UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

The Estate of LACETTA ANNE TESTER, by and through Personal Representative, NATHAN D. TESTER, *Plaintiff*, v. THE VILLAGE AT HAMILTON POINTE, LLC, An Indiana Limited Liability Company; RIVERVIEW HOSPITAL, d/b/a HAMILTON POINTE HEALTH AND REHAB, An Indiana County Hospital Corporation; TENDER LOVING CARE MANAGEMENT, INC., d/b/a TLC MANAGEMENT, An Indiana For-Profit Corporation; and NEWBURGH PROPERTY MANAGEMENT, LLC, An Indiana Limited Liability Company, *Defendants*.	)	CASE NO.: 3:24-cv-00005-MPB-CSW

HAMILTON POINTE'S REPLY TO THE PLAINTIFF'S RESPONSE IN OPPOSITION TO HAMILTON POINTE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The Village at Hamilton Pointe, LLC, Riverview Hospital, d/b/a Hamilton Pointe Health and Rehabilitation Center, Tender Loving Care Management, Inc., d/b/a TLC Management, and Newburgh Property Management, LLC (*Hamilton Pointe*), by their counsel, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, file their Reply to the Plaintiff's Response in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I. INTRODUCTION

The Estate's First Amended Complaint (*Complaint*), like the original Complaint falls squarely under the purview of the Indiana Medical Malpractice Act (*MMA*).

The Estate failed to meet its burden to establish that this Court has subject matter jurisdiction over this action and failed to address the Complaint's fatal procedural flaw.

The Estate's argument that it can bring a viable Eighth Amendment claim is fundamentally flawed. Hamilton Pointe is not a prison operated by a State or federal government, its employees are not prison officials employed by a government entity, and Ms. Tester was not an *incarcerated* or *convicted person*. Second, the Estate's Complaint, as pled, verifies and confirms that it contends Hamilton Pointe owed a duty to provide adequate medical care to Ms. Tester. Lastly, Hamilton Pointe provided nursing care and services to Ms. Tester that meet MMA's definition of health care.

Overall, the Estate's Complaint meets the requirements of a medical malpractice claim that falls under the MMA: (1) Hamilton Pointe's duty to Ms. Tester arose from a contract for the provision of nursing care and services; (2) the Estate's claim arises out of the alleged failure of Hamilton Pointe to provide adequate medical treatment; (3) by a qualified health care provider, i.e. Hamilton Pointe; and (4) to its resident (nursing home residents are referred to as residents and not patients) Ms. Tester. In addition, the Estate's Complaint involves Hamilton Pointe exercising professional skill and judgment while rendering health care services to Ms. Tester. Accordingly, the Estate's Complaint must first be presented to a medical review panel for an expert opinion. Since there has been no medical review panel opinion rendered on the allegations contained in the Estate's Complaint, this Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, must dismiss the Estate's Complaint, without prejudice, due to lack of subject matter jurisdiction.

II. ARGUMENT

Any analysis of the Estate's inadequate medical care claim must focus only on the substance of the allegation, not the label the Estate used in its attempt to circumvent the MMA.

This analysis must focus on Hamilton Pointe's nursing staff's conduct. From start to finish, the Estate's Complaint is replete with allegations of Hamilton Pointe's failure to provide Ms. Tester with health care. The Estate makes it easy for this Court to know what is the substance of its Complaint by explicitly alleging that Hamilton Pointe failed to provide Ms. Tester adequate medical treatment for her medical needs, and that these failures caused Ms. Tester's injuries and death.

The MMA applies when a plaintiff's claim meets the following elements: (1) it is a tort or breach of contract; (2) based upon health care or professional services that were or should have been provided; (3) by a qualified health care provider; and (4) to a patient. I.C. § 34-18-2-18. Here, the Estate's Complaint falls squarely under the MMA: (1) Hamilton Pointe's duty to Ms. Tester arose from a contract (Admission Agreement) for the provision of nursing care and services; (2) the Estate's claim arises out of Hamilton Pointe's alleged failure to provide nursing care and treatment i.e., claim of inadequate medical care, failure to provide treatment to Ms. Tester's medical condition, and failure to transfer Ms. Tester to the hospital; (3) by a qualified health care provider Hamilton Pointe, which qualified status was established and is undisputed; and (4) to its resident Ms. Tester,. For these reasons, the allegations in the Estate's Complaint sounds in medical negligence and not a violation of Ms. Tester's Fourteenth and Eight Amended rights and 42 U.S.C. § 1983 and, therefore, must be subject to the MMA requirements.

A. The Estate by law, cannot bring an Eighth Amendment complaint against Hamilton Pointe leaving only the Estate's claim for medical negligence.

The Estate first contends that its Complaint does not fall under the MMA because the Complaint asserts an allegation for inadequate medical care under the Eighth Amendment. In support, Plaintiff cites to *Jester v. Zimont*, 2011 U.S. Dist. LEXIS 137025, *6 (N.D. Ind. 2011) and *Hargett v. Corr. Med Servs.*, 2012 U.S. Dist. LEXIS 26877, *13-14 (S.D. Ind. 2012).

However, the Estate's reliance on *Jester* and *Hargett* is misguided as Eighth Amendment claims are not applicable to nursing homes.

The facts and legal analysis for *Jester* and *Hargett* are wholly distinguishable from the present matter. In *Jester,* the plaintiff was an incarcerated person at the Pendleton Correctional Facility f/k/a Indiana State Reformatory, Indiana Department of Corrections (*Pendleton*). The plaintiff brought a 1983 complaint alleging that, while he was in Pendleton's custody, the Pendleton physicians provided inadequate medical care and treatment violating his Eighth Amendment right. Likewise, in *Hargett*, the plaintiff was an incarcerated person in the custody of the Indiana Department of Correction (*DOC*). The plaintiff, through his guardian, filed a complaint against DOC physicians alleging that they provided inadequate medical care and treatment while he was in the DOC's custody in violation of his Eighth Amendment claims.

The *Jester* and *Hargett* Courts both acknowledged that the plaintiffs' inadequate medical care and treatment allegations may proceed as a claim of medical malpractice. The *Jester* Court determined that the plaintiff was not required to first bring his medical malpractice claims before a medical review panel as his Eighth Amendment claims for inadequate medical care against the prison employed physicians was an available avenue under federal law. *Jester* at 7. The *Hargett* Court's decision was similar in that it recognized that a claim for medical malpractice was brought. However, the Court granted only one physician's motion for lack of subject matter jurisdiction, and denied the remaining physicians' motions as the patient-plaintiff's claims could support multiple causes of action. *Hargett* at 7-9.

The Estate's reliance on *Jester* and *Hargett* is improperly based on its mistaken belief that it can bring an Eighth Amendment complaint against a nursing home. The *Hargett* Court explained the purpose of an Eighth Amendment claim:

> The Eighth Amendment's prohibition against cruel and unusual punishment . . . prohibits punishments which are incompatible with *the evolving standards of decency that mark the progress of a maturing society*. It thus requires that the government provide *medical care for those whom it is punishing by incarceration*. The Eighth Amendment safeguards the prisoner against a lack of medical care that *may result in pain and suffering which no one suggests would serve any penological purpose*. Accordingly, *deliberate indifference to serious medical needs* of a prisoner constitutes the unnecessary and wanton infliction of pain forbidden by the Constitution.

Hargett, 2012 U.S. Dist. LEXIS 26877, at 7.

The Eighth Amendment's ban on cruel and unusual punishment requires *prison officials* to take reasonable measures to guarantee the safety of *inmates*, including the provision of adequate medical care. *Minix v. Canarecci*, 597 F.3d 824, 830 (7th Cir. 2010) (citing Farmer v. Brennan, 511 U.S. 825 (1994)). The Eighth Amendment applies *only* to *convicted persons*. *Id.* at 831. Hamilton Pointe is not a prison, its employees are not prison officials, and Ms. Tester was not an *incarcerated* or *convicted person* at all times mentioned in the Estate's Complaint. Accordingly, the Estate cannot bring an Eighth Amendment claim against Hamilton Pointe and this leaves only the State' allegation that Hamilton Pointe failed to provide adequate medical treatment causing Ms. Tester's injury and death, which falls squarely under the purview of the MMA.[1]

B. The Estate's Complaint alleges that Hamilton Pointe owed a duty to Ms. Tester to provide medical treatment.

The discussion of whether Ms. Tester withdrew her consent to be a Hamilton Pointe resident is not necessary as the Complaint plainly pleads that Hamilton Pointe was required to provide Ms. Tester with adequate medical treatment. The Estate's argument in its Response that

[1] As Magistrate Judge Denise LaRue pointed out in a footnote in *Hargett*, the nature of whether an Eighth Amendment allegation is for a 12(b)(6) motion to dismiss for failure to state a claim. Hamilton Pointe filed its Motion to Dismiss for Failure to State a Claim first addressing the Estate's inability to bring an Eighth Amendment claim against Hamilton Pointe, as well as the Estate's remaining Counts.

Hamilton Pointe did not owe a duty to Ms. Tester is contrary to the allegations set forth in its Complaint. The Estate contends that Ms. Tester was experiencing a serious medical condition during the early morning hours of January 12, 2022 and that Hamilton Point failed to provide Ms. Tester *appropriate treatment* – i.e. failing to provide appropriate treatment to her chronic respiratory failure and failure to transfer Ms. Tester to receive emergency care and treatment – causing her *injuries and death*.

To establish a claim of medical malpractice, Indiana law requires a plaintiff to prove the following three elements: (1) the existence of a duty owed to the plaintiff on the part of the defendant; (2) breach of that duty by allowing conduct to fall below the applicable standard of care; and (3) a compensable injury that was proximately caused by the defendant's breach of duty. *Perry v. Driehorst*, 808 N.E.2d 765, 768 (Ind. Ct. App. 2004). The Estate's admits that Hamilton Pointe: (1) owed Ms. Tester a duty of care; (2) allegedly breached that duty of care by its alleged acts or omissions; and (3) caused Ms. Tester's injuries and death. Therefore, the Estate's Complaint alleges the elements necessary for a medical negligence case and should be dismissed as this Court lacks subject matter jurisdiction over it.

To the extent that the determination of whether Ms. Tester withdrew her consent is necessary for this Court's determination, Hamilton Pointe and Ms. Tester, at all relevant times, maintained a health care provider-patient relationship. The duty owed by a health care provider arises from the health care provider-patient relationship. *Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006). The health care provider-patient relationship is a consensual relationship formed between two parties: the health care provider and the patient. *Id*. A duty is based on privity. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991). A *patient* under the MMA is defined, in relevant part, as *an individual who receives or should have received health care from*

a health care provider, under a contract, express or implied . . .. I.C. § 34-18-2-22. Therefore, a patient can consent to receive health care either verbally, through written consent, or through implied consent. Regardless, the duty arises based on the parties' consent to the relationship. Naturally, if a patient wishes to withdraw consent, the patient must explicitly do so by informing the health care provider with whom he or she holds privity either verbally or in writing.

Nursing homes and its residents form a duty through privity of contract. As explained in Hamilton Pointe's Brief in Support, Hamilton Pointe's duty to Ms. Tester arose from privity of contract through the Admissions Agreement. The Estate does not dispute this fact. Based on the Estate's pleadings, Ms. Tester voluntarily chose to reside at Hamilton Pointe by entering into a contact with Hamilton Pointe for room and board and nursing care and services. She voluntarily admitted herself to and resided at Hamilton Pointe to receive, among other things, nursing care and services from August 2, 2021 to January 12, 2021. On those occasions when she transferred out for acute care in a hospital, she voluntarily returned to Hamilton Pointe thus continuing her residency.

Ms. Tester did not *irrefutably withdraw and revoke her consent* to be a Hamilton Pointe resident. On the contrary, the Estate's Complaint does not establish that Ms. Tester informed Hamilton Pointe she no longer wished to reside there or to accept the nursing care and services provided. By nature of the health care provider-patient relationship, a withdrawal of consent must be explicitly reported to the health care provider with whom the patient holds privity. However, the Estate argues that Ms. Tester withdrew her consent by the act of calling the Warrick Emergency 911 Operator and telling the operator that she believes she needs to go to the hospital. However, and importantly, the 911 Operator is not a party to the health care provider-patient relationship. In its Response, the Estate cites to no authority that provides a patient may withdraw consent by

reporting her withdrawal to a non-interested third party because there is no such authority. In addition, consent is not withdrawn in the event a nursing home resident is transferred to the hospital as in the normal course of business the resident returns to the nursing home once acute care or treatment is completed. Consent is not withdrawn when the resident leaves the nursing home to be seen by health care providers in their place of business such as a medical office. Accordingly, Ms. Tester did not withdraw her consent to reside at Hamilton Pointe and accept the nursing care and services it provided.

Furthermore, as pled, Ms. Tester's acceptance of nursing care and assistance during and following the *911 calls* confirms that she provided Hamilton Pointe at least implied consent. Ms. Tester allowed the nursing staff to provide nursing services, including asking Hamilton Pointe's nursing staff for assistance, the nursing staff assessing Ms. Tester, taking her vitals, assisting her and in re-applying her BiPAP in compliance with the physician's order. It also included ensuring that her care plan was followed, such as redirecting her behaviors and ensuring her call light was in place so that she could call the nursing staff for immediate help. The Estate's Complaint confirms Ms. Tester understood that tying up the 911 lines was wrong. If Ms. Tester truly meant to withdraw consent, she had opportunities to do so and never said she was or that she wanted to do so. At best, she thought she needed emergent, acute case. That belief and even acting on that belief did not withdraw the consent established by the Admission Agreement.

While the Estate is correct that in evaluating a 12(b)(1) motion the Court construes the complaint in the plaintiff's favor and accepts all factual allegations as true, the court may *not* draw any jurisdiction *inferences* from the pleading in favor of the plaintiff. *Norton v. Larney*, 266 U.S. 511, 515 (1925). Rather jurisdiction must be shown affirmatively and distinctly and cannot be helped by *presumptions* or *argumentative inferences* drawn from the pleadings. *Id.* The Estate is

asking this Court to ignore Indiana case law regarding consent and accept its presumptions and argumenetative inferences that are not supported by the pleaded facts. This is not enough, and the Court should disregard the Estate's argument in its entirety.

C. The MMA is applicable to nursing care and treatment.

The Estate's Complaint plainly acknowledges that its claim involves the provision of medical care and treatment by alleging that Hamilton Pointe provided inadequate medical care, failed to treat Ms. Tester's medical conditions, or failed to help provide medical treatment for her serious medical needs, which allegedly caused Ms. Tester's injuries and death. In addition, the Estate's Complaint is full of discussions regarding the provision of nursing care and treatment or the failure to provide nursing care and treatment for Ms. Tester. However, in the Estate's Response, it erroneously argues that [s]*ince a physician was not involved in Ms. Tester's treatment, and the person operating the devices in her treatment were not required to be healthcare workers or possess healthcare credentials, the MMA is inapplicable to Plaintiff's claims*. In support of this misguided assertion, the Estate argues that *Ob-Gyn Assocs. of N. Ind., P.C. v. Ransbottom*, 885 N.E.2d 734, 735-736 (Ind. Ct. App. 2008. But the Estate's argument is flawed for several reasons.

First and foremost, on the face of the Estate's Complaint, it alleges that Hamilton Pointe provided inadequate medical treatment to Ms. Tester that caused or contributed to her injuries and death. The Estate does not state specifically what medical treatment was inadequate or what treatment would have been adequate. However, it is clear that the Estate believes medical treatment by Hamilton Pointe should have been provided or should have been *adequate*. It is also clear that the Estate believes this alleged failure caused Ms. Tester's injuries and death. This admission alone is enough for the Court to determine that the Estate's Complaint involves the provision of medical services for the promotion of Ms. Tester's health.

Second, contrary to the Estate's assertion, a physician does not have to be involved in the provision of health care for a medical malpractice claim to exist. As the *Ransbottom* Court stated, *medical malpractice can stem from the acts of someone other than a physician. That principle is hardly controversial*. *Id.* at 738. Indeed, as pointed out in Hamilton Pointe's Brief in Support, the MMA definition of health care provider includes registered and licensed practical nurses and nursing homes, such as Hamilton Pointe and its nursing staff employees. IC § 34-18-2-14. Hamilton Pointe is a qualified provider under the MMA which means that its actions or inactions are subject to the medical review panel procedure. The point being that nursing homes are providers as are physicians and therapists and there is no requirement that medical malpractice claims must include a physician. The Estate's logic, in essence, defeats its claim because its claim is inadequate medical care, but the Estate failed to name the physician who allegedly provided this inadequate medical care.

Therefore, the Estate's argument that a physician must be involved in a claim for it to be medical malpractice is not supported by either logic or Indiana law and should be disregarded.

Third, a physician was involved in Ms. Tester's treatment at Hamilton Pointe. Indeed, Ms. Tester had a physician-patient relationship with her attending physician, a physician that under State and federal law she is required to have to reside in a nursing facility and under State and federal law she is free to choose her attending physician. Physicians are responsible medical care and treatment provided to nursing home residents such as issuing treatment and medication orders, seeing and assessing patients, signing off on the nursing staff's care plans, supervising the nursing staff's provision of nursing care and treatment of patients, and more. *See* 42 CFR § 483.30 and 410 IAC § 16.2-3.1-22. Nursing homes provide nursing care and treatment i.e. staff follow the

nursing regime, they are not licensed or permitted to provide medical care; rather, attending and consulting physicians issue orders which the nursing staff implements.

Fourth, it was important to the *Ramsbottom* Court that a licensed health care professional was not required to be involved in performing laser hair removal, *no physician participated in Ransbottom's laser hair removal treatment. Moreover, and significantly, no healthcare professional was required to*. *Ransbottom*, 885 N.E.2d 734 at 740. The opposite is true here. Physician(s) provided medical care and treatment to Ms. Tester at Hamilton as the law requires that she have a licensed physician overseeing her care. As a licensed nursing facility, Hamilton Pointe's staff was obligated to provide her with nursing care. The care and treatment that nursing home residents receive could not be *legally achieved outside of a healthcare facility by non-healthcare professionals*. It is for this very reason that residents such as Ms. Tester, are admitted to nursing homes. Nurses assess residents, provide nursing interventions, and communicate their medical needs to the physician. The nursing staff then carry out the physician's orders. Further, a nurse is able to provide first aid or life-saving care as needed, draw blood, administer medications, take vital signs, and other nursing measures.

Lastly, in regard to the Estate's argument that a BiPAP machine and taking vitals is not medical treatment is illogical and inaccurate but is a determination that the Court does not need to reach as it is inapplicable the ultimate question of whether the Complaint sounds in medical negligence. The Estate brought this point up only because Hamilton Pointe mentioned the BiPAP machine in its Brief in Support. While it is true that Ms. Tester used a BiPAP machine because her physician ordered it and the nursing staff carried out this order, Hamilton Pointe never argued that the Estate's Complaint sounds in medical malpractice *because* Ms. Tester used a BiPAP machine. See Dkt. No. 33, pp. 5-9. Similarly, Hamilton Pointe never argued that the Estate's Complaint

sounded in medical malpractice because the nursing staff took and assessed Ms. Tester's vitals.[2],[3] It has always been Hamilton Pointe's position that the plain language of the Estate's Complaint that Hamilton Pointe failed to provide *adequate medical treatment* causing injury and death supports the conclusion that the Estate is alleging a medical malpractice claim.

As previously noted, the MMA applies to *conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill or judgment*. *Winona Memorial Hospital, Limited Partnership v. Kuester*, 737 N.E.2d 824, 828 (Ind. App. 2000). Hamilton Pointe's nursing staff were exercising their professional judgment in making these decisions. *Exhibit A, p. 2.* Accordingly, the substance of the Estate's claims pertains to the Hamilton Pointe nursing staff's *professional expertise, skill or judgment* in providing nursing care and treatment to Ms. Tester for the promotion of her health.

The Estate concedes that its claims have not been presented to a medical review panel. Under the MMA, a court may not adjudicate the merits of a medical malpractice claim against a qualified provider before the plaintiff has filed a proposed complaint with the Indiana Department of Insurance and the medical review panel has issued its opinion. I.C. § 34-18-8-4; *Kho v. Pennington*, 875 N.E.2d at 209, 211; *H.D. v. BHC Meadows Hospital*, 884 N.E.2d at 853. In these circumstances, the malpractice claims must be and are dismissed. *Hubbard v. Columbia Women's Hospital*, 807 N.E.2d 45, 52 (Ind. Ct. App. 2004); *Estate of Perry ex rel. Perry v. Boone County*

[2] See e.g., *Yaney v. McCray Memorial Hospital*, 496 N.E. 2d 135 (Ind. Ct. App. 1986) in which the plaintiff alleged medical malpractice due to failure to take vitals. In addition, the Estate's comparison to a licensed nurse taking vital signs and understanding the health ramifications to an Apple watch is deeply flawed. According to Apple's website, *Blood Oxygen app measurements are not intended for medical use, including self-diagnosis or consultation with a doctor, and are only designed for general fitness and wellness purposes.* *How to use the Blood Oxygen app on Apple Watch*. Apple. https://support.apple.com/en-us/HT211027. Accessed 10, June 2024.

Sheriff, 2008 U.S. Dist. LEXIS 19358, *45-46 (S.D. Ind. March 12, 2008). Consequently, the Estate's Complaint must be dismissed, without, prejudice, as this Court lacks subject matter jurisdiction over the Estate's medical negligence allegations.

D. An Evidentiary Hearing is unnecessary prior to the Court's ruling on Hamilton Pointe's Motion to Dismiss.

This Court should deny the Estate's request for an evidentiary hearing as such a hearing is unnecessary. Dismissal without further discovery is entirely proper. Whether a case is one of medical malpractice as defined by the Act is a question of law for the court. *Anonymous Hosp., Inc. v. Doe*, 996 N.E.2d 329 (Ind. Ct. App. 2013) (citing *Weldon v. Universal Reagents, Inc.*, 714 N.E.2d 1104, 1107 (Ind. Ct. App. 1999)). The Estate's request for an evidentiary hearing is based on Hamilton Pointe's *Exhibit B,* which is the coroner's report that the Estate submitted as part of its original Complaint.[4]

It is confounding that the Estate takes issue with its own document alleging that it somehow contains factual disputes. The Estate did not believe that it contained any factual disputes when it filed it as part and parcel of its original Complaint. Additionally, if the Estate truly believed that further factual evidence was needed to be submitted for this Court's analysis, it would have done so in its Response. The Estate did not do so despite having Ms. Tester's medical records in its possession. As discussed above, Hamilton Pointe's Motion to Dismiss for Lack of Subject Matter Jurisdiction is by and large based on the plain language of the allegations in the Estate's Complaint.

The Estate's allegation that Hamilton Pointe allegedly failed to provide Ms. Tester with adequate medical treatment causing her injury and death is clearly one of medical negligence. Therefore, the Court should deny the Estate's request.

[4] Hamilton Pointe has contemporaneously filed a Response to the Estate's Motion to Strike under Rule 12(f) of the Federal Rules of Civil Procedure and thus incorporates the Response herein.

III. CONCLUSION

The Estate failed to meet its burden of establishing that jurisdiction over its claim lies in this honorable Court and thus, its Complaint must be dismissed, without prejudice. For the foregoing reasons, and those stated in the Brief in Support of Hamilton Pointe's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Hamilton Pointe respectfully requests that this Court grant its Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12 (b)(1) and for all other just and proper relief.

Respectfully submitted,

DREWRY SIMMONS VORNEHM, LLP

/s/ Janet A. McSharar
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served with the Clerk of the Court on this 10th day of June 2024 using the CM/ECF system which sent notification of this filing or by placing it in the U.S. Mail, postage pre-paid, to the following:

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