IN THE SUPREME COURT OF IOWA

No. 16-2148

ROBERT W. MILAS, M.D.,

Plaintiff-Appellant,

vs.

SOCIETY INSURANCE and ANGELA BONLANDER,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE HENRY LATHAM
Scott County No. LACE124179

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred in dismissing Plaintiff's fraudulent misrepresentation claim on summary judgment, and then later erred in failing to instruct the jury on Plaintiff's fraudulent misrepresentation claim.

II. The district court erred when it denied jury instructions on punitive damages.

III. The district court erred in denying Plaintiff's Motion to Disqualify Judge Latham.

ARGUMENT

I. The district court erred in dismissing Plaintiff's fraudulent misrepresentation claim on summary judgment, and then later erred in failing to instruct the jury on Plaintiff's fraudulent misrepresentation claim.

At trial, Dr. Milas introduced substantial evidence that Society Insurance, through its claims adjuster, Bonlander, made a fraudulent misrepresentation to Dr. Milas that Society Insurance would pay him one hundred percent (100%) of his surgical fees. Although there are seven elements of the tort of fraudulent misrepresentation, (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury or damage, Defendants challenge the sufficiency of evidence with respect to only three: the falsity of Society Insurance's material representation and scienter/intent to deceive.

A. There is substantial evidence that Society Insurance's representative made a *false* representation to Dr. Milas when the representative unequivocally signed the proposal for surgical fees.

Society Insurance argues on appeal that Dr. Milas failed to show that any representation it made in signing his estimate for surgical fees was not false at the time Dr. Milas relied upon it. Society Insurance contends that its subsequent failure to pay the amount on the estimate following the surgery "alone is not enough to show [Society Insurance's] earlier representation was

false." (Appellees' Brief pp.17-18) The obvious flaw in this argument is that there was abundant evidence—in addition to Society Insurance's failure to pay Dr. Milas the sum approved in the estimate—from which a jury could find that Society's representation was false when made.

A statement of intent to perform a future act is a false representation if, when made, the speaker had an existing intention not to perform. *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1996). "While it is true that a simple promise to do something in the future cannot alone be made the basis of fraud, yet when such promise is made with intent to breach it in the future, it is satisfactory proof of fraud." *Lamasters v. Springer*, 251 Iowa 69, 72, 99 N.W.2d 300, 301–02 (1959) (internal citations omitted); *see also Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20 (Iowa 1997).

The speaker's existing intention to breach a promise in the future may be inferred from the circumstances, such as "the defendant's insolvency or other reason to know that he cannot pay, or his repudiation of the promise soon after it is made, with no intervening change in the situation, or his failure even to attempt any performance, or his continued assurances after it is clear that he will not do so." *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565–66 (Iowa 1987) (citations omitted).

In *Magnusson*, the district court granted a motion for judgment notwithstanding the verdict on a claim for fraudulent misrepresentation. 560 N.W.2d at 27. Specifically, the district court ruled that the record lacked substantial evidence to support the elements of falsity, scienter, and intent. *Id.* The Iowa Supreme Court affirmed the district court's ruling. *Id.*

In regard to the falsity element, the *Magnusson* Court reasoned that the plaintiff in that case offered insubstantial evidence regarding the existing intention of the speaker at the time the promise was made. *Id.* The plaintiff in *Magnusson* introduced evidence regarding the intentions of other employees in the company but did not present substantial evidence regarding the existing intention of the employee who actually made the representation, and as a result, there was not substantial evidence to support a fraudulent misrepresentation claim. *Id.*

Unlike the evidentiary record in *Magnusson*, there is substantial evidence in this case to support the falsity element of the fraudulent misrepresentation claim because there is substantial evidence that Bonlander had no intention of honoring the promise to pay Dr. Milas the approved fees, $14,325.87 when Bonlander made this representation on behalf of Society Insurance. *See Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565–66

(Iowa 1987) (holding speaker's existing intention to breach a promise in the future may be inferred from the circumstances).

For example, there was evidence that when Bonlander signed the authorization, she knew that she was going to send Dr. Milas's fees to Society's "cost-containment vendor," but never told Dr. Milas about her intentions. App. 327. There was also evidence that Bonlander intended on paying whatever Society's "cost-containment vendor" told her to pay Dr. Milas. App. 327, 344. There was also evidence from which a jury could conclude that Bonlander intended the whole time to wait until after Dr. Milas performed the surgery and then attempt to negotiate his fees, i.e., to pay Dr. Milas less than the amount listed in the proposal, which is page 198 of the Appendix. App. 327.

Society Insurance suggests that Bonlander could not have had any intent not to perform when she approved the estimate "[b]ecause she did not believe she was entering into a contract paying Dr. Milas the amount listed on the authorization." (Appellees' Brief p.18) Defendants overlook the fundamental rule that the jury was not required to accept Bonlander's assertion that she didn't think she was agreeing to pay Dr. Milas's estimated fees upon completion of the surgery. In fact, Bonlander's assertion was undermined by her supervisor's testimony that she and Bonlander discussed

the estimate submitted by Dr. Milas and that she—the supervisor—knew that Dr. Milas was seeking preauthorization of his fees. App. 363. A jury could conclude that Bonlander's denial of knowledge that she was pre-approving Dr. Milas's fee was not credible.

Jurors are allowed to use their common sense and life experience in weighing the evidence and deciding whether the representation was false. *City of Cedar Rapids v. Bd. of Trustees of Mun. Fire & Police Retirement Sys.*, 572 N.W.2d 919, 926 (Iowa 1998) ("We do not ask juries to leave their experiences and common sense behind when deliberating."); *see Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001); *Boham v. City of Sioux City*, 567 N.W.2d 431, 436 (Iowa 1997). Plaintiff will illustrate the jury's permissible use of common sense and life experience with an example involving a home improvement project.

Assume a painter provides a written proposal/estimate to a homeowner who wants to repaint a kitchen. The painter submits a written proposal to the homeowner that describes two options, each with a cost estimate: one option if one coat of paint is needed and the second option if two coats of paint are needed. If the homeowner signs the proposal, it is reasonable for the painter to understand (and a jury to infer) that the homeowner's approval of the estimated costs for the work means that the painter's ultimate bill will be paid

without question – assuming of course that the final bill is consistent with the estimates and the painter competently paints the kitchen. If the homeowner signs the proposal with no intention of simply paying the amount listed in the proposal (again assuming consistency with the estimate and competent performance) and instead plans to negotiate a lesser amount when the work is satisfactorily completed, a reasonable jury could find that the homeowner made a false representation when he approved the proposal showing the cost of the work.

Similarly, here, a jury could reasonably infer based on its common sense and experience that when Bonlander signed the authorization showing Dr. Milas's fees for the two surgical options that she was representing that she would pay those fees upon competent performance of the surgery. The jury could also reasonably find that if Bonlander made that representation with the intent to negotiate a lower fee rather than to pay the approved fees, her representation was false when she signed the authorization. Thus, there is evidence from which a jury could find that Society, through its representative, Bonlander, made a false representation.

Society Insurance also claims that a jury could not have found the representation false when it was made because "it was *possible* for [Dr. Milas] to receive the amount he put on the authorization." (Appellee's Brief, p. 18)

(emphasis added) This statement reflects Society Insurance's misunderstanding or mischaracterization of the representation made when its representative signed the authorization. The representation here was not that Society Insurance *might* pay the amount stated in the authorization it signed. The representation made to Dr. Milas by Society when its representative signed the authorization was that Society had approved, i.e., agreed to or accepted, and would pay his stated fee. Period. Not that it would review his fee, then negotiate and *possibly* pay the stated fee. In other words, by signing the form, Society represented - without qualification and without any contingencies - that it would pay Dr. Milas's stated fee upon performance of the surgery.

The same analogy of the homeowner and painter also shows the weakness in the Defendants' argument that Society's representation was not false because it was "possible" that it might pay the full amount stated on the signed authorization. Jurors' common sense and experience would tell them that the homeowner, in signing the proposal, had represented that if the painter competently rendered the requested services and submitted a bill consistent with the estimated amount that the homeowner would pay the stated amount. The same common sense and experience would allow the jurors to reject any argument by the homeowner that he had only agreed that he might "possibly"

pay the stated amount, subject to getting other bids (outside review) and negotiation. Therefore, the representation was false when the homeowner signed the proposal with the intention of negotiating a lower price.

The present situation is no different. Society Insurance represented - without any qualification - that it would pay the fees stated in the authorization upon completion of the surgery. There is uncontroverted evidence this representation was false because it was always Bonlander's intent to review and negotiate the fees.

Thus, there was substantial evidence in the record that Society Insurance's representative made a *false* representation to Dr. Milas when its representative unequivocally signed App 198 showing the estimated costs for the surgery.

B. There is substantial evidence that Society Insurance had scienter and the intent to deceive Dr. Milas when its representative unequivocally signed the proposal for surgical fees.

The Iowa Supreme Court has stated the following with respect to the intent-to-deceive element of fraud:

> We have held that the intent to deceive element, *like the scienter element*, may be proved in one of two ways: "by proof that the speaker (1) has actual knowledge of the falsity of the representation or (2) speaks in reckless disregard of whether those representations are true or false."

Dier v. Peters, 815 N.W.2d 1, 9 (Iowa 2012) (quoting *Rosen v. Bd. of Med. Exam'rs*, 539 N.W.2d 345, 350 (Iowa 1995)).There is substantial evidence in the record to support the scienter and intent-to-deceive elements of a fraudulent misrepresentation claim under both methods of proof.

1. There is substantial evidence that Society Insurance's representative, Bonlander, had actual knowledge that the representation was false.

In arguing there was not substantial evidence to establish scienter and intent to deceive, Defendants make the same argument they made in support of their contention that there was insufficient evidence of falsity: that when Bonlander signed the authorization, she did not believe she was entering into a contract to pay the estimated costs set forth in the authorization she signed. But as noted above, a jury did not have to believe Bonlander's testimony, particularly when it was inconsistent with the testimony of her supervisor. Bonlander discussed Dr. Milas's surgical fees with her supervisor before Bonlander signed the authorization on behalf of Society Insurance. App. 323. Her supervisor testified at trial that she—the supervisor—knew that Dr. Milas was seeking "preauthorization" of his fees:

> Q: [The] estimate represented preauthorization, did it not, on what Dr. Milas was going to charge?
>
> A: Yes.

App. 363. Knowing this, the supervisor told Bonlander to "sign off" on both of the proposals. App. 323.

Bonlander's testimony that she was only authorizing Dr. Milas to perform the surgery, but not his fees, is also undermined by her testimony that she was not qualified to evaluate the propriety of the surgical procedure. App. 352. Moreover, the vice-president of Society Insurance agreed that the authorized doctor does not need to get approval from Society Insurance before performing surgery. App. 271. Bonlander's supervisor also denied that Society Insurance needed to sign a form to authorize the procedure before Dr. Milas performed surgery. App. 276. This evidence undermines any argument by Society Insurance that Bonlander thought she was merely approving the surgery and not the fees by signing the proposal submitted by Dr. Milas.

Relying on the witnesses' testimony and their common sense and experience, the jurors could have reasonably conclude from this evidence that Bonlander knew when she signed a document authorizing certain work at a specified price, that she knew she was agreeing to pay that price for the work when it was completed. Because the jury can reasonably find that Bonlander knew she was agreeing to pay the stated estimate for the surgical procedure performed by Dr. Milas, the jury could also reasonably find that Bonlander knew her representation that she would pay the stated estimate for the surgery

was false because she admitted she always intended to negotiate Dr. Milas's fees, i.e., pay a lesser amount than his estimate. App. 327. The substantial evidence of Bonlander's actual knowledge of the falsity of her representation is sufficient proof of her scienter and intent to deceive so as to require the District Court to submit Plaintiff's claim of fraudulent misrepresentation to the jury.

2. There is substantial evidence that Bonlander spoke in reckless disregard of whether its representation was true or false.

There is substantial evidence in the record that Society Insurance spoke in reckless disregard of whether its representation was true or false. As established above, there was substantial evidence that Bonlander knew when she signed the authorization that she was representing Society would pay the stated fees for that surgery. Society Insurance argues that this statement was not false because it was "possible" that it would pay the full amount of Dr. Milas's fees. (Appellee's Brief, p. 18) This argument reveals the reckless disregard with which Bonlander acted when she signed the approval. If the jury accepts that Bonlander did not know her statement was false because she thought it might be possible for Society to pay Dr. Milas's estimated fees, the jury could also conclude that Bonlander acted in reckless disregard of whether her representation that Society would pay Dr. Milas's estimated fees was true or false. Bonlander intended when she signed the authorization to put Dr.

Milas's bill through Society's cost-containment process. She did not know what Society's cost-containment vendor was going to recommend for payment but she knew that in all likelihood, the recommendation would be less than the amount agreed upon in the authorization.

Given the evidence that Bonlander knew her representation that Society would pay Dr. Milas's estimated fees may or may not be true, a jury could reasonably find that she acted in reckless disregard of whether her representation was true or false when she signed the authorization. There is substantial evidence to support such a finding, and accordingly, there is substantial evidence of Society Insurance's scienter and intent to deceive.

II. The district court erred when it refused to give jury instructions on punitive damages.

A. The district court's refusal to instruct the jury on punitive damages was erroneous because there is substantial evidence in the record that Society Insurance acted with actual malice.

There is substantial evidence in the record that Society Insurance acted with actual malice toward Dr. Milas. Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Schultz v. Sec. Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998).

Here, there is substantial evidence that Society Insurance had actual malice towards Dr. Milas. There is abundant evidence in the record that Society Insurance treated Dr. Milas differently than any other medical

professional who provided medical care to Ricky Fitzgerald. Society Insurance boasted that it had paid $214,000.00 to medical professionals for providing care to Fitzgerald. App. 346. Yet, Society Insurance's payment to Dr. Milas was only $1,620.52. App. 233.

Society Insurance paid for Ricky Fitzgerald to undergo an evaluation with its medical experts for litigation purposes. App. 353, 242. The medical expert did not provide medical care, rather, he gave medical opinions about medical care. App. 353. Society Insurance prepaid the medical professional one hundred percent (100%) of his agreed upon fees about a month before the evaluation. App. 353, 242. Society Insurance paid its expert witness more for a one-time evaluation than it paid Dr. Milas for performing a delicate surgery and three months of follow-up care. App. 233, 353.

For another example, Society Insurance promptly paid the anesthesiologist who was present during the surgery performed by Dr. Milas. App. 241, 254, 354. Society Insurance paid the anesthesiologist more than what it paid Dr. Milas even though they were in the same operating room for the same amount of time. App. 241, 254.

Society Insurance has offered no credible reason for treating Dr. Milas any differently than it treated the other health professionals involved in Fitzgerald's care and the evaluation of his care. Society Insurance's

representative claimed that she had to send Dr. Milas's fees to the cost-containment vendor, but this is simply untrue. Society Insurance's vice-president testified that Society Insurance's representative had the power to disregard the cost containment vendor's recommendation and pay Dr. Milas what she had agreed to pay him before the surgery. App. 272, 274. In other words, Society Insurance's representative could have sent Dr. Milas a check for one hundred percent of his fees on June 4, 2013 – more than three years before the trial in this case. Instead, Dr. Milas had to struggle for more than three years with this insurance company, and actually go through a trial before Society Insurance paid him what it had agreed to pay in the first place.

Society Insurance's conduct in processing the payment of Dr. Milas's fees, particularly as compared to how it handled the payment for services of other medical professionals, would support a jury finding that Defendants acted with personal spite or ill-will toward Dr. Milas—a finding that would support an award of punitive damages. For this reason, the trial court erred in refusing to instruct the jury on punitive damages.

B. The district court's refusal to instruct the jury on punitive damages was erroneous because there is substantial evidence in the record that Society Insurance acted with legal malice.

There is substantial evidence in the record that Society Insurance acted with legal malice. Legal malice is conduct that exhibits a "willful and wanton

disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a); *accord Beeman v. Manville Corp. Asbestos Disease Comp. Fund,* 496 N.W.2d 247, 256 (Iowa 1993). It "involves wrongful conduct committed 'with a reckless disregard of another's rights.'" *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 745 (Iowa 2009) (quoting *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984)). The intentional acts of the defendant must be of "an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...." *Fell v. Kewanee Farm Equip. Co.,* 457 N.W.2d 911, 919 (Iowa 1990). Evidence of a "defendant's persistent course of conduct . . . shows that the defendant acted with no care and with disregard to the consequences of [his] acts." *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005); *accord Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

There was evidence in the record that Bonlander's supervisor understood that Dr. Milas was requesting preauthorization of his fee for performing Fitzgerald's surgery and that she nonetheless instructed Bonlander to sign the approval forms submitted by Dr. Milas. Bonlander did so with the intention that she would submit Dr. Milas's fees to Society Insurance's cost-containment vendor for review and with full knowledge that such a review would result in a reduction in Dr. Milas's fees and an attempt to negotiate a

savings for Society Insurance. Moreover, the evidence showed that these actions were encouraged, if not required, by Society Insurance's corporate policies.

There was also evidence from which the jury could find that upon receipt of Dr. Milas's bill for performing the surgery, Society Insurance arbitrarily refused to pay that bill. Notwithstanding their preauthorization of the surgery in an amount identical to the bill ultimately submitted, Society Insurance's employees and agents attempted to coerce Dr. Milas to agree to a substantially reduced payment to avoid further delay and additional reductions in payment. When he refused to accept that offer, his bill was submitted to Society Insurance's cost-containment vendor who also recommended that Society Insurance pay a substantially reduced sum in payment of Dr. Milas's agreed-upon fees.

Bonlander's supervisor, Kelderman, even admitted their conduct was consistent with the custom and practice of Society Insurance. App. 378. Society Insurance's "audit guidelines" contain corporate policies and procedures governing payment of medical bills. App. 378-379. One policy and procedure in those guidelines states: "If our Bill Review Company is unable to secure savings on your bill; as [sic] it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment"! App.

251. Thus, Society Insurance tells its employees—without qualification—that it is acceptable to withhold payments to medical providers in order to negotiate a reduced amount with those providers.

A jury could find from this evidence that Bonlander and her supervisor acted in reckless disregard of Dr. Milas's rights throughout their handling of Fitzgerald's surgery, instead focusing on efforts to obtain a savings on the cost of the surgery to financially benefit Society Insurance and their individual year-end bonuses. A jury could also reasonably find from the evidence outlined above that Society Insurance engaged in a persistent course of conduct that disregarded the rights of medical providers and the adverse impact its conduct would have on patients receiving prompt medical care when their authorized, treating doctors are not fully compensated. Therefore, this evidence was sufficient to create a jury question on the issue of punitive damages, and the trial court erred in refusing to submit this issue to the jury under proper instructions.

C. Society Insurance's breach of contract supports a punitive damages award because the breach constituted an intentional tort and was malicious.

1. Plaintiff preserved error under this theory for punitive damages.

Plaintiff submits that punitive damages should have been given to the jury based on two different, legal theories. First, Plaintiff submits that that the

District Court should have given punitive damages instructions based on the fraudulent misrepresentation claim. Defendants agree that the error was properly preserved under this theory. (*See* Appellee's Brief, p. 22)

Second, Plaintiff submits that the District Court should have given punitive damages under an alternative theory, where Defendants' breach of contract constituted an intentional tort and was malicious. App. 441–47. Defendants dispute that Plaintiff preserved error under the second theory for submitting punitive damages instructions. (*See* Appellee's Brief, p. 22) This argument is without merit because Plaintiff properly preserved error.

Before the jury instruction conference, Plaintiff submitted Plaintiff's Proposed Additional Instructions, which included instructions on punitive damages. App. 470-76. Plaintiff listed the case of *White v. Nw Bell Tel. Co.*, 512 N.W.2d 70 (Iowa 1994) in support of his punitive damage claim. App. 473.

During the jury instruction conference, Plaintiff alerted the District Court to the second theory for punitive damages, and in fact, stated the following:

> …I just would like to alert the Court that besides the negligent and fraudulent misrepresentation, we would also be arguing that we have proven bad faith, and that would meet the first element in the holding in White Bell Telephone Company, 514 N.W.2d 70. And, like I said, Your Honor, I understand your ruling, but I

> just want to alert the Court to that issue and give counsel a change to argue it.

App. 446. Defendant then argued against the submission of the punitive damages based on the second theory. *Id.* Then, the District Court denied the request for punitive damages based on Plaintiff's second theory. *Id.*

2. Society Insurance's breach of contract constitutes the intentional tort of bad faith.

Society Insurance's breach of contract is sufficient to support a punitive damage award because it was done maliciously and constituted the intentional tort of bad faith. Generally, a breach of contract, even if intentional, will be insufficient to support a punitive damage award. *White v. Nw. Bell Tel. Co.*, 514 N.W.2d 70, 77 (Iowa 1994). However, punitive damages may be awarded for breach of contract upon proof of two things: (1) that the breach also constitutes an intentional tort, and (2) that the breach was committed maliciously, in a manner meeting the standards of section 668A.1. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 156 (Iowa 1993). Here, Society Insurance's breach constituted the intentional tort of bad faith, and Society Insurance acted with actual and legal malice toward Dr. Milas.

First, Society Insurance's breach constituted the intentional tort of bad faith. There is a two-part test for the common law tort of bad faith: (1) an

insurance company lacked a reasonable basis to deny or delay benefits; and (2) the insurance company knew or should have known that it lacked a reasonable basis to deny or delay benefits. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 329 (Iowa 2002).

Society Insurance lacked a reasonable basis to deny full payment to Dr. Milas. Society Insurance gave the following reason to deny payment: "Dr. Milas has to utilize a fee schedule in Illinois." App. 236, 326. At trial, Bonlander admitted that she knew that the Illinois fee schedule did not apply:

> Q: Under the circumstances, you knew that an Illinois fee schedule didn't apply to an Iowa workers' Compensation claim, yes?
>
> A: Yes
>
> Q: So what's written there is not accurate is it?
>
> A: No.

App. 326. Thus, Society Insurance lacked a reasonable basis and admitted at trial that it knew it was unreasonable. In fact, the District Court held that there was a jury question on whether Society Insurance had acted in bad faith. App. 100.

Second, Society Insurance's breach was committed maliciously, in a manner meeting the standards of section 668A.1. Plaintiff details above how

Society Insurance acted with both actual malice and legal malice. Thus, Plaintiff's breach of contract claim also supports a punitive damages award.

III. The District Court erred in denying Plaintiff's Motion to Disqualify Judge Latham.

Dr. Milas relies on the argument from his initial brief for Section III of the Argument. (Appellant's Brief, pp. 47-61)

CONCLUSION

For the reasons stated above, the rulings of the district court, individually or cumulatively, require reversal and a new trial. Plaintiff respectfully requests that this Court remand this case for a new trial and direct the case to a different trial judge.

Respectfully submitted,

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We hereby certify that the costs paid for printing Plaintiff-Appellant's Brief was the sum of $_____.

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