

Affirmed and Opinion filed November 8, 2001.



In The
Fourteenth Court of Appeals

NO. 14-01-00623-CV

GERARD J. MITCHELL, Appellant

V.

SIMPRO, INC., Appellee

**On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 99-60504**

OPINION

In this interlocutory appeal, appellant Gerard J. Mitchell seeks review of the trial court's order denying his special appearance. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this lawsuit, Simpro, Inc. seeks to recover on a debt allegedly owed to Simpro by Atlanta Film and Mitchell arising from Atlanta Film's purchases of industrial-use plastic film. Mitchell formed Atlanta Film as a Georgia corporation in 1980. At all material times, Mitchell owned 95% of the stock in Atlanta Film. Mitchell also served as the president, chief

executive officer, and chairman of the board of Atlanta Film. For several years throughout the 1980's and 1990's Atlanta Film purchased industrial-use film from Simpro for conversion and resale. This relationship continued without disruption until the beginning of 1998, when, because of Atlanta Film's deteriorating financial situation, its debt to Simpro significantly increased.

Around March of 1998, Mitchell met with Simpro's president, Dan Demaris. Mitchell told Demaris that Atlanta Film had encountered some operational difficulties in 1997 and that although they were corrected, it would take some time for Atlanta Film to recover and for cash flow to improve. Mitchell proposed in a letter that Atlanta Film would pay the past due amounts owed in six equal monthly payments. Mitchell requested that Simpro continue to sell its products to Atlanta Film on credit, promising payment within 60 days for all future purchases. Mitchell stated that he would personally guarantee the debt if Simpro agreed to a promissory note for all past amounts due. Mitchell sent a proposed promissory note in the amount of \$500,000, which included a short guarantee provision, wherein he promised to personally guarantee the debt.

Demaris found this note and guarantee inadequate and drafted documents acceptable to Simpro. Demaris faxed this note and guarantee to Atlanta Film. The newly proposed guarantee was a continuing guarantee that covered both the \$500,000 promissory note and all future purchases. In addition, the note was deemed for all purposes, to be "made in and governed by the laws of the State of Texas." Mitchell signed the promissory note and the personal guarantee and returned them to Simpro.¹

¹ Mitchell contends that at the time he signed the note and guarantee he raised concerns with Demaris regarding whether personal guarantee was binding on him for debts beyond the promissory note. He claims that Demaris, in response to these concerns, promised him that once the promissory note was paid off by Atlanta Film, the guarantee would be extinguished and Simpro would no longer be able to enforce it against him for future obligations. Mitchell then argues that he only signed the guarantee based on these representations. Demaris, however testified that he does not remember making such statements. Nevertheless, Mitchell's contention violates the parol evidence rule. "An unconditional written instrument cannot be varied or contradicted by parol agreements or by representations of the payee that the maker would not be held liable according to the tenor of the instrument." *See Town North Nat. Bank v. Broaddus*, 569

A few months later, in approximately September of 1998, Mitchell traveled to Houston to meet with Demaris to determine whether Simpro had any interest in acquiring Atlanta Film. During this meeting, Demaris informed Mitchell that contrary to their previous commitments, Atlanta Film was four months behind in their payments. Acting as the owner of Atlanta Film and guarantor of its purchases, Mitchell assured Demaris that he was optimistic about Atlanta Film's future although there had been some problems and despite Atlanta Film's weak financial performance and previous cash flow problems.

Simpro decided it was not interested in acquiring the assets of Atlanta Film. Realizing that he would be unable to sell Atlanta Film unless he kept it operating, Mitchell increased the amount initially borrowed from StarBank, Atlanta Film's principal lender, from \$4.5 million to \$5.2 million. In addition, Mitchell knowing that Atlanta Film would not be able to pay, purchased on credit, from established suppliers, over a million dollars worth of products. Unbeknownst to Simpro, Mitchell was also negotiating with Packaging Products, Inc. a corporation in the same business as Atlanta Film. On December 10, 1998, Mitchell entered into a letter agreement with Packaging Products to sell all assets of Atlanta Film. Two and a half months later, Atlanta Film sold all its assets to Packaging Products. Following this sale, Simpro instituted suit against Atlanta Films for the unpaid receivable debt of approximately \$200,000.

Several months later, Simpro joined Mitchell in the proceedings, asserting claims for breach of the guarantee, fraud, and alter ego. Mitchell, a resident of Georgia, filed a special appearance claiming that he has never conducted business in Texas, and that he does not have minimum contacts sufficient for personal jurisdiction. The trial court overruled Mitchell's special appearance.

S.W.2d 489 (Tex. 1978) (quoting *Dean v. Allied Oil Co.*, 261 S.W.2d 900, 902 (Tex. Civ. App. Waco 1953, writ dismissed). Furthermore, the case upon which Mitchell relies, *Simpson v. Mbank Dallas N.A.*, held based upon substantially similar facts that the parol evidence rule barred contentions similar to the ones he alleges here. 724 S.W.2d 102, 108 (Tex. App.—Dallas 1987, writ refused n.r.e).

II. STANDARD OF REVIEW

The plaintiff has the initial burden of pleading sufficient allegations to bring the nonresident defendant within the ambit of the Texas long-arm statute. *C-Loc Retention Systems, Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.–Houston [14th Dist.] 1999, no pet.). At the special-appearance hearing, the nonresident bears the burden of negating all bases of personal jurisdiction. *National Indus. Sand Ass'n v. Gibson*, 879 S.W.2d 769, 772 (Tex. 1995). Whether the court has personal jurisdiction over a nonresident defendant is a question of law, but the proper exercise of such jurisdiction is sometimes preceded by the resolution of underlying factual disputes. *See C-Loc Retention Sys., Inc.*, 993 S.W.2d at 476. The standard of review for determining the appropriateness of the resolution of those facts is the factual sufficiency of the evidence review. *Id.* The reviewing court considers all evidence in the record. *Id.* However, where the record contains no findings of fact or conclusions of law, as here, all questions of fact are presumed to be found in support of the judgment. *Carlin v. 3V Inc.*, 928 S.W.2d 291, 294 (Tex. App.–Houston [14th Dist.] 1996, no writ).²

Where a complete statement of facts appears in the record, however, these implied findings are not conclusive and an appellant may challenge the sufficiency of the evidence. *Robertson v. Robertson*, 768 S.W.2d 280, 281 (Tex. 1989). This court must affirm the judgment of the trial court on any legal theory finding support in the evidence. *C-Loc Retention Sys., Inc.*, 933 S.W.2d at 477.

² Mitchell contends in his second point of error that he made a request for findings of fact and conclusions of law and filed a notice of past due past due findings of fact and conclusions of law as required by the rule of civil procedure. *See* TEX. R. CIV. P. 296 and 297. However, the notice of past due findings is not the record before this court. Thus, the failure to file a reminder constitutes waiver. *See* TEX. R. CIV. P. 297. In any event, such findings of fact and conclusions of law are not required to be filed by a trial court in an accelerated appeal. *IKB Industries v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997); *see also Smith Barney Shearson, Inc. v. Finstad*, 888 S.W.2d 111, 114 (Tex. App.–Houston [14 th Dist.] 1994, no writ).

III. PERSONAL JURISDICTION

A Texas court may exercise jurisdiction over a nonresident if two conditions are satisfied. First, the Texas long-arm statute must authorize the exercise of jurisdiction. Second, the exercise of jurisdiction must be consistent with federal and state constitutional guaranties of due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990); *Hendrix*, 993 S.W.2d at 477.³ Although the Texas long-arm statute must also be satisfied, we need not make a separate inquiry in this regard because the Texas Supreme Court has interpreted the long-arm statute to reach as far as the federal constitutional requirements of due process will allow. *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding).

Federal due process mandates (1) that the nonresident have purposefully established “minimum contacts” with the forum state; and (2) that the exercise of jurisdiction over the nonresident comports with “traditional notions of fair play and substantial justice.” *CSR Ltd. v. Link*, 925 S.W.2d at 594.

A nonresident establishes minimum contacts in Texas by purposefully availing himself of the privileges and benefits inherent in conducting business within the state. *Id.*; see also *Reyes v. Marine Drilling Cos., Inc.*, 944 S.W.2d 401, 404 (Tex. App.–Houston [14th Dist.] 1997, no writ) (citing *Burger King*, 471 U.S. at 474-75). The nonresident must take some action or engage in some conduct creating a “substantial connection” with the forum

³ The Texas long-arm statute authorizes the exercise of jurisdiction over a nonresident defendant who does business in Texas. See TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). In pertinent part, the Texas Civil Practice and Remedies Code characterizes nonresident activity as “doing business” in Texas where the nonresident:

- (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;
- (2) commits a tort in whole or in part in this state;
- (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state; or
- (4) performs any other acts that may constitute doing business.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997).

state. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 230 (Tex. 1991).

If the court concludes that minimum contacts with the forum state exist, the court then proceeds to evaluate those contacts in light of five factors to determine if the assertion of jurisdiction comports with traditional notions of fair play and substantial justice. *Antonio v. Marino*, 910 S.W.2d 624, 627 (Tex. App.–Houston [14th Dist.] 1995, no writ) (citing *Guardian Royal Exch. Assurance, Ltd.*, 815 S.W.2d at 228). The five factors are: (1) the nonresident’s burden; (2) the forum state’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining an efficient resolution of disputes; and (5) the states’ common interest in furthering fundamental, substantive social policies. *Id.*

A nonresident defendant’s contacts with a forum can produce either general or specific jurisdiction. *CSR Ltd. v. Link*, 925 S.W.2d at 595. Simpro does not assert general jurisdiction, so we need only discuss specific jurisdiction. When specific jurisdiction is asserted, the cause of action must “arise out of or relate to” the nonresident defendant’s contacts with Texas. *Guardian Royal Exch. Assurance, Ltd.*, 815 S.W.2d at 230. A single contact with Texas, of substantial quality and nature, may be sufficient to establish specific jurisdiction when the cause of action arises from that contact. *Memorial Hosp. System v. Fisher Ins. Agency, Inc.*, 835 S.W.2d 645, 650 (Tex. App.–Houston [14th Dist.] 1992, no writ).

The nonresident must reasonably anticipate being haled into a Texas court to answer for its injurious actions. *Cartlidge v. Hernandez*, 9 S.W.3d 341, 348 (Tex. App.–Houston [14th Dist.] 1999, no pet.). In conducting a specific jurisdiction analysis, we focus on the relationship among the defendant, the state of Texas, and the litigation. *Schlobohm*, 784 S.W.2d at 357 (citing *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414 n.8 (1984)). We consider whether Simpro’s claims “arose from or relate to” the contacts, if any, Mitchell had with Texas and whether such contacts were directed at Texas.

A. Mitchell's Contacts with Texas

Simpro asserts that specific jurisdiction exists for the following reasons: (1) Mitchell executed a continuing guarantee of Atlanta Film's debt to Simpro and this guarantee provides that it "shall for all purposes be deemed to be made in, and shall be governed by the laws of, the State of Texas"; (2) Mitchell committed fraud in Texas when he made intentional misrepresentations to Simpro; and (3) Mitchell operates Atlanta Film as his alter-ego, and therefore Atlanta Film's contacts with Texas should be counted as Mitchell's contacts.

When analyzing whether the trial court has personal jurisdiction, we begin with the presumption that it does. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985). Because Simpro pleaded sufficient allegations to bring Mitchell within reach of the Texas long-arm statute, the burden shifted to Mitchell to negate all alleged bases of personal jurisdiction. *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 772 (Tex. 1995) (orig. proceeding). Mitchell challenges the denial of his special appearance contending that: (1) the guarantee signed by him is not sufficient to exercise personal jurisdiction over him; (2) there is insufficient evidence of the alleged fraud committed by him to impose personal jurisdiction; and (3) there is no evidence that he operates Atlanta Film as his alter ego. For the reasons explained below, we find that Mitchell failed to establish that he is not subject to the specific jurisdiction of the trial court. We address each alleged basis of personal jurisdiction in turn.

1. The Promissory Note and Personal Guarantee Signed by Mitchell

The Texas Long-Arm Statute provides that a non-resident does business in Texas if the non-resident "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in Texas." TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). It is undisputed that in the Spring of 1998, Mitchell signed a personal guarantee and promissory note in the amount of \$500,000, in his individual capacity, at the request of Simpro. Mitchell approached Simpro with a proposal for paying off the debts

presently owed to Simpro and for purchasing future products. Mitchell testified at his deposition that he prepared a promissory note and guarantee, which he signed and sent to Demaris, the president of Simpro.

Simpro, however, found Mitchell's form unsatisfactory and prepared a different one. Mitchell executed the guarantee and promissory note and sent it back to Simpro, at their Houston office. This guarantee was to be continuing in nature, guaranteeing both the payment of the attached promissory note and all future purchases made by Atlanta Film. The guarantee expressly stated that it was for all purposes, "to be deemed made in and governed by the laws of the State of Texas."⁴

We recognize that personal jurisdiction is not justified by the single fact that a nonresident contracts with a Texas resident. *See U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 763 (Tex. 1977). However, Mitchell did more than just contract with Simpro. In a case with similar facts, a court held that a nonresident guarantor had a substantial connection with the forum, permitting the assertion of specific jurisdiction. *J.D. Fields & Co., Inc. v. W.H. Streit, Inc.*, 21 S.W.3d 599 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.). In *Fields*, the defendant, a resident of New Jersey, telephoned the plaintiff's Houston office and offered to personally guarantee the indebtedness of the defendant company, a New Jersey corporation. *Id.* After the plaintiff accepted, defendant guarantor sent a written, personal guarantee by fax in the form of a letter addressed to plaintiff's Houston office. The court in *Fields* held that the contacts between the guarantor and Texas were sufficient to meet due process minimum contacts requirements and did not offend traditional notions of fair play or substantial justice. *Id.*

Here, under the terms of the guarantee, Mitchell is deemed to have entered into a

⁴ Although a choice of law provision in a contract is not the *sine quo non* of personal jurisdiction, it is nevertheless one of the most important factors courts consider in determining whether the defendant purposefully established minimum contacts within the forum state. *Burger King*, 471 U.S. at 478; *see also Berg v. AMF, Inc.*, 29 S.W.3d 212, 218-19 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (finding choice of law provision militated strong in favor of Canada in *forum non conveniens* context).

guarantee in Texas that covered all past and future debt of Atlanta Film. Moreover, Mitchell, as guarantor, initiated the process by telephoning and writing Simpro in its Houston office, with an offer to personally guarantee Atlanta Film's indebtedness in order to induce Simpro to continue selling products to Atlanta Film. As in the *Fields* case, the signed note and guarantee was sent to Texas. Here, however, the contacts are even greater than in the *Fields* case, because Mitchell agreed that the guarantee would be deemed to have been made in Texas and governed by Texas law.

Mitchell's actions, were purposefully directed toward Texas. His contacts were not random, fortuitous or attenuated. This guarantee and promissory note created a substantial connection with Texas, because it was foreseeable that if Mitchell's performance was deficient, it would inflict economic injury on a resident of Texas, *i.e.*, Simpro. Simpro's guarantee claim arises out of and relates to Mitchell's contacts with Texas. Accordingly, we hold that this contact with Texas is sufficient to meet the due process minimum contacts requirements.

2. Misrepresentations Made by Mitchell in Texas

Pursuant to the Texas Long-Arm Statute, "a non-resident defendant may be held subject to personal jurisdiction if, in part, he or she commits a tort in whole or in part in Texas." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). We now determine whether Mitchell's contacts with Texas, relating to Simpro's fraud claims, are sufficient to satisfy due process.

When reaching a decision to exercise or decline jurisdiction based on the defendant's alleged commission of a tort, the trial court should examine only the necessary jurisdictional facts and should not reach the merits of the case. *Arterbury v. American Bank & Trust Co.*, 553 S.W.2d 943 (Tex. Civ. App.—Texarkana 1977, no writ); *see also See Portland Sav. & Loan Ass'n. v. Bernstein*, 716 S.W.2d 532, 535 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.), *overruled on other grounds by Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex.

1998) (stating that ultimate liability in tort is not a jurisdictional fact and the merits of the cause are not at issue). Specific jurisdiction over a tort defendant is satisfied when “the defendant, personally or through an agent, is the author of an act or omission within the forum state, and the petition states a claim in tort arising from such conduct.” *Baldwin v. Household International, Inc.*, 36 S.W.2d 273, 277 (Tex. App. – Houston [14th Dist.] 2001, no pet. h.). Simpro's petition specifically states a fraud claim, alleging that Mitchell made fraudulent representations, inducing Simpro to continue selling Atlanta Film products on credit, knowing that Atlanta Film was not in a position to pay. In approximately September of 1998, Mitchell traveled to Houston to meet with Demaris. The purpose of this meeting was to discuss the possibility of selling his company to Simpro. Demaris stated that during this meeting, Mitchell appeared to be acting as the owner of Atlanta Film and made certain misrepresentations about the financial condition of his company, Atlanta Film. He assured Simpro that, although Atlanta Film was not “doing well at the time,” he projected that the future looked promising. Relying on these statements, Simpro continued to sell products, on credit, to Atlanta Film.

We recognize the fact that just because a tort was committed in Texas does not automatically give our courts jurisdiction over a nonresident. *Hoppenfeld v. Crook*, 498 S.W.2d 52 (Tex. Civ. App.– Austin 1973, writ ref'd n.r.e.). There must be a substantial connection between the contact and the cause of action in the forum state. The nonresident must be able to foresee or anticipate being haled into the forum court. In determining whether there is a substantial connection between the nonresident defendant and the forum state, “foreseeability” should be considered. *Guardian Royal Exch. Assurance, Ltd.*, 815 S.W.2d at 223.

Where a defendant sends false information into a state, knowing it will be relied upon by the resident of the forum state, the defendant should foresee direct economic injury to the resident at its domicile. *See Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc.* 835 S.W.2d 645, 648 (Tex. App.–Houston [14th Dist] 1992, no writ). Therefore, if the tortfeasor knows

that the brunt of the injury will be felt by a particular resident in the forum, he must reasonably anticipate being haled into the forum court to answer for his actions. *Id.* There must be a nexus in instances which the nonresident defendant maintains only few contacts with the forum. *Id.* Although the extent of the defendant's contacts with the forum state may be minimal, the quality and nature of those contacts may be substantial. *Id.* at 650.

We find sufficient evidence in the record to support Simpro's allegation that Mitchell committed fraud in Texas. Mitchell purposefully communicated the alleged misrepresentations about Atlanta Film's financial stability to Simpro by initiating the meeting and traveling to Texas for the purpose of selling his company. Simpro contends that it relied to its detriment on this allegedly false information. Based on these facts, we find that Mitchell's contacts with Texas were not random or fortuitous; rather, Mitchell purposefully established contact with Texas. Because Simpro has alleged a misrepresentation committed in Texas, it has satisfied the tort requirement for jurisdiction under the Texas long-arm statute.

Although Mitchell's contacts with Texas are few, we find them to be substantial. Simpro relied to its detriment on the alleged false information, thus causing economic injury. Mitchell purposefully availed himself of the benefits of Texas corporation when he signed a personal guarantee and a promissory note. Therefore, we find sufficient evidence in the record to support a conclusion that Mitchell should reasonably have anticipated being haled into a Texas court. *See Memorial Hosp. Sys.*, 835 S.W.2d at 648. (finding that Texas courts had specific jurisdiction over a New York insurer whose only contact with Texas consisted of a misrepresentation made over the phone to a Texas hospital).⁵

⁵ Because we find that the court has specific jurisdiction based on Simpro's first two alleged bases of jurisdiction: (1) the signed guarantee and promissory note; and (2) the alleged misrepresentations made by during a meeting held in Houston, Texas, we do not address Simpro's allegation that Atlanta Film's contacts should be considered because Mitchell treated Atlanta Film as his alter-ego.

B. Fair Play and Substantial Justice

We now determine whether the trial court's exercise of personal jurisdiction over Mitchell comports with traditional notions of fair play and substantial justice. *See Guardian Royal Exch. Assurance, Ltd.*, 815 S.W.2d at 225. In conducting this inquiry, we bear in mind that only in rare cases will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state. *Id.* at 231. With this standard in place, we now apply the relevant fair play and substantial justice factors. Those factors are: (1) the nonresident's burden; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining an efficient resolution of disputes; and (5) the states' common interest in furthering fundamental, substantive social policies. *Id.*

Mitchell maintains that subjecting him to suit in Texas would be burdensome, inconvenient, and expensive because he is a Georgia resident and has only traveled to Texas a few times, which were at the request or invitation of Simpro. Regarding Mitchell's Georgia residency, we note foremost that distance alone is not ordinarily sufficient to defeat jurisdiction as "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity." *See id.* (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 231(1957)). In fact, requiring Mitchell to defend a suit in Texas does not appear overly burdensome. The record demonstrates that Mitchell traveled to Houston several times, including the time in September of 1998, when he traveled to Simpro's offices, to negotiate a possible sale of Atlanta Film's assets. Furthermore, even though Simpro's form was ultimately used, it was Mitchell who contacted Demaris, pleading with him to enter into a promissory note for amounts due and to continue selling Atlanta Film product on credit.

Texas has a substantial interest in this matter for two basic reasons. First, misrepresentations have allegedly been made by Mitchell to induce Simpro, thereby causing

harm to a Texas corporation. Texas has a significant interest in adjudicating the claims of a Texas corporation harmed by tortious conduct of a nonresident in Texas. Second, the personal guarantee signed by Mitchell specifically states that for all purposes it “shall be deemed to be made in, and be governed by the laws of the State of Texas.” Texas has a legitimate interest in providing an effective means of redress to a Texas corporation for Mitchell’s fraudulent conduct and his failure to honor his guarantee. *See e.g., McGee*, 355 U.S. at 232. This controversy can be efficiently resolved in Texas, the state in which the harm occurred. Accordingly, we hold the trial court’s exercise of jurisdiction over Mitchell does not offend traditional notions of fair play and substantial justice.

IV. CONCLUSION

Mitchell’s contacts with Texas are sufficient to satisfy due process. Personal jurisdiction over Mitchell comports with traditional notions of fair play and substantial justice. Accordingly, we affirm the trial court’s denial of Mitchell’s special appearance.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Justices Yates, Anderson, and Hudson.

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