SC15-1747

In the Supreme Court of Florida

SEARCY, DENNEY, SCAROLA, BARNHARDT & SHIPLEY, P.A., *et al.*,
Petitioners,

v.

THE STATE OF FLORIDA,
Respondent.

ANSWER BRIEF OF THE STATE OF FLORIDA

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
Case No. 4D13-3497

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STATEMENT OF THE CASE AND FACTS

This case involves an impaired minor ward, Aaron Edwards, for whom the Legislature provided significant financial relief through a claim bill. Importantly, the Legislature did not appropriate the $15 million directly to Aaron or his parents. Rather, the claim bill included specific language directing that the amount be placed into a special needs trust created for Aaron. The Legislature also included an express fee provision that authorized the payment of up to $100,000 from the claim bill proceeds for attorney's fees, costs, and other similar expenses. Petitioner Law Firm now attacks that $100,000 limit and argues that it is entitled to 25 percent—in total, $3.75 million—of the funds the Legislature directed for placement into a special needs trust. R3:591-96.

The Contingency Fee Contract and the Hospital's Sovereign Immunity

After Aaron Edwards suffered a traumatic birth that left him significantly impaired, his parents hired Petitioner Law Firm to pursue a medical malpractice case against Lee Memorial Hospital, a public entity. R1:86-90, 105.[1] A contingent fee contract was entered into between Aaron's parents and the Law Firm, under which the Law Firm was entitled to "40% of the total recovery in the event suit is

[1] The record on appeal consists of four volumes plus a supplemental record and will be referred to as R#:*, or SR#:*, where # stands for the volume number and * for the page number.

filed." R1:87. However, the contract contained an express limitation in the event a defendant was entitled to sovereign immunity:

> In the event that one of the parties responsible to pay my claim for damages is a governmental agency, I understand that Federal and Florida Law may limit the amount of attorney fees charged by SEARCY DENNEY SCAROLA BARNHART & SHIPLEY P.A. *In that event, I understand that the attorney fees owed to SEARCY DENNEY SCAROLA BARNHART & SHIPLEY P.A. shall be the amount provided by law*.

R1:88 (emphasis added).

A jury awarded Aaron just under $28.5 million. R1:48-52. Additionally, Aaron's mother and father obtained judgments of $1.34 million and $1 million, respectively, for their own damages. *Id.* As for taxable costs, the court awarded $174,969.65. Ch. 2012-249, Laws of Fla.; *see also* R1:52.

Throughout the litigation, the plaintiffs and the hospital disputed whether sovereign immunity applied. Ultimately, the trial court determined that the hospital was a public entity and the judgment was therefore subject to the sovereign immunity liability cap. R1:51-52, SR1:20-21. The hospital appealed the verdict and Aaron cross-appealed the hospital's entitlement to sovereign immunity. R1:94. The Second District affirmed per curiam. *See Lee Mem'l Health Sys. v. Edwards*, 22 So. 3d 81 (Fla. 2d DCA 2009) (table op.). Lee Memorial Health System paid $200,000 towards the judgment in accordance with the sovereign immunity limits

in section 768.28(5), Florida Statutes. R1:63. The Law Firm kept the entirety of this amount as reimbursement for costs. *Id.*

Aaron's Claim Bill

To provide Aaron with relief, the Legislature enacted a claim bill during the 2012 legislative session. *See* Ch. 2012-249, Laws of Fla. The Legislature directed Lee Memorial Health System to pay a total of $15 million "to the Guardianship of Aaron Edwards, to be placed in a special needs trust created for the exclusive use and benefit of Aaron Edwards, a minor." *Id.* § 2. From this sum, "[t]he total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed $100,000." *Id.* § 3. The $15 million would be split into six payments; the first payment, consisting of $10 million, would be followed by five consecutive yearly payments of $1 million. *Id.* § 2.

The Guardianship Proceedings

In November 2012, Aaron's mother petitioned to establish a guardianship over her minor son's property. R1:1-2.[2] The trial court granted the request and appointed the mother as guardian. R1:10-11. Subsequently, Lee Memorial Health System made its first payment of $10 million to the Law Firm's trust account. R2:220, 225.

[2] Aaron's father consented to the appointment of the mother over the property. R1:2, 9.

Arguing that the claim bill's fee provision was unconstitutional, the Law Firm filed a petition in the guardianship proceeding seeking $2.5 million, or 25 percent of the first payment. R1:59-71; 1:158-75. The State of Florida intervened to defend the constitutionality of the legislation. R2:204-06; 2:229-30. Ultimately, recognizing that it was bound by precedent from both this Court in *Gamble v. Wells*, 450 So. 2d 847 (Fla. 1984), and the Fourth District Court of Appeal in *Noel v. Sheldon J. Schlesinger, P.A.*, 984 So. 2d 1265 (Fla. 4th DCA 2008), the guardianship court denied the Law Firm's petition. R3:595-96.

The Parents' Motion and the Guardian ad Litem

Several weeks after the Law Firm filed its petition, Aaron's parents filed a separate motion challenging the constitutionality of the claim bill. R2:215-18. Specifically, the parents argued that they were entitled to a pro rata share of Aaron's claim bill based on their individual derivative judgments obtained in the earlier malpractice suit. *Id.* (The jury separately had awarded Aaron's mother and father $1.34 million and $1 million, respectively. R1:48-52.) In enacting Aaron's claim bill, however, the Legislature directed the $15 million to be placed in a special needs trust for Aaron and awarded the parents nothing. Ch. 2012-249, Laws of Fla. Under the parents' legal theory, they are entitled to a share of the legislative award. R2:215-18.

Because this separate motion presented a clear conflict of interest between Aaron and his mother—who was both his appointed guardian and a party seeking to redirect a portion of the claim bill proceeds to herself—the court appointed a guardian ad litem for Aaron "with regard to the proceedings and issues emanating from [the parents' motion]." R3:494. The trial court allowed the mother to direct the guardianship otherwise.

The Fourth District's Decision

The Law Firm appealed to the Fourth District, which affirmed the guardianship court's denial of the Law Firm's petition by a vote of two to one. Op. at 9. The majority opinion explained that "*Gamble* and *Noel*, and the reasoning therein, support the guardianship court's decision to recognize the Legislature's prerogative of limiting the payment of fees and costs to $100,000." *Id.* at 7. Specifically, the majority noted that in *Gambl*e, "the Florida Supreme Court, in no uncertain terms, has held that the limitation of attorneys' fees in a private relief act/claims bill 'is a constitutionally permissible exercise of legislative authority and does not constitute an impairment of contractual obligations . . . .'" *Id.* at 8 (quoting *Gamble*, 450 So. 2d at 849). The majority opinion also cautioned that "the course of action proposed by [the Law Firm] would violate the separation of powers doctrine" because it invited a judicial rewrite of two legislative enactments—the claim bill at issue and section 768.28(8), Florida Statutes. *Id.*

By contrast, the dissent would have reversed the guardianship court because it believed "changes in the law and legislative procedure have rendered *Gamble* distinguishable and inapplicable to the facts at hand." *Id.* at 19 (Ciklin, C.J., dissenting). Specifically, the dissent viewed the enactment of section 768.28, Florida Statutes, as a "sea change" that undercut the reasoning of *Gamble*. *Id*. at 21.

The special concurrence addressed the dissent's reasoning and focused on the critical distinction between seeking redress from a court, in accordance with section 768.28, as opposed to seeking redress from the Legislature through the claim bill process. *See Id.* at 9-10 (Conner, J. specially concurring). "The concept of 'legislative grace' espoused by our supreme court in *Gamble* implicitly recognized the difference in core functions between the two branches of government." *Id.* at 10. For this reason, the special concurrence disagreed with the dissent's premise that the enactment of section 768.28 altered the Legislature's discretion in enacting claim bills by welding a plaintiff's judicial remedy to the legislative remedy of seeking a claim bill. *See id.* at 9.

Subsequently, the Fourth District granted the Law Firm's motion to certify a question of great public importance and certified the following to this Court:

> AFTER THE ENACTMENT OF SECTION 768.28, FLORIDA STATUTES, AND THE ADOPTION OF FLORIDA SENATE RULE 4.81(6), IS IT CONSTITUTIONALLY PERMISSIBLE FOR THE FLORIDA LEGISLATURE TO LIMIT THE AMOUNT OF

ATTORNEYS' FEES PAID FROM A GUARDIANSHIP TRUST ESTABLISHED BY A LEGISLATIVE CLAIMS BILL?

Searcy Denney Scarola Barnhart & Shipley, P.A. v. State, No. 4D13-3497, 2015 WL 5440796, at *1 (Fla. 4th DCA Sept. 16, 2015). The Law Firm sought discretionary review in this Court, which accepted jurisdiction. *See* Order Accepting Jurisdiction, No. 15-1747 (Fla. Oct. 14, 2015).

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourth District's decision and reject the Law Firm's attempts to obtain a judicial rewrite of Aaron's claim bill.

The claim bill included very specific conditions on the $15 million. The money was not appropriated directly to Aaron or his parents. Rather, the claim bill proceeds were to be paid to the child's guardianship for placement in a special needs trust created for Aaron's exclusive use and benefit. And of the $15 million, only $100,000 could go towards payment of professional fees. The Legislature was well within its authority to include the fee provision in Aaron's claim bill. Simply put, private parties cannot contractually bind the Legislature in the exercise of its independent and sovereign power over claim bills. This Court acknowledged that core principle over thirty years ago in *Gamble v. Wells* when it soundly rejected a near identical attempt to strike an attorney's fee provision in a claim bill. *Gamble* squarely applies here to foreclose the Law Firm's challenge.

Moreover, neither the passage of time nor the enactment of section 768.28, Florida Statutes, renders *Gamble* inapplicable here. In enacting section 768.28, the Legislature provided a *judicial remedy* for plaintiffs with claims against the State or its subdivisions. But this in no way restricted the Legislature's authority over claim bills, which are exclusively a *legislative remedy*.

The Law Firm's challenge fails for several other reasons. The underlying contingent fee contract at issue expressly acknowledged that, if a defendant was entitled to sovereign immunity, then the fee amount could be limited "by law," which is exactly what happened here. Moreover, even if this Court were to find the fee provision invalid (despite the substantive defects in the Law Firm's various constitutional claims), *and* take the remarkable step of severing the fee provision from the rest of the claim bill, then the Law Firm would be foreclosed from *any* recovery because the challenged fee provision plays a dual role. It does not merely limit the amount of professional fees—it *authorizes* their payment from the claim bill proceeds in the first place. Without that authorizing language, then Aaron's claim bill in its new formulation would provide no authority for the payment of any professional fees whatsoever, instead directing *all* the proceeds to the special needs trust.

STANDARD OF REVIEW

This case addresses the constitutionality of a legislative act, which is an issue of law reviewed de novo. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). The claim bill is "clothed with a presumption of constitutionality," *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008), and all reasonable presumptions must be indulged in favor of its constitutionality, *see State v. Bales*, 343 So. 2d 9, 11 (Fla. 1977); *Smithers v. N. St. Lucie River Drainage Dist.*, 73 So. 2d 235, 237 (Fla. 1954). A court cannot invalidate a law unless its invalidity is demonstrated "beyond reasonable doubt." *Crist*, 978 So. 2d at 139 (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)) (internal quotation marks omitted).

ARGUMENT

When passing Aaron's claim bill, the Legislature was very specific. The claim bill proceeds were to be paid to the child's guardianship for placement in a special needs trust created for Aaron's exclusive use and benefit. Of the $15 million, only $100,000 could go towards payment of professional fees; the Legislature thus protected the remaining $14.9 million from depletion by declaring it off-limits to attorneys or lobbyists—or anything other than the special needs trust. The Law Firm now seeks to have the judicial branch cast aside that protection and essentially rewrite the claim bill. To achieve that end, the Law Firm

would have this Court violate the constitutionally mandated separation of powers, disregard directly binding precedent, misconstrue section 768.28's plain language, and outright ignore the very explicit directive from the Legislature that the claim bill proceeds enter the security of a special needs trust.[3] This Court should reject the Law Firm's efforts and affirm the Fourth District's decision.

The answer to the certified question is "yes"—the Legislature was well within its authority to include the fee provision in Aaron's claim bill. Simply put, private parties cannot contractually bind the Legislature in the exercise of its independent and sovereign discretion over claim bills. This Court acknowledged that core principle over thirty years ago in *Gamble v. Wells* when it soundly rejected a near identical attempt to strike an attorney's fee provision in a claim bill. Neither the passage of time nor the enactment of section 768.28, Florida Statutes, renders *Gamble* inapplicable here. In enacting section 768.28, Florida Statutes, the

[3] "Special Needs Trusts (SNT) are so called because the beneficiary is a person with disabilities who has 'special needs,' not because the distributions that may be made from the trust are limited to medical supplies or services related to the beneficiary's medical condition." Fla. Bar, *Administration of Trusts in Florida*, § 17.1 Special Needs Trusts (2014). Such trusts are intended to "maximize and supplement, but not supplant, the goods and services from government resources already provided or that could be provided to persons with disabilities with proper financial planning." *Id.* As with any trust, the trustee has a fiduciary obligation to the trust beneficiary. "The trustee, who holds legal title to trust property as a fiduciary, is required to manage the property with reasonable care, avoid any type of self-dealing with the property, and be certain not to be in a position in which the trustee's personal interests could conflict with those of the beneficiaries." *Id.* at § 2.3 General Fiduciary Standards (citing Gerry W. Beyer, *Wills, Trusts, and Estates* 300 (Aspen Law and Business 1999)).

Legislature waived sovereign immunity for tort claims and imposed liability limits, thereby providing a *judicial remedy* for plaintiffs with claims against the State or its subdivisions. But this in no way restricted the Legislature's authority over claim bills, which are exclusively a *legislative remedy*. And it certainly did not afford private parties the right to contractually restrict the Legislature in the exercise of its sovereign power over claim bills.

Further, the Law Firm's challenge suffers from other fatal flaws. The Law Firm claims to have a contract right to no less than 25 percent of the claim bill money, but the underlying contingent fee contract at issue expressly acknowledged that, if a defendant was entitled to sovereign immunity, then the fee amount could be limited "by law," R1:88, which is exactly what happened here. Moreover, even if this Court were to find the fee provision invalid, *and* take the remarkable step of severing the fee provision from the rest of the claim bill, then the Law Firm would be foreclosed from *any* recovery because the challenged fee provision plays a dual role. It does not merely limit the amount of professional fees—it *authorizes* their payment from the claim bill money in the first place. Without that authorizing language, the claim bill directs the payment of $15 million "to the Guardianship of Aaron Edwards, to be placed in a special needs trust." Ch. 2012-249, § 2, Laws of Fla. If the fee provision is severed, then Aaron's claim bill in its new formulation

would provide no authority for the payment of any professional fees whatsoever, instead directing *all* the proceeds to the special needs trust.

This Court should affirm the Fourth District's decision.

I. THE FEE PROVISION IS CONSTITUTIONAL BECAUSE CLAIM BILLS ARE INDEPENDENT SOVEREIGN ACTS THAT PROVIDE LEGISLATIVE RELIEF.

In Florida, "[a] claim bill, also known as a relief bill, is a legislative measure that directs the Comptroller of Florida, or, if appropriate, a unit of local government, to pay a specific sum of money to a claimant to satisfy an equitable or moral obligation." D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA. BAR J., Apr. 1988, at 23. Claim bills are purely discretionary acts by which the Legislature may award money to "a person who has suffered injury or damages, but who is without a judicial remedy or who is not otherwise legally compensable." *Id.* Historically, claim bills originated out of the State's sovereign immunity, *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 & n.5 (Fla. 1981), and Florida's Constitution vests the Legislature with the exclusive authority to exercise the State's sovereign power by granting relief for governmental wrongs through waivers of that immunity, *id*. at 381. For that reason, claim bills are exclusively a legislative remedy.

A. The Legislature Is Not Bound by Pre-existing Fee Contracts When It Exercises Its Sovereign Authority to Enact a Claim Bill.

Over thirty years ago, this Court rebuffed a similar effort to evade a professional fee limit in a claim bill. This Court explicitly recognized the powerful and unique nature of claim bills—they are legislative exercises of the State's sovereign power and, as such, are not controlled by the terms of private contracts. *Gamble v. Wells*, 450 So. 2d 850, 853 (Fla. 1984); *see also Noel v. Schlesinger*, 984 So. 2d 1265, 1267 (Fla. 4th DCA 2008) (relying on *Gamble* to reject an attorney's attempt to impose a charging lien on claim bill proceeds). So while a party may seek relief in the form of a claim bill, it may not contractually bind the Legislature's discretion in deciding the amount provided or its recipients (or any other specific condition the Legislature decides to impose).

In *Gamble*, which is directly controlling, this Court held that an attorney fee provision in a claim bill did not impair any contractual obligation because a claim bill is a separate and independent act of sovereign power. *Gamble*, 450 So. 2d at 853.[4] At issue was a claim bill compensating a minor for injuries suffered while in the State's custody. *Id.* at 851. The bill awarded the minor $150,000 (to be held in

[4] *Gamble* referred to a "private relief act," which is synonymous with a claim bill. *See* Kahn, *supra*, at 23 ("A claim bill, *also known as a relief bill*, is a legislative measure . . . ." (emphasis added)). Indeed, Aaron's claim bill uses language—"[a]n act for the relief of Aaron Edwards, a minor" —that mirrors the *Gamble* claim bill. 450 So. 2d at 852 n.2 ("An act for the relief of Cynthia Leigh Gamble, a minor; . . . .").

a trust account administered by her guardian) and limited the minor's attorney to a fee recovery of $10,000. *Id.* at 852 & n.2. The attorney challenged the fee provision, arguing that it unconstitutionally impaired the pre-existing contingent fee contract. *Id.* at 852. In no uncertain terms, this Court rejected this argument because the Legislature was not bound by the terms of the pre-existing contract:

> [The claim bill] is an act of grace to redress a wrong suffered by [the minor] at the hands of the state which is not otherwise legally compensable. In seeking to obtain relief for [the minor] by means of a private relief act, [the attorney] was not in a position to demand that the legislature grant compensation to [the minor]. He could only request that the legislature grant the compensation sought. *The legislature then, as a matter of grace, could allow compensation, decide the amount of compensation, and determine the conditions, if any, to be placed on the appropriation.*
>
> *Parties cannot enter into a contract to bind the state in the exercise of its sovereign power.* The legislature had the power to place the attorney's fee limitation in [the bill]. [The attorney], by the terms of his contingent fee contract . . . , could not deprive the legislature of this power. *The legislature was in no way bound to pass legislation conforming with the provisions of the prior contingent fee contract.*

Id. at 853 (emphasis added).

The Law Firm attempts to factually distinguish *Gamble* based on differences in the *Gamble* attorney's contract or the attorney's "waiver" of his rights. *See* Initial Br. at 20-21. But this Court did not base its ruling upon those facts. It did not hold that the fee provision was valid because the contract did not cover fees for services rendered in obtaining the claim bill, nor did it hold that the fee provision was valid because the attorney waived his rights. Rather, *Gamble* recognized that a

claim bill is an exercise of sovereign power, and a contract between private parties cannot deprive the Legislature of that power, or direct its exercise of that power. *See* 450 So. 2d at 853.[5]

The Law Firm further argues that this Court can ignore *Gamble* because the United States Supreme Court has noted that constitutional rights do not depend on whether a benefit is characterized as a "privilege" as opposed to a "right." *See* Initial Br. at 21-23. But this principle was well-established by the time this Court was deciding *Gamble*. Indeed, all the cases the Law Firm cites for this proposition were issued at least a decade before *Gamble*, and address due process claims,[6] equal protection challenges,[7] and First Amendment rights.[8] *Gamble* however addressed a completely different legal concept—the interplay between private contracts and the Legislature's "sovereign power." 450 So. 2d at 853. The question

[5] The Law Firm also asserts that the attorney in *Gamble* "was provided an appropriate fee for the only work he performed, i.e. getting the private relief act passed by the legislature." Initial Br. at 21. But the Second District's opinion indicates that before seeking relief through a claim bill, the *Gamble* attorney rendered services that included active proceedings in juvenile court, circuit court, the Second District Court of Appeal, and even this Court. *In re Guardianship of Gamble*, 436 So. 2d 173, 176 (Fla. 2d DCA 1983).

[6] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

[7] *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[8] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *see also Jones v. State Bd. of Ed. of State of Tenn.*, 397 U.S. 31, 33-34 (1970) (dismissing certiorari petition as improvidently granted in light of determination that facts in the record "render[ed] the case an inappropriate vehicle" to address the First Amendment issue presented).

was not merely whether, when choosing to exercise its discretion, the Legislature had acted in accordance with the Constitution. Rather, the critical issue in *Gamble* was whether a private party could control the exercise of that sovereign power, not through any constitutional authority, but through a private contract. This Court squarely held that a contingent fee contract between private parties cannot trump the Legislature's exercise of its sovereign power to provide relief through claim bills. And without any cognizable pre-existing contract right, there can be no unconstitutional impairment of that right.

More recently, the Fourth District relied on *Gamble* when it rejected another attempt by an attorney to defeat a fee limit. In *Noel*, the Legislature passed a claim bill that provided relief for an injured minor and her parents. 984 So. 2d at 1266. The Legislature's award mirrored the jury award obtained in an underlying suit against a department of the State and provided that "[p]ayment for attorney's fees and costs incurred by the claimant's attorneys shall not exceed $1,074,667." *Id.* The attorney attempted to avoid the fee limit by reopening the personal injury suit and attaching a charging lien against the claim bill proceeds. *Id.* The Fourth District rejected that attempt, reiterating the powerful and unique nature of claim bills:

> That the claim bill is *separate and apart from the constraints of an earlier lawsuit* is demonstrated by the supreme court's recognition that *[the] legislature has the power to limit attorney's fees in a claims bill, no matter what the underlying fee contract provides* . . . . Since the Noel claims bill appropriation was separate and apart from the recovery in the lawsuit, the circuit court was not authorized to impose a charging lien upon it.

Id. at 1267 (emphasis added) (citations omitted). *Noel* also noted that the claim bill indicated direct legislative intent to limit the attorney's fees to no more than the stated amount. *Id.*

The Law Firm attempts to paint *Noel* as irrelevant because it addressed a charging lien, and the attorney's claim in that cause was grounded in the language of the claim bill and not upon any theory of constitutional entitlement. *See* Init. Br. at 24-26. But ultimately, as here, the *Noel* attorney's theory of entitlement was based on the pre-existing fee contract. 984 So. 2d at 1266. The Law Firm's fixation on non-pertinent factual distinctions overlooks the legal principles driving the decision in *Noel*, which relied upon *Gamble*. In both cases, the Courts held that a private party cannot claim entitlement to proceeds from a claim bill in contravention of the Legislature's sovereign exercise of its discretion to compensate an individual for wrongs committed by the State. The Law Firm also notes that in *Noel*, "the minor's parents objected to payment of the attorney's fees . . . unlike in this case." Initial Br. at 26. But that is of no legal consequence.

The Legislature decides where to direct the claim bill proceeds, and it directed the proceeds here to Aaron's special needs trust.[9]

Gamble rejected the same type of challenge brought here, and the Law Firm cannot overcome this precedent.

B. The Enactment of Section 768.28, Florida Statutes, Did Not Affect the Legislature's Sovereign Authority Over Claim Bills

In an attempt to escape *Gamble*'*s* conclusive holding, the Law Firm argues that the decision has been superseded by the Legislature's enactment of

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[9] The Law Firm's Initial Brief includes the erroneous statement that Aaron's parents, "*and Aaron's guardian ad litem*, all waived application of the Claims Bill's $100,000 limitation." Initial Br. at 7 (emphasis added). Aaron's guardian ad litem was appointed due to the conflict of interest between Aaron and his mother as guardian, which was triggered by the parents' separate motion seeking individual payments from the claim bill. The guardian ad litem's appointment was for the limited purpose of representing Aaron's interests "with regard to the proceedings and issues emanating from [the parents' motion]." R3:494; *see also supra* at 4-5. His scope of appointment did not include representation as to the Law Firm's petition.

Moreover, the guardian ad litem's report filed below contained no waiver of the fee provision. Instead, the report explained that, notwithstanding that it was Aaron's "expressed wish . . . that the proportionate share of the Claims Bill award be pro rated proportionately among him (i.e. the Special Needs Trust . . .) and his parents," the guardian ad litem "does not believe that expressed desire or intent of [Aaron] is in his best interest." *See* Report of Guardian Ad Litem on Behalf of Aaron Xavier Edwards at 2 (Oct. 19, 2013), *In Re: Guardianship of Aaron Xavier Edwards*, No. 502012GA000558 (Fla. 15th Cir.). Further, the guardian ad litem adopted and incorporated the State's arguments regarding the constitutionality of the legislative act. *Id.* at 3.

Several weeks after the guardianship court denied the Law Firm's petition, and over the State's objection, the court granted the parents' request to abate the proceedings related to their motion pending disposition of the Law Firm's appeal. *See* Order Abating Certain Proceedings (Oct. 18, 2013), *In Re: Guardianship of Aaron Xavier Edwards*, No. 502012GA000558 (Fla. 15th Cir.).

768.28, Florida Statutes, *see* Initial Br. at 15-18, which partially waived the State's sovereign immunity in tort actions while imposing liability caps on recovery. The crux of the Law Firm's argument is that section 768.28 changed the discretionary nature of claim bills, and the Legislature, therefore, is bound to include a 25 percent fee recovery in every claim bill that seeks recovery over the sovereign immunity liability caps. *See* Initial Br. at 18-19. Even if the Legislature that enacted section 768.28 could bind the Legislature that enacted Aaron's claim bill, the Law Firm's argument is belied by the plain language of section 768.28.

In enacting section 768.28, the Legislature partially waived sovereign immunity and provided a judicial remedy for plaintiffs with tort claims against the State or its subdivisions. *See* § 768.28(1), Fla. Stat. (2007) ("*Actions at law* against the state or any of its agencies or subdivisions to recover damages in tort . . . may be prosecuted subject to the limitations specified in this act." (emphasis added)). However, the Legislature in no way limited its authority over claim bills. Indeed, section 768.28(5), recognizes the Legislature's discretion over claim bills based upon a judgment that exceeds the liability caps:

> [A] judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but *may be paid* in part or in whole *only by further act of the Legislature*.

Id. § 768.28(5) (emphasis added). Contrary to the Law Firm's assertion, this provision did not transform the essential nature of claim bills. They remain a purely discretionary *legislative* remedy that is separate and apart from any preceding *judicial* remedy. *See State, Dep't of Envtl. Prot. v. Garcia*, 99 So. 3d 539, 545 (Fla. 3d DCA 2011) (citing *Gerard v. Dep't of Transp.*, 472 So. 2d 1170, 1172 (Fla. 1985)) ("[E]ven if the Garcias obtain an excess judgment in their favor and submit a claims bill for relief to the Legislature, *the decision whether or not to pass a claims bill and pay any or all of a claim is entirely a legislative function completely independent of judicial intervention*." (emphasis added)); *cf. City of Miami v. Valdez*, 847 So. 2d 1005, 1007 (Fla. 3d DCA 2003) (citing *Dickinson v. Bradley*, 298 So. 2d 352, 354 (Fla. 1974)) ("An action at law is not a legislative claims bill.").

As for the Law Firm's insistence that it is entitled to 25 percent of Aaron's claim bill proceeds based on section 768.28(8), Initial Br. at 11, 18-19, the plain language of the provision contradicts this assertion. First, even assuming that section 768.28(8) applied to claim bill proceeds, *cf.* § 768.28(8), Fla. Stat. (providing that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any *judgment or settlement.*" (emphasis added)), as the Fourth District explained, the provision does not establish a "mandatory minimum" for attorneys' fees—it only mandates "that the fees cannot

be 'in excess of 25 percent.' The statute places a cap on the recoverable attorneys' fees, not a floor.'" Op. at 8. The fee provision in Aaron's claim bill is entirely consistent with the plain language of subsection (8) because it is not "in excess of 25 percent."

Second, this 25 percent cap is not absolute and binding—it is a general percentage set forth in a statute but it in no way bars future legislatures from deviating—either upward or downward—from that percentage. *See Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 824 (Fla. 1985) (citing *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974); *Tamiami Trail Tours, Inc. v. Lee*, 194 So. 305 (Fla. 1940); *Sovereign Camp Woodmen of the World v. Lake Worth Inlet Dist.*, 161 So. 717 (Fla. 1935); *Kirklands v. Town of Bradley*, 139 So. 144 (Fla. 1932)) (noting that a legislature may not bind the hands of future legislatures). Just as the Legislature could exceed that 25 percent limit in a claim bill, it could likewise set a lower limit, as it did here.[10] As for the Law Firm's reliance on cases addressing fees under the Federal Tort Claims Act, Initial Br. at 29-31, those cases address actions at law brought under a federal statute[11] and have no applicability to the

[10] In fact, section 768.28(5) limits total recovery to $200,000. But the Law Firm certainly does not argue that limit trumps the $15 million award.

[11] *Jackson v. United States*, 881 F.2d 707 (9th Cir. 1989) (addressing whether a California statute applied to limit attorney's fees in a case brought under the Federal Tort Claims Act); *Joe v. United States*, 772 F.2d 1535 (11th Cir. 1985) (addressing whether a plaintiff is entitled to attorney's fees from the United States in an action brought under the Federal Tort Claims Act); *Robak v. United States*,

present situation, which involves the Legislature's exercise of its sovereign power to enact claim bills.

Finally, section 768.28(8) is a statute of general applicability. A specific "special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." *Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959)); *see also Gretz v. Florida Unemployment Appeals Comm'n*, 572 So. 2d 1384, 1386 (Fla. 1991). In other words, the specific controls because it is an exception to the general statute. *Gretz*, 572 So. 2d at 1384 (citing *Adams*, 111 So. 2d at 667). Here, Aaron's claim bill is extremely specific—it was fashioned and enacted for the express benefit of Aaron and authorized only $100,000 for professional fees; therefore, it would control over the general 25 percent cap in section 768.28(8), Florida Statutes, if that provision otherwise applied.

C. Procedural Rules of the Legislature, Which Can Be Amended or Waived, Do Not Render *Gamble* Inapplicable.

The Law Firm likewise points to Senate Rule 4.81(6) as support for its argument that it is entitled to 25 percent of the claim bill proceeds because "obtaining a judgment and finalizing it on appeal was a prerequisite to Aaron's perfecting his right to file a claims bill." Initial Br. at 20.

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658 F.2d 471 (7th Cir. 1981) (addressing, among other things, the scope of a court's discretion to award attorney's fees under the Federal Tort Claims Act).

Although both the Senate and House Rules currently require the exhaustion of all judicial and administrative remedies prior to bringing a claim bill,[12] these rules, like every other rule governing the Senate or House, may be waived or suspended if those bodies determine that such action is appropriate. *See* Fla. S. Rule 11.2 (2014-2016); Fla. H.R. Rule 13.2 (2014-2016, ed. 1). To that end, the Legislature is free to pass a claim bill whether or not there is an underlying judgment or settlement, so the lack of one in *Gamble* is of no significance here. *Cf. Gerard*, 472 So. 2d at 1172 (quoting *Jetton v. Jacksonville Elec. Auth.*, 399 So.2d 396, 397 (Fla. 1st DCA 1981)) ("[W]e agree with the Department of Transportation's assertion that a judgment in this case was not a prerequisite to Gerard's filing a claims bill in the legislature. . . . [W]hile the legislature has placed limits on recovery, 'claimants remain free to seek legislative relief bills, as they did during days of complete sovereign immunity.'"). But regardless, the Law Firm cites no case standing for the proposition that the constitutionality of legislation (or the applicability of this Court's precedents) can turn on a legislative body's procedural rules.

[12] Fla. S. Rule 4.81(6) (2014-2016) ("The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted; except that the hearing and consideration of a claim that is still within the judicial or administrative systems may proceed where the parties have executed a written settlement agreement. This subsection does not apply to a bill which relates to a claim of wrongful incarceration."); Fla. H.R. Rule 5.6(c) (2014-2016, ed. 1) (similar).

This Court should apply *Gamble* and affirm the Fourth District.

D. The Fee Provision Does Not Infringe Upon Any Constitutional Right.

The Law Firm alleges numerous constitutional defects resulting from the fee provision. None of these claims comes close to overcoming the bill's presumption of constitutionality. Indeed, all are meritless. More fundamentally, if this Court accepts the remarkable notion that the Legislature's decision to *not* award requested relief through a claims bill constitutes a constitutional violation, sovereign immunity would all but disappear.

1. The fee provision does not impair any contract rights

As detailed above, *Gamble* squarely forecloses the Law Firm's challenge of the fee provision in Aaron's claim bill, *see supra* I.A, so it is unnecessary for this Court to even address the actual terms of the underlying contract between the Law Firm and Aaron's parents.[13] But if this Court were to delve into the contingent fee contract, then the futility of the Law Firm's claim becomes even more apparent.

Most notably, the fee terms of the contract do not even conflict with the fee provision in Aaron's claim bill. The contract expressly recognized that, if

[13] The contract addresses only the Law Firm's representation of the parents, not representation of Aaron, or his parents on behalf of Aaron. R1:86-90. And it *only* obligates Aaron's parents—not Aaron (the actual beneficiary of the claim bill).

sovereign immunity applied, then the attorney's fees could be limited by the Legislature:

> In the event that one of the parties to pay my claim for damages is a governmental agency, I understand that Federal and Florida Law may limit the amount of attorney fees charged by SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. *In that event, I understand that the attorney fees owed to SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A. shall be the amount provided by law.*

R1:88.

This express contractual provision contemplates that attorney fees may be limited when a governmental agency is involved, and it acknowledges consent by both the Law Firm and the parents that the fee "shall be the amount provided by law." It is beyond contention that the phrase "by law" means by act of the Legislature, which is the government branch constitutionally vested with the State's legislative power. *See* Art. III, § 1, Fla. Const.; *cf. AFL-CIO v. Hood*, 885 So. 2d 373, 375 (Fla. 2004) (discussing constitutional provision that contains the phrase "by law").

The Law Firm contends that this phrase refers only to the 25 percent fee cap in section 768.28(8), Florida Statutes. Initial Br. at 31. But this is at odds with the plain language of the contract, which does not contain the specificity the Law Firm asserts. Moreover, at the time of the signing of the contract in 1999, this Court's decision in *Gamble*—which acknowledged the Legislature's sovereign prerogative,

regardless of pre-existing fee contracts, to include fee limits in claim bills—had constituted part of the body of law in Florida for almost fifteen years.

Here, the Law Firm has already recovered the entire $200,000 allowed under section 768.28(5), Florida Statutes, and applied it to its costs. R1:63. The only other amount "provided by law" is the $100,000 set forth in Aaron's claim bill. Under its own contract, the Law Firm is bound to this limit. The same limit flows to the agreement between the Law Firm and William S. Frates, II, PA, which states that "[u]nder no circumstances will the total fee of the attorneys involved exceed the amount agreed upon between the client and the law firm of [Searcy Denney]." R1:92. And the "Contract to Employ Appellate Counsel" similarly provides that "the undersigned clients" will pay "5% of the gross recovery, *if approved by the Legislature*." (emphasis added).[14] R1:94. Therefore, beyond *Gamble*'s unequivocal holding, impairment of contract is not even an issue because the contracts at issue do not conflict with—but rather incorporate—the challenged fee provision.

To the extent the Law Firm expended substantial resources in the pursuit of Aaron's interest, it did so under a contingent contract that expressly recognized that the Law Firm might not recover *any* costs or fees. Indeed, the Law Firm has already received 100 percent of what was *recovered* pursuant to the prior court

[14] That agreement had a separate fee provision "[i]f the undersigned clients prevail on the cross-appeal and sovereign immunity does not apply." R1:94. The cross-appeal was unsuccessful, *see Lee Mem'l Health Sys. v. Edwards*, 22 So. 3d 81 (2d DCA 2009) (table op.), and sovereign immunity did apply.

proceedings—the $200,000 already paid out under the general statutory sovereign immunity waiver. R1:63. And the Law Firm will recover $100,000 beyond what it would have recovered had the Legislature not passed *any* claim bill, which even the Law Firm appears to accept the Legislature was constitutionally authorized to do. In any event, the challenged fee provision does not impair the obligation of any contract.

2. The fee provision does not result in a taking of property.

The Law Firm's takings argument begins with the flawed premise that it has a property interest in Aaron's claim bill based upon the contingent fee contract. Initial Br. at 36-37. As addressed earlier, there is no contractual right to proceeds from a claim bill. *See Gamble*, 450 So. 2d at 853; *Noel*, 984 So. 2d at 1267; *supra* I.A. Put into context, the purported "taking" is of funds the Legislature had no obligation to authorize in the first place. The claim also fails because the Law Firm got everything under the contract it was entitled to receive. *See supra* I.D.1. No property was taken by the Legislature's inclusion of the challenged fee provision.

3. The fee provision does not unconstitutionally contravene section 768.28(8), Florida Statutes.

The Law Firm next argues that the fee provision unconstitutionally amends section 768.28(8), Florida Statutes. Initial Br. at 38-39. However, this argument misapplies caselaw discussing the constitutional limits on provisos included in general appropriation acts. More problematic, the Law Firm's argument fails to

take into account the actual constitutional provision at issue in those cases, which states "[l]aws making appropriations for *salaries of public officers and other current expenses of the state* shall contain provisions on no other subject." Art. III, § 12, Fla. Const. (emphasis added). Here, a claim bill is at issue, not a proviso in a general appropriations act that makes appropriations for public salaries and other public expenses. Article III, section 12 simply has no application to the claim bill here. Further, even if this constitutional provision did apply to Aaron's claim bill, for the reasons discussed earlier, the challenged fee provision is not at odds with section 768.28(8). *See supra* I.B.

4. The fee provision does not violate separation of powers.

The Law Firm asserts that the Legislature's inclusion of a fee provision in Aaron's claim bill violates the constitutional separation of powers. Initial Br. at 39-43. But its argument does not identify in any way how the Legislature's exercise of its sovereign power to enact a claim bill is an unconstitutional interference with the powers of the executive or judicial branches. The crux of their argument appears to be that because the "attorney's fees limitation was unconstitutional, . . . it was the [Fourth District's] duty to declare it as such," and "the [Fourth District's] interpretation of the language of § 768.28 . . . was incorrect." *Id.* at 42. But that is not a separation of powers argument. It is merely a complaint about the outcome below.

Ironically, for this Court to grant the Law Firm the relief it seeks would require an outright judicial rewrite of Aaron's claim bill—an act that, in itself, would violate the separation of powers. *Cf. Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) ("This Court . . . has traditionally applied a strict separation of powers doctrine [which] encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." (citations and internal quotation marks omitted)).

5. The fee provision does not impair the right to petition for redress of grievances, nor does it deny access to courts.

The Law Firm next argues that the fee provision deprives future claimants of the right to petition for redress of grievances, and results in the denial of access to courts. Initial Br. at 43-45. These claims likewise have no merit.

First, the Law Firm does not have standing to bring constitutional claims on behalf of speculative future claimants. *See, e.g., Sieniarecki v. State*, 756 So. 2d 68, 76 (Fla. 2000) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *Sandstrom v. Leader*, 370 So. 2d 3, 4 (Fla. 1979) ("[A]s the Fourth District observed in its decision below, constitutional rights are personal in nature and generally may not be asserted vicariously.").

Second, neither the Law Firm—nor any hypothetical future claimant—has had its right to seek redress from the government limited in any way by the

challenged fee provision. "The presentation of a complaint to government concerning its conduct is now expressly held central to the right to petition that government for the redress of grievances against it." *Cate v. Oldham*, 450 So. 2d 224, 226 (Fla. 1984) (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Mid-Tex. Commc'ns Syst., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1382 (5th Cir. 1980)). In harmony with this principle, Aaron's claim bill was presented to the Legislature, vetted through a series of public committee hearings and debates, and ultimately passed. Aaron and his parents and the Law Firm demonstrably exercised their right to petition, and Aaron received significant relief as a result of that exercise. As for future claimants, the challenged provision does not bind future legislatures' decisions on future claim bills, nor could it. *See supra* at 21 (noting that a legislature may not bind the hands of future legislatures).

Further, as a substantive matter, in order to establish a denial of access to courts under Article I, section 21 of the Florida Constitution, an aggrieved party must demonstrate that the Legislature has abolished a common-law right or statutory cause of action enjoyed by the people of Florida prior to the adoption of the Declaration of Rights in 1968. *Eller v. Shova*, 630 So. 2d 537, 542 & n.4 (Fla. 1993) ("We take this opportunity to clarify that, when reviewing article I, section 21, of the Florida Constitution, one must look to the common law as it existed on November 5, 1968."); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). Here, the Law

Firm can point to no pre-existing right upon which to base an access-to-courts claim because, due to sovereign immunity, there was no pre-1968 right to sue and recover against the State. And under Florida law, there has never been a right to receive proceeds from a claim bill. *See Gamble*, 450 So. 2d at 853; *Noel*, 984 So. 2d at 1267. Accordingly, the challenged fee provision does not result in a denial of access to courts.

The Law Firm's policy arguments are equally unconvincing. The Law Firm's allegations concerning the "chilling effect" that would result from upholding this fee provision, Initial Br. at 43, are unfounded, completely speculative, and contradicted by the Law Firm's own actions in this very case. *Gamble*, which recognized the Legislature's sovereign prerogative to limit attorney's fees in claim bills regardless of any preexisting fee contract, was decided over thirty years ago.[15] When the Law Firm entered the contingent fee

[15] Notably, when deciding *Gamble*, this Court was not unaware of the implications of its decision. In briefing, the attorney challenging the fee provision highlighted the significance of contingent fee agreements:

> Every Justice of the Supreme Court of Florida who reads this brief will be thoroughly familiar with a contingent fee contract. The provisions and purposes of this type of contract are well known and have received approval by our Supreme Court. Such a contract has been called "the poor mans [sic] key to the courthouse" and never has that been more clearly shown than in this case.

Answer Brief of Appellee & Initial Brief of Cross-Appellant at 12 (Jul. 13, 1983), *Gamble v. Wells*, 450 So. 2d 850 (Fla. 1984) (No. 63,768).

agreement with Aaron's parents, *Gamble* had been established precedent for almost fifteen years. Yet that did not deter the Law Firm from undertaking representation against a defendant with sovereign immunity. Certainly any such chilling effect would have manifested itself by now.[16] Contrary to the Law Firm's assertions, a decision upholding the challenged fee provision would not represent any dramatic change in the law. It would merely reaffirm what has been well-settled.

Rather, the relief the Law Firm is seeking—to have the judicial branch ignore an express fee provision included in a claim bill—would have a potentially far greater negative effect on injured claimants. It would erode the separation of powers between the legislative and judicial branches and potentially have a chilling effect upon the future passage of claim bills.

II. SEVERING THE FEE PROVISION WOULD CONTRAVENE LEGISLATIVE INTENT AND FORECLOSE THE LAW FIRM FROM ANY RECOVERY.

The Law Firm urges this Court to find the fee provision invalid and sever it from the claim bill. Under settled law, the challenged provision is not severable. But even if the fee provision were severable, eliminating the language from the claim bill would completely foreclose the Law Firm from any recovery.

[16] Even if a decision upholding the fee provision resulted in no attorney agreeing to represent injured parties against the State (which is hardly likely), that does not constitute an access to courts violation. There is no right to counsel in civil cases. *See In re D.B.*, 385 So. 2d 83, 89 (Fla. 1980) (explaining that civil plaintiffs have no constitutional right to counsel).

The doctrine of severability recognizes a court's ability to uphold the constitutionality of legislative enactments where possible by removing invalid portions. *State v. Catalano*, 104 So. 3d 1069, 1080 (Fla. 2012). A provision is severable only if the remaining constitutional sections can accomplish the legislative intent in the absence of the invalid provision. *E. Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 311, 317 (Fla. 1984). Factors to consider in addressing severability are whether "the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void," and whether "the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other." *Cramp v. Bd. of Pub. Instruction*, 137 So. 2d 828, 830 (Fla. 1962).

Importantly, the purpose of Aaron's claim bill act wasn't to provide his attorneys a reasonable fee, or even any fee at all. It was to provide Aaron relief through the funding of a special needs trust. The Legislature included an express provision authorizing the payment of a limited amount of professional fees. The provision was not a part of the original version of the bill, but was specifically added during the legislative process.[17] Because it was integral to the final

[17] For an overview of the legislative process that led up to passage of Chapter 2012-249, Laws of Florida, see the Florida House of Representatives website for CS/CS/HB 965 -Relief/Aaron Edwards/Lee Memorial Health System/Lee County, *available at* http://flhouse.gov/Sections/Bills/billsdetail.aspx?BillId=48199, and the Florida Senate website for CS/SB 10: Relief of Aaron Edwards by Lee

enactment, severing the provision would contravene clear legislative intent. *See Noel*, 984 So. 2d at 1267 ("[A] fair reading of the claims bill indicates the legislative intent to limit appellee's fees . . . .").[18]

Even if this Court determines that the fee provision is severable, then the Law Firm still cannot recover what it seeks. Specifically, the challenged provision plays a dual role. It does not merely limit the amount of professional fees—it *authorizes* their payment from the money in the first place. Without that authorizing provision, the remaining language directs the payment of $15 million "to the Guardianship of Aaron Edwards, to be placed in a special needs trust created for the exclusive use and benefit of Aaron Edwards, a minor." Ch. 2012-249, § 2, Laws of Fla. Aaron's claim bill in its new formulation would provide no authority for the payment of any professional fees and would instead direct *all* the proceeds to the special needs trust. What the Law Firm really wants is not an order striking language, but an order rewriting language. This Court lacks that authority. Just as this Court cannot alter the claim bill to award "$28,477,966.48" instead of "$15,000,000," it likewise cannot override the clear legislative directive that the money enter a special needs trust.

Memorial Health System of Lee County, *available at* http://www.flsenate.gov/Session/Bill/2012/0010.

[18] Additionally, the record indicates no suggestion that the Legislature would have passed a claim bill that authorized unlimited professional fees.

CONCLUSION

This Court should answer the certified question in the affirmative and affirm the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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