that intent is a question of law"); *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980) (a finding that has legal implications is actually a conclusion of law and should be reviewed as such).

testimony and his notes on the surveyor's proposed short plat. The Urquharts offered *no evidence* to contradict this testimony. Thus, the court's finding was contrary to uncontroverted evidence and not supported by substantial evidence, and must be reversed.

The record is replete with statements from Bill and Richard Dickson regarding their intent in purchasing the property and creating the easement. Dickson had multiple reasons for purchasing the property: "We wanted another access into our property from Waller Road is the main reason, and the other reason is we wanted to send our fill, and also to own as a buffer zone." RP Vol. 2 at 82:21-23. Dickson had intended to use the road for truck traffic, and later for other traffic if it ever sold the gravel pit. *Id.* at 88:5-9; *see also id.* at 92:4-10. Bill Dickson did not ever intend to limit use of the road to access solely the four lots of the short plat, and did not believe that the language of the short plat was restrictive. *Id.* at 92:24-93:10.

The testimony of Richard Dickson confirmed this intent. Although Bill Dickson signed the deeds, Richard Dickson was also involved in discussions regarding purchase of the property. RP Vol. 1 at 48:10-14. He stated two reasons for purchasing the property: to provide access and to act as a buffer. *Id.* at 11:22-12:4. Mr. Urquhart confirmed that he understood Dickson intended to use Lot 4 as a buffer, but Dickson's intent

regarding use of *Lot 4* is irrelevant to its intent for use of the road. The Urquharts offered no testimony regarding Dickson's intent as to use of the private road.

The exhibits offered at trial also corroborated Bill Dickson's testimony. Most significantly, the preliminary short plat diagram admitted as Exhibit 22 originally depicted a private road 40 feet wide, but Bill Dickson widened the road to 60 feet, as indicated by his handwritten notes on the diagram. Exhibit 23, another copy of the preliminary diagram, also has notes indicating Dickson's instruction to widen the road. Dickson's purpose in widening the easement was to allow for truck access. RP Vol. 2 at 84:17-19, 85:12-14, 96:25-97:4; *see also* RP Vol. 1 at 12:7-8. Had he only been concerned about providing access to four residential lots, 40 feet would have been sufficient.

Further, Dickson's pattern of acquiring property adjacent to the original gravel pit supports the conclusion that the property was intended as more than a buffer. Over time, Dickson acquired several parcels of land adjacent to the original gravel pit. Each new parcel was considered a part of the gravel pit as a whole and was put to use. At no time did Dickson acquire a parcel solely to act as a buffer. For example, the parcel referred to as the "Carlton Property," located just south of Lot 4, the property at issue, was mined by Dickson, although it is also adjacent to

residential property. RP Vol. 1 at 43:18-20. Although no mining took place on the Woempner parcel, Dickson intended to use it as an alternate access, and it did place some fill on Lot 4. *Id.* at 46:12-14. The court's finding that the Woempner parcel was purchased solely as a buffer is incompatible with evidence regarding Dickson's pattern of acquisition.

The evidence offered at trial establishes that a gate was in place at the end of the private road (along the boundary of Lot 4). RP Vol. 2 at 179:16-19. The Urquharts offered as evidence photos they had taken of the gate, admitted as Exhibit 33. The Urquharts labeled these photos "access gate to *pit* from easement." Exhibit 33 (emphasis added). Thus, the Urquharts conceded that the gate, and therefore the private road, were intended for access to the gravel pit, and not just to Lot 4.

The trial court's strained justification for Finding of Fact No. 6 appears in Finding No. 11:

In making findings # 6 and # 10 the court discerned the parties intent from more than the in-court testimony about what Dickson wants the road or easement to be today. Dickson's use since the road and easement were created does not support the proposition that the road and the creation of the easement were acquired as a secondary access for the gravel pit. This is also consistent with the use by Dickson of the 20-foot wide access to the gravel pit across parcel No. 0320144-024. It is also consistent with the fact that only a portion of the easement road was paved in 1979 and with the fact that on the Dickson historical map/drawing of their land acquisitions over the years the 60 foot easement is identified as a "dead end."

These few references do not support the court's conclusion. The court cited Dickson's infrequent use of the road for heavy trucks, but even the Urquharts agreed that Bill Dickson had used the road for his personal access to the pit. RP Vol. 2 at 175:18-19, 200:4. Further, Dickson's subsequent use of the road is not dispositive of his intent at the time the easement was created. The record shows that Dickson cleared the south side of the private road near the neighbor's fence, which would not have been necessary if the property was only a buffer. RP Vol. 2 at 100:12-18. In addition, Dickson attempted to widen the road, again unnecessary unless Dickson intended to use the road to access the pit. *Id.* at 154:19-20, 155:10-11. As mentioned above, the fact that Lot 4 was used in part as a buffer does not preclude a dual intent to also use the the private road to access the gravel pit.

The court also apparently based its conclusion upon nonexistent testimony regarding Dickson's use of the 20-foot strip, referred to as parcel no. 0320144024, between the Carlton Property and the rest of the gravel pit. Although the 20-foot strip was not acquired until 2004, Dickson regularly accessed its pit from lot 4 and the Carlton Property. RP 75:21-25, 80:25, 91:1-3. As far as Dickson was concerned, the parcel did not exist. *Id.* at 80:11-14. In fact, Richard Dickson testified that the 20-foot strip was supposed to have been conveyed earlier, but was missed by

the parties. *Id.* at 78:20-22. The existence of the 20-foot strip was therefore irrelevant to a determination of Dickson's intent in creating the easement. In addition, although it would be possible to use the 20-foot strip as another access road, it would not significantly improve access to the pit because it also exited onto the same street as Dickson's main access. RP 125:6-14. It is unclear how use of the 20-foot strip is at all relevant to determining the scope of the easement on the Woempner parcel.

The extent of paving on the road also cannot be relied upon to determine Dickson's intent. It is true that the entire length of the private road was not originally paved, and that the paving has never extended onto Lot 4. However, Dickson intended that the road be used as access to a gravel pit, where few, if any roads are paved. RP Vol. 1 at 35:1-3. Dickson's vehicles did not require a paved road to access the pit. *Id.* at 34:16-23; RP Vol. 2 at 102:4-5. The simple fact that the road was not paved is irrelevant as to whether Dickson intended to use it for access.

Finally, the court misconstrued Bill Dickson's notation on the topographical map admitted as Exhibit 13.⁵ Although he indicated on the map that the private road was a dead end, this obviously meant that the road was no longer a public road past the border of Lot 4. Both Bill and

⁵ There is no evidence that this exhibit is a "historical" map or drawing, as characterized by the trial court in Finding of Fact No. 11.

Richard Dickson testified at length that the road was not a dead end for vehicles accessing the pit. RP Vol. 1 at 14:10-19, RP Vol. 2 at 86:8-9, 15, 107:2-4. There was no testimony as to when the “dead end” notation was made. Further, the existence of a gate at the end of the private road, as mentioned above, certainly contradicts the conclusion that it was a dead end for all purposes.

Examining the evidence in the record, it is apparent that the substantial weight of the evidence supports the conclusion that Dickson intended the private road to be used to access the entire gravel pit. The Urquharts did not present evidence to contradict the substantial evidence offered by Dickson. Thus, the trial court’s findings of fact regarding intent are not supported, and must be overturned.

C. The Conclusion of Law and the Injunction Prohibiting Access to the Gravel Pit via the Private Road Must Be Reversed.

Once the pertinent findings of fact are reversed, the Court must also reverse the injunction against Dickson’s access to the pit using the private road. Due to its erroneous finding regarding intent, the trial court incorrectly made the following conclusion of law:

Judgment should be entered declaring that the easement that serves Lot 4 of Short Plat No. 79-563 cannot be used for ingress and egress to the Dickson gravel pit properties and permanently enjoining Dickson from using the easement for that purpose.

As stated above, the scope of the easement is determined by the language of the grant and the parties' intent. *Sunnyside Valley*, 149 Wn.2d at 880. Based upon the substantial evidence in the record, the Court must conclude that Dickson's intent in creating the private road was to allow access to the pit. This is consistent with the language of the deed and short plat and supported by the testimony and exhibits cited previously.

An easement can be appurtenant to land not physically adjacent to the easement itself. *Kemery v. Mylroie*, 8 Wn. App. 344, 506 P.2d 319 (1973). The easement at issue in *Kemery* was held to be appurtenant to the plaintiff's land despite the fact that it was geographically separated from the way, consistent with the parties' intent. *Id.* at 346. Further, an easement can be created even though a dominant estate and a servient estate are not identifiable at the time of creation. *Beebe v. Swerda*, 58 Wn. App. 375, 381-82, 793 P.2d 442 (1990).

Because Dickson intended the private road to be used to access the land in addition to the four lots of the short plat, the Court must also reverse Conclusion of Law No. 6 and the corresponding portions of the judgment enjoining Dickson from using the private road to access the gravel pit. Use of the private road cannot be restricted solely to access the four lots of the short plat.

D. Conclusion

Whether the private road may be used to access land outside the short plat must be based upon the language of the instruments creating the private road and on the intent of the party creating the road. Neither the deed nor the short plat state that the road may only be used to access Lots 1 through 4. Evidence offered by Dickson established that the road was created to provide a second access to the gravel pit. The Urquharts offered no evidence to contradict this intent, but relied upon facts that are not pertinent to determine Dickson's intent at the time the road was created. The trial court's finding of fact was not supported by substantial evidence, and the resulting judgment enjoining Dickson's access to the gravel pit must be reversed.

DATED this 27th day of October, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the Appellant's Brief to counsel of record as follows:

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DATED this 27th day of October, 2006.


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