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COURT OF APPEALS
STATE OF NEW YORK

MEREDITH SZYPULA,

Appellant,

-against-

NO. 76

JOHN SZYPULA,

Respondent.

20 Eagle Street
Albany, New York
September 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Szypula v. Szypula.

2 MR. MILLER: Szypula. Very well, Your Honor.

3 CHIEF JUDGE WILSON: Szypula?

4 MR. MILLER: Szypula.

5 CHIEF JUDGE WILSON: Szypula.

6 MR. MILLER: May it please the court. My name is
7 Jim Miller. I'm with the firm of Miller Mayer in Ithaca,
8 New York, and I'm here on behalf of Meredith Szypula.

9 I would reserve five minutes, if I may, for
10 rebuttal.

11 CHIEF JUDGE WILSON: Sure.

12 MR. MILLER: First of all, I want to thank the
13 court for taking this appeal. 236 of the Domestic
14 Relations Law defines property. It's a classification of
15 property. It defines all property that is acquired during
16 the marriage as marital property. Pretty simple. Property
17 that's acquired during or prior to the marriage is separate
18 property. In Dolan, this court said that pension rights
19 that are earned or acquired prior to the marriage are
20 separate property.

21 So the question for you, in this narrow case, is
22 clarifying for everybody in New York what it means to earn
23 property rights prior to marriage. And I'm going to
24 suggest a very simple rule in this case. When you have a
25 contributory pension system, such as we have in this case,

1 and you never become a member, you never become a
2 participant in that system, much less you never make any
3 contributions to the system - - -

4 JUDGE GARCIA: But was it a contributory system
5 in the Navy?

6 MR. MILLER: It was a contributory system.

7 JUDGE GARCIA: So he should - - -

8 MR. MILLER: That's the whole point.

9 JUDGE GARCIA: But he should have been putting
10 money into that system and deducting it from his pay at the
11 time he was in the Navy.

12 MR. MILLER: And if he's a participant, he's
13 required to do that.

14 CHIEF JUDGE WILSON: How do we - - - how do we
15 know that?

16 JUDGE GARCIA: Yeah.

17 MR. MILLER: How do we know that?

18 CHIEF JUDGE WILSON: Where is that in the record?

19 MR. MILLER: So the record here is we brought a
20 motion. I brought a motion to classify this as a marital
21 property. That was done in chambers off the record with
22 Judge McBride and we pointed to the - - - the Burke case.

23 JUDGE CANNATARO: So the assertion that the Navy
24 pension did not require contributions - - -

25 MR. MILLER: No, no, no. It did require.



1 JUDGE CANNATARO: It would be incorrect.

2 MR. MILLER: It did require contributions.

3 Absolutely. It required contributions. And that's why you
4 are able to buy it back.

5 JUDGE GARCIA: No, but my understanding of that -
6 - - and maybe this is just not accurate - - - was when you
7 transferred whatever of the years were here - - - eleven -
8 - - from the Navy system to the state system, the state - -
9 -

10 MR. MILLER: No.

11 JUDGE GARCIA: - - - the federal system required
12 you to buy the equivalent of that time that you would have
13 paid in if you had been working in their agency.

14 MR. MILLER: No.

15 JUDGE GARCIA: Again, how - - -

16 MR. MILLER: But he was always an employee of the
17 federal government before and after.

18 JUDGE GARCIA: The military may have a very
19 different pension than the State Department, right? In the
20 military, I could see you not having to buy in.

21 MR. MILLER: No.

22 CHIEF JUDGE WILSON: I guess what I'm still
23 struggling with is is there somewhere in the record of this
24 case where we can see that he had to contribute to the Navy
25 pension?

1 MR. MILLER: Okay, Your Honor. As I said, this -
2 - - this motion was argued in front of a judge right in
3 chambers.

4 CHIEF JUDGE WILSON: Right. So does that mean -
5 - -

6 MR. MILLER: There was a discussion about it that
7 was - - -

8 JUDGE TROUTMAN: No.

9 CHIEF JUDGE WILSON: Does that mean no - - -

10 MR. MILLER: - - - understood. And it was - - -
11 there was - - - it was admitted that he was never a member.

12 JUDGE TROUTMAN: Okay.

13 MR. MILLER: He never bought into it.

14 JUDGE TROUTMAN: But he was in the Navy before he
15 ever met her, correct?

16 MR. MILLER: Correct. Absolutely.

17 JUDGE TROUTMAN: And there - - - because he was
18 in the Navy during a specified period, he was eligible at a
19 later period.

20 MR. MILLER: No. No. You just - - - look.

21 JUDGE TROUTMAN: Okay. Follow me. He - - - he -
22 - - before he ever met her, he was in the Navy. That is
23 uncontroverted, correct?

24 MR. MILLER: Correct. For nine years.

25 JUDGE TROUTMAN: For nine years. And it is



1 because of that service during that specified time that
2 later he could buy it?

3 MR. MILLER: No. No. Absolutely not.

4 JUDGE TROUTMAN: So where does the right come
5 from - - -

6 MR. MILLER: The right comes from - - -

7 JUDGE TROUTMAN: - - - and where does the record
8 support it?

9 MR. MILLER: So the right comes from he leaves
10 the Navy three years after the marriage. He's got twelve
11 years in - - - nine premarital, three marital. He leaves
12 the Navy for fourteen years, enters a private practice. He
13 has no pension rights whatsoever. He goes back to the
14 federal government, his original employer - - -

15 JUDGE TROUTMAN: Um-hum.

16 MR. MILLER: - - - and the federal government
17 says look, as a benefit of your current employment, if you
18 join the pension plan, and if you pay into the pension
19 plan, then we will give you the opportunity to purchase
20 those credits.

21 JUDGE HALLIGAN: Credits based, though, on years
22 - - - I'm right here. Credits based, though, on years of
23 service that - - -

24 MR. MILLER: No.

25 JUDGE HALLIGAN: Okay. So - - - so presumably,

1 this is not, you know, like some investment and - - - and
2 where you're simply buying a stock or a security. My
3 understanding - - - but if I'm wrong, correct me, please -
4 - - is that what he is being allowed to repurchase is the
5 credits from the nine years plus the three years during the
6 marriage that he served in the Navy. Am I wrong in
7 understanding that? So that then he can vest and hit
8 twenty, or whatever the vesting number is, with that twelve
9 credited towards the vesting.

10 MR. MILLER: What he's allowed to pay is what he
11 would have paid based upon his salary, not the years of
12 service.

13 JUDGE HALLIGAN: I understand, but - - - but if
14 he had not served the twelve years in the Navy, he would
15 not have had any option to do this; is that right?

16 MR. MILLER: That's correct.

17 JUDGE HALLIGAN: Okay. And so he has earned the
18 option, whether he exercised - - - let me finish, if I
19 could, please - - - he - - - he might not have exercised
20 the option, but the years that he spent in the Navy, which
21 are necessary to earn the option to do that, nine of those
22 were prior to the marriage; is that right?

23 MR. MILLER: I don't understand.

24 JUDGE HALLIGAN: If he - - - let me put it
25 differently, if he had not spent the nine years in the Navy

1 prior to getting married, plus the three during his
2 marriage, would he have been able to do this?

3 MR. MILLER: No.

4 JUDGE HALLIGAN: Okay. And so what weight does
5 your analysis give to the nine years of time that he put in
6 prior to the marriage?

7 MR. MILLER: Because it's not a basis of the
8 service. It's whether or not you are a member - - -

9 JUDGE HALLIGAN: Um-hum.

10 MR. MILLER: - - - of the plan. He - - -

11 JUDGE HALLIGAN: So I take it the answer is it
12 doesn't - - - it doesn't take it into - - -

13 MR. MILLER: It makes no difference.

14 JUDGE HALLIGAN: - - - consideration.

15 JUDGE CANNATARO: So is your argument that he was
16 a member, but a noncontributing member, or that he was not
17 a member in any way of the Navy pension system?

18 MR. MILLER: Not a member in any way. And that's
19 the rule that this court should adopt. That if you're not
20 a member - - -

21 JUDGE CANNATARO: Hold on. Hold on. Because I
22 really - - - because, you know, as state employees, we have
23 some passing familiarity with our own pension systems. And
24 my general conception is that if you - - - when you buy
25 back time, you have to buy back eligible time.

1 JUDGE TROUTMAN: Um-hum.

2 JUDGE CANNATARO: So in other words, you might
3 have had a number of years in some eligible pension system,
4 but you can only buy back the number of years that you had.
5 You're saying here the State Department just said give us
6 this much money and we'll credit you as if you had been a
7 member of the pension in the Navy for twelve years?

8 MR. MILLER: You're allowed to buy that - - - as
9 a benefit of his employment, the federal government says
10 look, you should have paid - - - based upon your salary,
11 not years of service - - - based upon your salary, which is
12 basically - - - it's the same as Social Security. You can
13 - - -

14 JUDGE CANNATARO: I have to stop you right there,
15 because I don't understand this distinction about based
16 upon your salary, not years of service, the number that
17 state is saying - - - pay us this much - - - has to be
18 reflective of the time. You're buying back time.

19 MR. MILLER: You're buying back time, but the
20 payment - - - the payment that you're using - - -

21 CHIEF JUDGE WILSON: So - - -

22 MR. MILLER: - - - that you're paying is based
23 upon - - -

24 CHIEF JUDGE WILSON: What the - - -

25 MR. MILLER: - - - what you would have paid into



1 the system if you had been a member.

2 CHIEF JUDGE WILSON: Sorry - - -

3 JUDGE HALLIGAN: Yeah, of course.

4 CHIEF JUDGE WILSON: - - - into - - - into the
5 Foreign Service system or into the Navy system?

6 MR. MILLER: Into the Navy system.

7 JUDGE HALLIGAN: So to be - - -

8 CHIEF JUDGE WILSON: But so if he had only been
9 in the Navy one year, would the amount have been the same?

10 MR. MILLER: No, it would have been whatever he
11 would have owed for that one year of service.

12 CHIEF JUDGE WILSON: So the number of years does
13 affect the cost?

14 MR. MILLER: Correct.

15 CHIEF JUDGE WILSON: Okay.

16 MR. MILLER: Correct.

17 JUDGE HALLIGAN: And - - -

18 MR. MILLER: So I mean, just - - -

19 JUDGE HALLIGAN: And if - - - if the pension plan
20 were otherwise and he did not have to pay in, but accrued
21 years of eligibility that didn't vest until some, you know,
22 twenty years or whatever, pick your number, would your - -
23 - would you still win or do you lose if that were the case?

24 MR. MILLER: If he's a member of the pension plan
25 - - -



1 JUDGE HALLIGAN: If he's - - -

2 MR. MILLER: - - - and that vests - - -

3 JUDGE HALLIGAN: But what I mean - - -

4 MR. MILLER: - - - over time - - -

5 JUDGE HALLIGAN: Yeah. If it vests over time so
6 that - - - that - - - that you accrue eligibility with each
7 passing year, but it doesn't vest until year twenty, say.

8 MR. MILLER: Sure.

9 JUDGE HALLIGAN: You say you would - - - you
10 would not have a claim that it's marital property - - -

11 MR. MILLER: No.

12 JUDGE HALLIGAN: - - - in that circumstance.

13 MR. MILLER: No, you - - -

14 JUDGE HALLIGAN: So if the record is not clear on
15 this point, what are we to do about that?

16 MR. MILLER: What you need to do is have a rule,
17 and if you want to send it back to the court, we can have
18 more testimony. That's easy. But - - - but the rule has
19 got to be that if you are not a member of a contributory
20 plan and you never contribute, you are not earning pension
21 benefits.

22 Your Honor, I started my career off as an
23 assistant DA for eight years. First day, I sat down with
24 the county HR department and they said look, you can either
25 join the system and pay into it every year. It accrues

1 some benefits, but oh, by the way, if you don't stay for
2 twenty years, it's all gone.

3 JUDGE GARCIA: Not going to vest. Yeah.

4 MR. MILLER: Or you can keep the money, you know,
5 in your pocket and not be a member, and I elected not to be
6 a member.

7 JUDGE GARCIA: But what if the military is
8 different than that? What if the military says - - - and I
9 don't think we can tell from this record - - - you serve
10 the country in the military for twenty years and we'll give
11 you X pension. What if that was the case?

12 MR. MILLER: Well, if it's a noncontributory plan
13 and you're a member, absolutely. It is - - -

14 JUDGE GARCIA: Then it would not be - - -

15 MR. MILLER: - - - separate property.

16 JUDGE GARCIA: Okay.

17 MR. MILLER: Absolutely. Absolutely.

18 CHIEF JUDGE WILSON: Well, wait - - -

19 JUDGE RIVERA: But I thought the pension is not
20 the Navy's pension. Have I misunderstood this from day
21 one?

22 MR. MILLER: No, you're - - - you're - - - you're
23 correct that the pension is the federal service - - -

24 JUDGE RIVERA: Correct.

25 MR. MILLER: - - - pension - - - federal - - -



1 JUDGE RIVERA: That's the pension - - -

2 MR. MILLER: Right. It's the federal - - -

3 JUDGE RIVERA: - - - that he receives. That's
4 the pension they're fighting over. Okay.

5 MR. MILLER: Correct.

6 JUDGE RIVERA: All right.

7 MR. MILLER: Correct.

8 JUDGE RIVERA: So his eligibility for that
9 depends on what he did prior to the marriage, but the
10 property itself is this pension that now exists - - -

11 MR. MILLER: That's right. And - - -

12 JUDGE RIVERA: - - - while - - - while he's
13 married.

14 MR. MILLER: Right. And you can supplement that.
15 You can buy back increased pension benefits by paying to
16 your employer, the federal government, which was the same
17 money - - -

18 JUDGE RIVERA: He would not have that - - - I
19 think Judge Halligan asked this before - - - he would not
20 have that pension, but for the fact that he's got to buy
21 this time - - -

22 MR. MILLER: That's correct.

23 JUDGE RIVERA: - - - in the Navy, even though - -
24 - I think I'm understanding your argument here - - - even
25 though when he was unmarried, he paid - - - he made a

1 decision not to join that pension plan. But once he's
2 married, he's now making a decision, I want this pension
3 plan.

4 MR. MILLER: That's - - - that's - - -

5 JUDGE RIVERA: It's like any other requirement to
6 join that pension plan.

7 MR. MILLER: Sure.

8 CHIEF JUDGE WILSON: So let me ask you - - -
9 sorry. Let me ask you a hypothetical. Suppose we assume
10 that the pension plan from the Navy is noncontributory.
11 That's everybody is entitled to it no matter what, right?

12 MR. MILLER: Absolutely.

13 CHIEF JUDGE WILSON: And what - - - then what
14 happens is exactly what happens here. So that - - - and so
15 we would assume then, for the sake of my hypothetical, that
16 the nine years is a - - - is separate property.

17 MR. MILLER: Absolutely.

18 CHIEF JUDGE WILSON: And that separate property
19 and then some marital property in the form of something
20 like 9,000 dollars is used to purchase an enhancement to
21 the Foreign Service Pension. What, then, is - - - is all
22 the Foreign Service Pension marital property? Is some of
23 it marital property? How do we determine that value?

24 MR. MILLER: Excellent question. There are two
25 ways to look at this. Okay? So we talked about whether or

1 not - - - how you define that pension benefit. The other
2 thing is the purchase. So just remember, go back to the
3 very first thing I said. Property - - - all property that
4 is acquired during the marriage is marital property. The
5 Appellate Division states, in their opinion, they made a
6 finding, this property was acquired with marital funds
7 during the - - - during the marriage - - -

8 CHIEF JUDGE WILSON: Well, in my hypothetical - -
9 -

10 MR. MILLER: - - - and there is - - -

11 CHIEF JUDGE WILSON: - - - it's a mix. My
12 hypothetical, it's a mix of things - - -

13 MR. MILLER: Let me continue.

14 CHIEF JUDGE WILSON: Okay.

15 MR. MILLER: If you may.

16 CHIEF JUDGE WILSON: Yes, of course. Go ahead.
17 Sorry.

18 MR. MILLER: So they made a finding that it was
19 acquired during the marriage, so it is marital by
20 definition of the statute. Okay? What they then did said
21 - - - say is oh because that property right that you
22 acquired was associated with a pension that had some
23 service premarital, we're going to make that separate
24 property. You can't do that. Go to your question. If you
25 use marital funds during the marriage to acquire a

1 property, it's marital property. You may have a separate
2 property claim. We're used to doing that in my business.

3 JUDGE TROUTMAN: So are you treating the time - -
4 - that the earned option that he acquired before he married
5 those nine years - - - as if it were a house? Because
6 you're saying well, you bought it during the marriage. A
7 house is - - - is still a house if you buy it in one period
8 or another period. But that which - - - the only way he
9 could have benefit of this bump up is because of that prior
10 Naval service well before he was married.

11 MR. MILLER: No, not - - - not at all.
12 Absolutely not.

13 JUDGE TROUTMAN: Okay. So you're saying - - -

14 MR. MILLER: You can only get that if you pay - -
15 -

16 JUDGE TROUTMAN: No.

17 MR. MILLER: - - - money.

18 JUDGE TROUTMAN: No, wait. The nine years of
19 service in the Navy had nothing to do with the ability to
20 get that extra?

21 MR. MILLER: I don't say that. I don't say that
22 at all.

23 JUDGE TROUTMAN: That's what you were suggesting.

24 MR. MILLER: No, no, no. What I - - - I don't
25 say that at all, but the - - - the reason he was able to do

1 that is because it was a benefit of his new employment for
2 the Foreign Service. They tell him look, as a benefit, if
3 you keep working for us and if you join this system and if
4 you pay into the system, we will allow you - - -

5 JUDGE TROUTMAN: Two things can be - - -

6 MR. MILLER: - - - as a benefit - - -

7 JUDGE TROUTMAN: - - - true. But ultimately, as
8 to the sharing, part of it gets cut up at the end of the
9 dissolution of the marriage one way and another part gets
10 divided another because they're coming to the marriage in
11 different parts. Part of it is because of the Naval
12 service, but if he didn't go back into service, then
13 ultimately it is correct. He wouldn't have been had the -
14 - - the ability to have the ultimately the greater pension
15 benefit.

16 MR. MILLER: That's correct.

17 JUDGE TROUTMAN: It all worked together.

18 MR. MILLER: Yeah. That's correct.

19 JUDGE RIVERA: How do you divide up - - - I want
20 to buy whatever it is when we're married. We use marital
21 funds. Nobody's going to debate that these are marital
22 funds that we're going to use to purchase.

23 MR. MILLER: Right.

24 JUDGE RIVERA: But it's not enough. We only have
25 20,000. We need thirty. I have my private money, my own

1 money, that I had before this marriage. I've kept it off
2 in some account that my spouse cannot touch. I say okay, I
3 really want us to have this. I'm going to take that money
4 so that we can buy this. How would you divide that up?

5 MR. MILLER: We do that all the time in my work.

6 JUDGE RIVERA: Yes, I know. That's why I'm
7 asking.

8 MR. MILLER: So let's just make it simple.

9 JUDGE RIVERA: Yes, please.

10 MR. MILLER: I earn 200,000 dollars during our
11 marriage.

12 JUDGE RIVERA: Um-hum.

13 MR. MILLER: Okay? My wife has inheritance. You
14 know - - -

15 JUDGE RIVERA: Yes, yes.

16 MR. MILLER: - - - money that she had - - -
17 200,000. We buy a 400,000-dollar house.

18 JUDGE RIVERA: Yes.

19 MR. MILLER: The law is clear. That house - - -

20 JUDGE RIVERA: Yes.

21 MR. MILLER: - - - was acquired during the
22 marriage. By definition of the statute, it is a marital
23 asset. She now has a claim for a separate property credit.
24 She can come in - - - it's her burden, but she can come in
25 and say - - -

1 JUDGE RIVERA: It was - - -

2 MR. MILLER: - - - I can accept the property - -
3 -

4 JUDGE RIVERA: It was - - - it was nonmarital
5 property that we used to purchase this. I want back
6 200,000.

7 MR. MILLER: Absolutely.

8 JUDGE RIVERA: Is that correct?

9 MR. MILLER: But it's classified - - -

10 JUDGE RIVERA: We can divide the house and I want
11 my 200,000.

12 MR. MILLER: It's classified as a marital asset -
13 - -

14 JUDGE RIVERA: Uh-huh.

15 MR. MILLER: - - - subject to a separate
16 property.

17 CHIEF JUDGE WILSON: And - - - and let me just
18 ask you about that. Suppose that 400,000-dollar house is
19 worth a million dollars at the time of the divorce.
20 Assuming that she can prove her separate property claim, it
21 entitles her to the 200,000 dollars, not the appreciation.
22 The appreciation is the marital asset?

23 MR. MILLER: Fortunately, that issue has been - -
24 - been litigated many times.

25 CHIEF JUDGE WILSON: And I just want to make sure



1 I have the answer right.

2 MR. MILLER: It's - - - it's 200,000. It's
3 200,000.

4 CHIEF JUDGE WILSON: Yup.

5 MR. MILLER: You have a separate property credit
6 - - -

7 CHIEF JUDGE WILSON: Right.

8 MR. MILLER: - - - for your contribution.

9 CHIEF JUDGE WILSON: Yup.

10 MR. MILLER: Regardless if the price of the house
11 goes up or down - - -

12 CHIEF JUDGE WILSON: Right.

13 MR. MILLER: - - - you're going to get your
14 credit. You're going to be put back in - - -

15 CHIEF JUDGE WILSON: And so here, if we viewed -
16 - - and I know you don't view this this way - - - but if we
17 viewed the nine years as separate property of Mr. Szypula,
18 if we viewed it that way - - -

19 MR. MILLER: Szypula.

20 CHIEF JUDGE WILSON: Right. If we viewed it that
21 way, and if he could prove that it was separate property,
22 right? He goes through whatever claim he has. He would
23 get the value of that?

24 MR. MILLER: Yeah. He - - - he - - - he - - -

25 CHIEF JUDGE WILSON: And what is the value of



1 that?

2 MR. MILLER: It was zero. That was very simple -

3 - -

4 JUDGE CANNATARO: Wouldn't it mean he not be
5 paid?

6 MR. MILLER: When he left the military, he had
7 zero.

8 JUDGE CANNATARO: Did you not say in the
9 beginning that they - - - that the State pension system
10 said, give us this much money and we'll credit you for
11 those prior years? And wouldn't that be the - - - the
12 value of that?

13 MR. MILLER: Just to clarify the record, these
14 are federal systems.

15 JUDGE CANNATARO: When I say state, I mean
16 Department of State, not the New York State.

17 MR. MILLER: Okay. I'm sorry. I - - - I - - - I
18 - - - so I apologize. Can I ask you - - -

19 JUDGE CANNATARO: So to go back to the question,
20 in this determining this contribution of premarital assets,
21 wouldn't the value of his premarital asset be the amount
22 that the State Department Foreign Service Pension System
23 asked them to pay to in order to credit the eleven - - - or
24 I'm sorry - - - the nine years of premarital service?

25 MR. MILLER: No, because everybody agrees that

1 that cost was marital money. They said you have to come up
2 with 12,000 dollars out of your pocket that you earned.
3 These - - - these - - - it took them six years to save
4 money during the marriage to pay the federal government
5 the, you know, 12,000 dollars. And then it actually - - -
6 they got a credit, so they overpaid, but let's just call it
7 12,000 dollars to buy those credits.

8 JUDGE RIVERA: Because that was the value - - -

9 MR. MILLER: That - - - that was marital money.

10 JUDGE RIVERA: But isn't that because that was
11 the value of those years in service of the Navy?

12 MR. MILLER: No, because that's how much he would
13 have had to pay - - -

14 JUDGE RIVERA: Into the Navy pension.

15 MR. MILLER: - - - into the Navy. And so
16 basically, the federal government says look, as an
17 incentive, as a - - - as a benefit of your employment, you
18 know, the fact that you didn't pay it when you were young -
19 - - because we all make mistakes when we're young - - - you
20 know, we're - - - as a benefit of employment for working
21 for us now, you can pay that in and we're going to worry -
22 - - not worry about the fact that we didn't have the use of
23 that money to invest or whatever to increase that, we're
24 going to allow you to buy that for the same money that you
25 would have paid if you had been a member. He was never a

1 member. If you're not a member - - -

2 JUDGE SINGAS: He was never a member because he
3 chose not to be a member.

4 MR. MILLER: Exactly.

5 JUDGE SINGAS: Not because he wasn't - - -

6 MR. MILLER: Absolutely.

7 JUDGE SINGAS: He wasn't allowed to or there was
8 some restriction.

9 MR. MILLER: Right.

10 JUDGE SINGAS: He made a decision. I'm going to
11 forgo paying - - - paying this because I could use the
12 money - - -

13 MR. MILLER: Right.

14 JUDGE SINGAS: - - - in some other way.

15 MR. MILLER: Absolutely. And again, the rule of
16 I'm asking you to adopt is - - - you know, if you think the
17 record is not clear, you can go back - - - but the rule I'm
18 asking you to adopt is in the contributory pension system,
19 if you elect, you decide I'm not going to be a member - - -
20 I don't want to do that - - - then you can't ever be said
21 to have earned or acquired property. Because if - - -

22 JUDGE HALLIGAN: But not if it's a
23 noncontributory system is the converse, I take it.

24 MR. MILLER: Absolutely. Absolutely. If it's a
25 noncontributory system, your service, the fact that you

1 serve, that - - - that's a - - - that's a separate property
2 credit. But the - - -

3 CHIEF JUDGE WILSON: Thank you. Let's hear from
4 - - -

5 MR. MILLER: Thank you.

6 CHIEF JUDGE WILSON: You have your rebuttal.

7 MR. MILLER: Thank you, Judge.

8 CHIEF JUDGE WILSON: Yeah.

9 MS. BARNET: May it please the court. Emily
10 Barnet for John Szygula. This court has repeatedly applied
11 a clear rule for determining when pension benefits are
12 acquired. They're acquired when they're earned, and
13 they're earned incrementally during each year of service as
14 deferred compensation. Mr. Szygula had a benefit when he
15 left the Navy.

16 JUDGE GARCIA: Did he have to contribute during
17 his time in the Navy or not?

18 MS. BARNET: So I - - - I don't think that this
19 is in the record, but my understanding is that the Navy had
20 a noncontributory pension plan at the time that Mr. Szygula
21 was serving in the Navy.

22 JUDGE HALLIGAN: So what do we do about the fact
23 that the record doesn't establish that if we were to decide
24 that it's relevant to the to the outcome here?

25 MS. BARNET: Well, I also think - - -

1 JUDGE HALLIGAN: The property is presumed to be
2 marital, right? Unless it's established otherwise. I
3 think. So - - - so if there's not sufficient evidence in
4 the record to show that it's noncontributory, as you say,
5 and we think that that matters, what do we do?

6 MS. BARNET: I think it would be appropriate to
7 remand, in that case, with the instruction that the court
8 should conduct fact finding as to whether the Navy pension
9 plan was not contributory, and if it was, then the decision
10 below should be affirmed.

11 JUDGE HALLIGAN: And why is that not, you know, a
12 second bite at the apple, if you will?

13 MS. BARNET: Well, I will say, I think the
14 closest that there is in the record to suggesting that the
15 Navy pension plan is not contributory is on page 893A,
16 which is Mr. Szygula's testimony during trial.

17 JUDGE HALLIGAN: But - - - I take that. But I'm
18 asking if - - - if we were to conclude that there's not
19 enough in the record, you think we should send it back.
20 And I'm just asking, why would we do that as opposed to
21 taking the record as we find it?

22 MS. BARNET: I mean the - - - Ms. Szygula
23 petitioned for review and this court granted review, and I
24 - - - and I think that at this point it would be
25 appropriate.

1 JUDGE TROUTMAN: Let me ask you this. With
2 respect to the definition of property, if Mr. Szypula had
3 not served those nine years with this - - - that which they
4 are fighting over, by whatever name you call it, would it
5 be available to be split up?

6 MS. BARNET: No, it would not be available to be
7 split up if he had not served the nine years in the Navy.

8 JUDGE TROUTMAN: So what value, if any - - - who
9 does that belong to? It - - - he couldn't necessarily cash
10 in before he married, but he served. Is it worth
11 something? And does she get benefit? It becomes marital
12 properly - - - property solely because of when funds were
13 used? And how do you separate out the fact that he served?
14 Or is it irrelevant? It's just all about when the time
15 came and he bought it.

16 MS. BARNET: So I think this court has adopted a
17 clear rule that all that matters for determining when a
18 pension benefit was acquired under the Domestic Relations
19 Law is when it was earned. And this court has addressed a
20 number of cases where there were contingent features, where
21 the pension would have been worth nothing if something
22 hadn't happened after those years in which the pension was
23 earned. The husband had to keep working so the pension
24 would mature. That was Majauskas. The husband had to keep
25 working so the pension would vest. There was a change to

1 the pension after the parties' marriage that changed the
2 value of the pension, but none of those things mattered.
3 All that matters is when was the pension benefit earned.
4 That's when it was acquired. And what you - - - the
5 pension benefit that you earned is whatever the pension
6 benefit is as ultimately determined when the person
7 retires.

8 JUDGE CANNATARO: So how do - - -

9 JUDGE RIVERA: Does it matter that this is not
10 the Navy pension? It's a different pension, and they have
11 different rules and different requirements. And he's - - -
12 he's complying with those requirements to be able to get
13 that pension. Does that matter? I mean, I could see
14 somewhat your - - - an argument if the Navy allowed him
15 some way to buy these years, years later when he says you
16 know what, I'd like this pension. I want the pension from
17 the Navy, so and he buys that back in some way or another.
18 He does whatever they require to get that pension. But
19 this is a wholly different pension plan. Yes, it's the
20 federal government at the end of the day, but it's - - -
21 it's different rules and requirements from that federal
22 services, the Department of State.

23 MS. BARNET: So I don't think that matters
24 because I don't think it changes the fact that the Foreign
25 Service is compensating him for his time in the Navy.

1 There is a very concrete tie between the additional nine
2 years that are added to the calculation of his pension
3 benefit under the Foreign Service Pension Plan that are
4 tied to the nine years in the Navy he's served before the
5 marriage. And this court's cases say that what matters is
6 is the person being compensated for the prior years of
7 service. If so that is when those benefits are deemed
8 acquired.

9 CHIEF JUDGE WILSON: Suppose we think that the
10 nine years is separate property, right? That - - - that's
11 a pension credit that was earned. And that was used and
12 some amount of cash that's marital property was used. The
13 two were used in combination to purchase the Foreign
14 Service Pension. Is that a fair characterization of what
15 happened?

16 MS. BARNET: Yes. That's - - -

17 CHIEF JUDGE WILSON: Okay. So then is counsel
18 wrong to say then what should happen is the whole thing is
19 marital property, but Mr. Szygula has a claim for the value
20 of his contribution to the pension. Is that the way it
21 would work?

22 MS. BARNET: The - - - the way it would work is
23 that the portion of the pension that's attributable to Mr.
24 Szygula is nine years in the Navy before - - -

25 CHIEF JUDGE WILSON: But that gives him - - -



1 that's different than from the rule that would apply if
2 this were a house, for example, where the appreciation is
3 marital property and all you get back is your contribution.
4 So here if we were using that - - - that set of rules, I
5 think what you'd have to do is value the nine years and say
6 what was that nine years worth at the time the contribution
7 was made? That may be a pretty hard thing to do with an
8 inchoate pension, especially one that, as Judge Rivera was
9 pointing out, isn't actually the pension that he ends up
10 getting paid.

11 MS. BARNET: I think that that's not the right
12 way to think about it under this court's cases, Your Honor,
13 because the court's cases say that you have - - - and I'm
14 quoting Olivo here - - - that the right to the pension you
15 have is the right to the pension that is ultimately
16 determined. And so it doesn't matter that some contingent
17 feature happened later on that changed the value of the
18 pension. It's not deemed marital property just because the
19 contingent thing that increased the value of the pension
20 happened during the marriage. If the pension benefit - - -

21 JUDGE RIVERA: Again, why doesn't it matter that
22 it's not the same pension? You're not talking about the
23 same pension. You're talking about different pension.
24 They have different requirements.

25 MS. BARNET: I - - - Your Honor, you know, I

1 would give the same answer I gave before, which I think
2 that what matters - - - what matters under this court's
3 cases is whether the individual is being compensated for
4 past service, and - - -

5 JUDGE TROUTMAN: So - - -

6 JUDGE RIVERA: For a particular outcome in that
7 pension system, you know, you're now - - - for a different
8 pension. I mean, that's, I guess, why I'm having some
9 difficulty with this particular argument. Let me ask you
10 this. What's the difference between what the Appellate
11 Division did and what the Chief Judge has described and
12 what counsel argued was this separate property claim that
13 that Mr. Szygula would have?

14 MS. BARNET: I'm sorry. Could you ask that one
15 more time?

16 JUDGE RIVERA: I'm sorry. I just want some
17 clarity on what the Appellate Division did. The way they
18 decided to determine what each party is entitled to. What
19 they remitted it to the Supreme Court to do. Because I
20 think there is a difference between that and what counsel
21 is describing is the way one should resolve this case. I
22 just want to hear from you if you think there's a
23 difference and what it is.

24 MS. BARNET: So - - -

25 JUDGE RIVERA: Does that help?



1 MS. BARNET: Yeah. What the Appellate Division
2 did is said that the portion of the pension that is
3 attributable to the nine years in the Navy is entirely
4 separate property, but the - - - about approximately 9,000
5 dollars of marital funds that the parties put in remains
6 marital property such that that is subject to equitable
7 distribution.

8 JUDGE HALLIGAN: Is - - - is your view the same
9 regardless of whether it's a contributory or
10 noncontributory pension? Does that matter?

11 MS. BARNET: I - - - I don't think it matters
12 because of this court's cases, saying that all that matters
13 is whether you're being compensated for your past service.

14 JUDGE HALLIGAN: But isn't there a different
15 decision that's being made? If you didn't contribute prior
16 to the marriage, and then during the marriage, you make a
17 decision to purchase credits and - - - and then that
18 becomes an asset that you can rely on. Is it - - - is it -
19 - - is it perhaps is there a better argument that that's
20 earned during the marriage than if it was noncontributory
21 and - - - and those years were accruing without any choice
22 made? I mean, the deferred compensation concept to me
23 seems maybe to apply differently in those two
24 circumstances. You're - - - you're pocketing the delta if
25 it's - - - if it's contributory, I think. And you choose

1 not to contribute, right?

2 MS. BARNET: Yeah. So I understand what you're
3 saying. I think that maybe the most helpful case on this
4 point is not a pension benefit plan, but DeJesus - - -

5 JUDGE HALLIGAN: Uh-huh.

6 MS. BARNET: - - - which involves stock options
7 that was sort of in the same line as Majauskas, and this
8 court has - - - has construed other employment benefits
9 that are deferred compensation along the same lines as
10 pension benefits. And in that case, the stock options were
11 an entirely new benefit that only came into being during
12 the marriage.

13 JUDGE HALLIGAN: Yes.

14 MS. BARNET: But the court still held that to the
15 extent that those stock options were intended as deferred
16 compensation.

17 JUDGE HALLIGAN: Yeah - - -

18 MS. BARNET: They would be separate property.

19 JUDGE HALLIGAN: I think - - - yeah, that's what
20 I'm asking. So if it's a contributory pension, I presume
21 that if I choose not to contribute, that I am pocketing
22 whatever the money is that I would otherwise pay in each
23 month in order to be accruing pension eligibility credits,
24 yes?

25 MS. BARNET: Yes.



1 JUDGE HALLIGAN: And so it seems to me that
2 perhaps my compensation is not deferred. I'm actually
3 getting it in the moment because I'm choosing not to put it
4 in and - - - and accrue the - - - the credits, much like I
5 would with a 401(k), for example. So why wouldn't we treat
6 them differently is my question.

7 MS. BARNET: I think under DeJesus, it doesn't
8 matter whether in the time that you are - - - for which you
9 are being compensated you are being paid less, because I
10 don't think in DeJesus, the husband was being paid less in
11 the premarital time, for instance. But - - -

12 JUDGE HALLIGAN: But if deferred compensation is
13 the touchstone, then - - - then why wouldn't we assume
14 that, you know, you're choosing yourself whether to
15 contribute or not. There's no aspect of deferred - - -
16 there's nothing deferred about it.

17 MS. BARNET: Well, and as I said at the outset,
18 in this case - - -

19 JUDGE HALLIGAN: Yeah.

20 MS. BARNET: - - - my understanding is the Navy
21 plan is noncontributory. And you know, this - - - this
22 court could decide - - -

23 JUDGE TROUTMAN: Let me ask you this. With
24 respect to - - - where - - - there's questions, about
25 whether it's two different pension systems or they're

1 different, but the two are joined together whether you call
2 them one is State Department, one is Naval. Ultimately,
3 the payment that is received upon retirement, it comes from
4 one pot, correct? And they're - - - and one is impacted by
5 the other. So the prior service impacts what you
6 ultimately get.

7 MS. BARNET: Yes. That's right. And also, I'll
8 say - - - this is not - - - I don't think this was in the
9 briefs or in the record - - - but Federal Government
10 Pension Systems - - - or they're governed by a
11 comprehensive federal statutory scheme.

12 JUDGE TROUTMAN: It's just like the State of New
13 York. If you work for a county and then you work for the
14 State proper, ultimately, if it's part of the same pension,
15 they come from the same pot. The amounts are impacted,
16 though, by the contributions during the relative periods.

17 MS. BARNET: I guess - - -

18 JUDGE TROUTMAN: Ultimately, you're paid from one
19 source, they're paid from the federal government.

20 MS. BARNET: That's my understanding.

21 JUDGE TROUTMAN: But what he and she ultimately
22 get is impacted by all the service that occurred here. The
23 nine years impacts the later State Department portion and
24 the marital portion that she gets. To the extent that the
25 marital portion is enhanced, she gets more. And to the

1 extent that the other part was separate, but they're all -
2 - - they are all - - - they all go together. They all
3 impact one another, correct?

4 MS. BARNET: Correct.

5 CHIEF JUDGE WILSON: So - - -

6 JUDGE TROUTMAN: And - - -

7 CHIEF JUDGE WILSON: I'm sorry.

8 JUDGE TROUTMAN: Okay.

9 CHIEF JUDGE WILSON: Do you have an understanding
10 of why if the Navy plan is noncontributory, someone would
11 have to make payments to the Foreign Service?

12 MS. BARNET: So again, this is not in the record.
13 But my understanding is it's sort of to treat individuals
14 who are buying Navy credits fairly with individuals for
15 whom their entire Foreign Service Pension is coming from
16 years in the Foreign Service, so that they - - - they're
17 treated as if they had been in the Foreign Service in those
18 years and had been paying in.

19 JUDGE CANNATARO: Isn't that how all buyback
20 plans work? When you use time from a prior employer to buy
21 back time under your new pension plan, you're being asked
22 to contribute what you would have paid had you been working
23 for the new pension employer all along, right? I mean,
24 they're - - - they're not asking you to contribute your
25 contributions or lack thereof from your prior employer. Or

1 am I wrong about that?

2 MS. BARNET: That's my understanding, Your Honor.

3 JUDGE CANNATARO: Can I just ask you one other
4 question about valuation? I mean, and I guess this relates
5 to something Judge Halligan was asking you. For where it's
6 a noncontributory pension plan and you're making a claim of
7 separate property, you know, earned under Majauskas back in
8 the day when he, you know, when - - - when he was working
9 for the Navy. How do you value that?

10 MS. BARNET: How do you value - - - I mean - - -

11 JUDGE CANNATARO: What's the methodology for
12 valuing time under a noncontributory pension plan?

13 MS. BARNET: I - - - well, the value of that - -
14 - in this case, the value of the nine years of his time in
15 the Navy before the parties' marriage will be - - - you
16 know, he's planning to retire at age sixty-five, I think,
17 in 2030. And so it will be nine twenty-ninths of whatever
18 his pension plan pays out. Because my understanding is the
19 formula for calculating your annuity under the pension is
20 something like the average of your three highest salaries
21 times the number of years times some percentage.

22 JUDGE CANNATARO: So it's the enhancement to the
23 value of the State Department pension, basically.

24 MS. BARNET: It's the part - - - yeah, it's the
25 portion of the State Department pension that's attributable

1 to his time in the Navy. And Your Honors, if I may, just
2 one last point. I - - - I believe this court's cases
3 holding that pension benefits are earned when they're
4 acquired resolve this case - - - resolves this case. The
5 rule is a good rule. It reflects economic realities. It's
6 administrable and it's equitable. And there's no reason to
7 depart from the rule in this case. And awarding Ms.
8 Szypula the portion of Mr. Szypula's pension that's
9 attributable to his nine years in the Navy would give her a
10 windfall. They paid a 9,000-dollar administrative fee - -
11 - and again, this is not in the record, but it amounts to
12 roughly somewhere between 10- and 20,000 dollars a year.
13 And the value of that pension benefit is coming from Mr.
14 Szypula's years in the Navy. It's not coming from the
15 9,000-dollar administrative fee that the parties paid.

16 CHIEF JUDGE WILSON: Thank you.

17 MS. BARNET: Your Honor. Thank you.

18 MR. MILLER: If I may - - -

19 JUDGE RIVERA: How many years to vest?

20 MR. MILLER: Twenty. So every case that this
21 court has held before - - - you know, the Dolan case, the
22 DeLuca case, that - - - all these - - - Majauskas - - -
23 people were the title spouse, were participating in the
24 pension system they bought into the system. Okay?

25 JUDGE SINGAS: And wasn't it also in those cases



1 that the earned date and the acquired date was the same?

2 MR. MILLER: The earned date and the acquired
3 date - - -

4 JUDGE SINGAS: Like I think that Majauskas - - -

5 MR. MILLER: I guess. Yes, yes - - -

6 JUDGE SINGAS: - - - used that interchangeably,
7 earned and acquired.

8 MR. MILLER: Right. But - - - but - - - but let
9 me just - - - you know, if you're going to be
10 intellectually honest with the framework of the equitable
11 distribution statute, the statute says if you use marital
12 monies during the marriage and you acquire something, that
13 property right is marital. The Third Department said,
14 quote, marital funds were used during the marriage to
15 acquire a property right. But then what they said is
16 because that marital property right was associated with a
17 pension that had some service component to it, we're going
18 to convert that to separate property. There is nowhere in
19 the statute where any court - - - there's nowhere in the
20 statute, and there's no case in this state where any court
21 has converted a marital asset to separate property. You
22 can't do that. And that's exactly what the Third
23 Department did. They said you used marital property during
24 the marriage, you acquired - - - acquired. This is their
25 language. You acquired a property right.

1 JUDGE RIVERA: But - - - but - - - but your
2 position is - - - I'm sorry. But your position is that the
3 - - - the nine years in the Navy, as an unmarried
4 individual, right, has a value vis-a-vis this pension, and
5 he could have a separate property interest in that,
6 correct? Or am I - - - did I misunderstand you?

7 MR. MILLER: And absolutely. He could try to
8 assert some separate property claim. Okay? My position
9 would be that he had - - - that was worth zero. But - - -
10 but that's what the valuation - - -

11 And Judge Troutman, that goes to your point about
12 - - -

13 JUDGE RIVERA: Well, here's the thing.

14 MR. MILLER: - - - classification versus value.

15 JUDGE RIVERA: No, no. No, but here's the thing.
16 You have a pension system that says we're going to put a
17 number to that. We're going to give value to that. Up to
18 you if you want to actually let it go and put it into this
19 system. It's that externally there has been value given to
20 that. He's always had those - - - he's always had that
21 service. That service doesn't disappear, right?

22 MR. MILLER: Absolutely.

23 JUDGE RIVERA: Right. Okay.

24 MR. MILLER: But that service didn't earn him
25 anything when you're not a member of the pension system.

1 If you don't participate - - -

2 JUDGE RIVERA: I understand. But the time in - -
3 - apart from the benefit the United States all of us gained
4 from his service - - - the pension, the State Department -
5 - - yes, the federal government's - - - does give value to
6 that later on. Whether they contribute or not doesn't
7 matter. They're giving some value to that, and they're
8 saying if you want, we're going to value that. This is
9 what you can do with what we would value.

10 MR. MILLER: And this - - - and you have to pay
11 marital funds, 9,000, which is exactly what you would have
12 had to pay in the contributory plan.

13 JUDGE RIVERA: Okay. Well that's how you would
14 value it - - -

15 MR. MILLER: Right.

16 JUDGE RIVERA: - - - but I'm not sure I'm all
17 about it has zero value. I'm not sure that - - -

18 MR. MILLER: But you know - - -

19 JUDGE RIVERA: - - - completely makes sense to
20 me.

21 MR. MILLER: The court doesn't have to go there.
22 I mean - - -

23 JUDGE RIVERA: I know.

24 CHIEF JUDGE WILSON: Right. I mean, he - - - to
25 - - - to Judge Rivera's question. So he works nine years

1 or twelve years, I guess, in the Navy and leaves the Navy,
2 right? I worked twelve years in the private sector that
3 doesn't have a Navy pension at all, and I leave, right?
4 We're both now employed in the private sector in different
5 jobs. He, though, has some benefit that I don't have
6 because he has some ability to transfer that to other
7 government service. I don't know what that value is, but
8 he's better off than I am.

9 MR. MILLER: That's a benefit of his current
10 employment. His current employer, the federal government,
11 says as an incentive - - -

12 CHIEF JUDGE WILSON: But he doesn't work in the
13 private sector in between.

14 MR. MILLER: He works for fourteen years - - -

15 CHIEF JUDGE WILSON: In the private sector.

16 MR. MILLER: Absolutely.

17 CHIEF JUDGE WILSON: So now we're just talking
18 about the time that he's in the private sector.

19 MR. MILLER: Right.

20 CHIEF JUDGE WILSON: When he's working in the
21 private sector, he still has - - - he's a little bit better
22 off or maybe somewhat better off - - - we have to figure
23 out what the valuation is, maybe - - - but better off than
24 somebody who'd never worked for the Navy because he has the
25 option to go to work for the federal government and get a

1 benefit. He's a little bit better off.

2 MR. MILLER: When he's in the private sector, he
3 has no pension benefits. Absolutely none.

4 JUDGE HALLIGAN: But he does have a contingent
5 interest. Does he not?

6 MR. MILLER: But - - - but he has the ability, if
7 he goes back to the federal government - - -

8 JUDGE HALLIGAN: Right.

9 MR. MILLER: - - - as a benefit of his current
10 employment. I agree.

11 JUDGE RIVERA: So to the federal government,
12 there is value. He has something of value.

13 MR. MILLER: The federal government - - -

14 JUDGE RIVERA: That's what I'm saying.

15 MR. MILLER: - - - is willing to give him
16 something if he pays - - - if he joins the system, he works
17 for the federal government, he pays into the system, and
18 then he buys that back.

19 CHIEF JUDGE WILSON: Right. Right.

20 JUDGE GARCIA: And he had nine years of service
21 or twelve.

22 MR. MILLER: Yup. Absolutely.

23 JUDGE HALLIGAN: Yeah, but all of that would be -
24 - -

25 JUDGE GARCIA: You just can't buy back - - -

1 JUDGE CANNATARO: You can't get an offer to buy
2 back eleven years unless you work eleven years.

3 MR. MILLER: Absolutely.

4 JUDGE SINGAS: Yeah, but isn't the question like
5 first you have to decide if it's marital property or not.

6 MR. MILLER: Right.

7 JUDGE SINGAS: And then secondly, you'll - - -
8 you'll determine in the equitable distribution of that all
9 of those things. How much time he did versus what the wife
10 did, et cetera. Like, I feel like that's a separate
11 consideration.

12 MR. MILLER: That's a - - -

13 JUDGE SINGAS: The first one - - -

14 MR. MILLER: That's a valuation. I agree.

15 JUDGE SINGAS: Okay.

16 MR. MILLER: And the only issue before this court
17 - - -

18 JUDGE SINGAS: Is whether or not - - -

19 MR. MILLER: - - - is the classification of the
20 purchase with marital funds during the marriage of those
21 credits. Is - - - are those credits that were purchased
22 during the marriage with marital funds, is that marital
23 property or as the Third Department said, oh, it's marital,
24 but we're just going to convert it, make it separate
25 property. You can't do that.

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CHIEF JUDGE WILSON: Thank you.

MR. MILLER: Thank you very much. Have a good day.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sophia Long, certify that the foregoing transcript of proceedings in the Court of Appeals of Meredith Szypula v. John Szypula, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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