FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

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DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP4600146

PLAINTIFF(S)	DEFENDANT(S)	
Nadine Brantley	Rock Hill City Of	Wherry Construction Co Inc

Submitted by: | **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before me on October 16, 2014 upon Plaintiff's motion pursuant to Rule 59(e), SCRCP, asking the Court to alter or amend the Court's Order filed September 2, 2014. Representing the parties were: J. Cameron Halford for Plaintiff; and, W. Mark White for Defendant City of Rock Hill.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (Citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009); *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009).

Upon reviewing the record presented, and considering the memoranda and arguments of counsel, I find no matter presented that was not addressed expressly or by clear implication in the prior order. I further find no basis for reconsideration or amendment of the court's ruling in the prior order.
Therefore, it is ordered that Plaintiff's Motion pursuant to Rule 59(e), SCRCP, be denied.

AND IT IS SO ORDERED.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk: _____

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INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Special Circuit Court Judge — 3063 Judge Code — 12/15/2014 Date

For Clerk of Court Office Use Only

This judgment was entered on 12-18-14 and a copy mailed first class or placed in the appropriate attorney's box on 12-18-14 to attorneys of record or to parties (when appearing pro se) as follows:

J. Cameron Halford 238 Rockmont Drive 238 Rockmont Drive Fort Mill, SC 29708

ATTORNEY(S) FOR THE PLAINTIFF(S)

W. Mark White PO Box 790 Rock Hill, SC 29731-6790

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 2012 CP-00146

Nadine Brantley

PLAINTIFF(S)

The City of Rock Hill and Wherry Construction Co., Inc.,

DEFENDANT(S)

Submitted by: Jeremy D. Melville	Attorney for : ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Order for Summary Judgment

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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DAVID L. HAMILTON
CLERK OF C.&G.S.
YORK COUNTY, SC

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Open Circuit Court Judge | 3063 Judge Code | 8/29/14 Date

For Clerk of Court Office Use Only

This judgment was entered on the 2nd day of Sept, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 2nd day of Sept 2014 to attorneys of record or to parties (when appearing pro se) as follows:

J Cameron Halford
238 Rockmont Drive
Fort Mill SC 29708
ATTORNEY(S) FOR THE PLAINTIFF(S)

Jeremy Melville
PO Box 790
Rock Hill SC 29731-6790
ATTORNEY(S) FOR THE DEFENDANT(S)

Dawn Hamilton Tolbert
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Nadine Brantley,

Plaintiff,

vs.

The City of Rock Hill, a body politic and subdivision of the State of South Carolina and Wherry Construction Co., Inc.,

Defendants.

ORDER FOR SUMMARY JUDGMENT

Case No. 2012CP4600146

This matter came before me on August 11, 2014, upon Plaintiff's and Defendant City of Rock Hill's ("City") motions for summary judgment. Present and representing the parties at the hearing were: J. Cameron Halford for Plaintiff; and, W. Mark White and Jeremy D. Melville for the City. Based on the record before the Court, the applicable law, and the arguments of counsel, I make the following findings and conclusions.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct.App. 1994).

A party seeking summary judgment has the burden of clearly establishing, with use of the record properly before the court, the absence of a triable issue of fact. *Stanford Fire Ins. Co. v. Marine Contracting and Towing*, 301 S.C. 418, 392 S.E.2d 460 (1990). Once the moving party shows a lack of evidentiary support for the nonmoving party's claims, the nonmoving party must

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come forward with facts showing there is a genuine issue for trial in order to avoid summary judgment. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). The non-moving party need only submit a mere scintilla of evidence to withstand a summary judgment motion in cases where the applicable burden of proof is a preponderance of the evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004).

However, "[s]ummary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see, also, Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment "mirrors" standard for directed verdict).

BACKGROUND

Plaintiff is the owner of the property located at 1020 Willowbrook Avenue in Rock Hill, South Carolina ("Property"), having purchased it through a mortgage foreclosure sale in May, 2010. As with any foreclosure property, she purchased the property "as is" and was on notice of that fact.

Spencer Park is a public park owned by the City, and is situated upstream from the Property. An existing stream flows in a well-defined channel across Spencer Park and the Property. The stream then travels through a 24 inch culvert located underneath Willowbrook Avenue (the "Culvert"), and discharges by its natural course downstream into another natural watercourse, Manchester Creek. The stream carries storm water collected in the City's storm

water collection system. Willowbrook Avenue is a street owned by the South Carolina Department of Transportation ("SCDOT"), and is situated immediately downstream from the Property and Spencer Park.

In weather events with extraordinary amounts of rain, the culvert under Willowbrook is unable to handle the quantity of water flowing in the stream, and storm water is impounded at Plaintiff's lot, causing flooding of her lot and house. The record is lacking any evidence that the City has performed any work upstream of Spencer Park to increase either the volume, or rate of flow, of storm water discharged into the stream running through Spencer Park since well before Plaintiff purchased her property. Nor is there evidence of work done in Spencer Park since before Plaintiff's purchase, causing such increase.

There are documented events of storm water flooding upon the subject property in 2001, 2003, and 2007, all well before Plaintiff's purchase. Plaintiff's house was built in 2001, although Plaintiff did not acquire the property until 2010.

A building construction inspection report in 1999, during the construction of the house, indicated disapproval of the foundation footing due to the presence of water in a footing. The report indicates that approval of an engineer would be required to continue construction. It does not specify the form of the approval. Subsequently, construction was resumed and completed, and a certificate of occupancy was issued.

Plaintiff asserts that the house was completed, and a certificate of occupancy issued, without the required approval by an engineer, and that such action constituted gross negligence on the part of the City. While the City is not able to present the engineer's written report from its own file, witnesses confirm that approval of the footing, and a written report of such approval, were obtained. The engineer is now deceased, and the City also offered detailed testimony concerning its unsuccessful efforts to obtain a copy of the report.

On January 12, 2012, Plaintiff filed this lawsuit due to flooding of the stream and her Property during periods of heavy rain. Plaintiff has asserted three causes of action against the City: (1) inverse condemnation; (2) nuisance; and, (3) gross negligence. The City asserts the provisions of the South Carolina Tort Claims Act (S.C. Code Ann. § 15-78-10 *et seq.* (1976, as amended).) ("SCTCA"), as a bar to Plaintiff's claims.

ANALYSIS

I. Inverse condemnation.

"To establish an inverse condemnation, a plaintiff must show: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public

use; and (4) the taking has some degree of permanence." *Hawkins v. City of Greenville*, 358 S.C. 280, 290, 594 S.E.2d 557, 562 (Ct. App. 2004). "The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by 'affirmative, positive, aggressive' acts by the governmental agency. Allegations of mere failure to act are insufficient." *Hawkins, supra*, 358 S.C. at 291, 594 S.E.2d at 563.

Hawkins is controlling in this case. The record in *Hawkins* contained evidence that private developers installed pipes in a creek to expand the creek's ability to handle runoff, that the City of Greenville subsequently installed an additional pipe to increase the creek's stormwater capacity, and that the City of Greenville installed riprap along the banks of the creek. *Id.* Following these improvements, a rainstorm caused the creek to overflow and flood the plaintiff's property. The plaintiff alleged that the City of Greenville's actions were a cause of the flood and asserted claims against the city for inverse condemnation, negligence, trespass and nuisance, among others. The Court found that the City of Greenville's actions did not rise to "affirmative" and "positive" acts required for inverse condemnation.

Like *Hawkins*, the record in this case contains no facts that can be construed as an affirmative, positive, aggressive act by the City. As already stated, there is no evidence that the City has performed any work upstream of Spencer Park to increase either the volume, or rate of flow, of storm water discharged into the stream running through Spencer Park since well before Plaintiff purchased her property. Further, there is no evidence that the City has performed work in Spencer Park since before Plaintiff's purchase that would have such an effect. It is also apparent from the record, including the opinion of Plaintiff's experts, that the flooding occurs directly as a result of the undersized culvert running under Willowbrook Avenue, which is entirely the responsibility of SCDOT.

Thus, Plaintiff's claim of inverse condemnation must fail as a matter of law.

II. Nuisance.

The SCTCA bars claims for nuisance against the City. The Act provides that "[t]he governmental entity is not liable for a loss resulting from . . . (7) a nuisance; . . ." S.C. Code Ann. § 15-78-60(7). Therefore, Plaintiff's cause of action for nuisance fails as a matter of law.

III. Gross negligence.

Though Plaintiff has not identified the alleged gross negligent acts by the City with much specificity, it appears that this claim is based on two factual frameworks. First, she argues that the City was grossly negligent in the issuance of the construction permit and certificate of occupancy for the house. Second, she argues that the City is grossly negligent in failing to prevent the house

from flooding once the house was constructed.

> Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. . . . Negligence is the failure to exercise due care, while ***gross negligence is the failure to exercise slight care***." "Gross negligence ordinarily is a mixed question of law and fact. . . . When the evidence supports but one reasonable inference, . . . the question becomes a matter of law for the court. *Clyburn v. Sumter County School Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887-888 (1994) (internal citations omitted)(emphasis added).

A. Building and Permitting Claims.

Plaintiff asserts that the City's file on the Property from 1999-2000 contains no written report of an engineer, approving construction of the footing for the house, as noted in the building inspection report showing water in a footing.

First, the totality of the evidence confirms that engineer approval of the footing was obtained in response to the inspection report noting the presence of water in a footing. Even using the appropriate standard, the absence of the written report does not raise a reasonable inference, under the facts presented, that the City was grossly negligent in permitting construction, and allowing completion and occupancy, of the house. Further, the inspection report cited does not require a written report, and Plaintiff has not cited such a requirement. The mere assertion of the lack of a written report in the City's file, without some indication of fraud or deceit, does not present an inference of gross negligence under the facts of this case.

Second, Plaintiff's claim for negligent permitting fails for lack of a duty imposed on the City in this regard. "The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the [SCTC]." *Hawkins, supra*, 358 S.C. at 293, 594 S.E.2d at 564. "The determination of the existence of a duty is solely the responsibility of the court. . . . Whether the law recognizes a particular duty is an issue of law to be decided by the Court. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). (Internal citations omitted.)

Under established law the City does not have a duty to a property owner regarding the issuance of a building permit to a homebuilder. *Summers v. Harrison Const.*, 298 S.C. 451, 456, 381 S.E.2d 493, 496 (Ct. App. 1989). In *Summers*, a homeowner sued the Lexington County Department of Planning and Development ("Department"), claiming that the Department was grossly negligent in issuing a construction permit to an unlicensed builder. *Summers*, 298 S.C. at 455, 381 S.E.2d at 496. The Court of Appeals held that the Department owed no duty to the plaintiffs and therefore was not liable in negligence. *Id.*

In this case, there is neither a common law duty, nor a statutory duty, owed by the City to Plaintiff. The City issued a building permit to Lawrence Wherry, a duly licensed homebuilder, in 1999. The City was not involved in the construction of the house. Therefore, Plaintiff's claim must fail under the SCTCA.

B. Gross Negligence in Failing to Prevent Floods.

Plaintiff claims that the City's refusal and failure to preventing flooding is actionable gross negligence. Such a claim fails as a matter of law for at least three reasons.

First, the claim for gross negligence is precluded by the SCTCA. In *Hawkins, supra*, the Court held that municipal storm water activities are excepted from the general waiver of immunity provided under the SCTCA. *Hawkins, supra*, 358 S.C. at 294, 594 S.E.2d at 564. The court quoted the applicable exceptions that deal with a governmental entity's acts or failures to act with respect to a drainage system. Referring to the SCTCA, the court states:

> Several of these exceptions bear directly upon the alleged acts and failures to act by the City with respect to the municipal drainage system. Specifically, under section 15-78-60, the City is not liable for a loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2) "administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (3) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (4) "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee"; or (5) "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." *Hawkins, supra*, 358 S.C. at 293, 594 S.E.2d at 564, *quoting* S.C.Code Ann. § 15-78-60(1), (2), (4), (5), and (13).

Second, the City has no duty under South Carolina law to protect all property, or in this case the subject Property, from flooding. The record has no evidence that the flooding at issue is the result of any action by the City. The City has not altered the natural flow of water upstream from the Property. Further, and critically, the City has no control over the infrastructure located immediately downstream from the Property. The drainage infrastructure associated with Willowbrook Avenue, which is acknowledged by Plaintiff's experts to be the critical factor in causing the flooding, is owned and maintained by the SCDOT. In short the record is void of evidence upon which to find the existence of a duty owed by the City to prevent flooding at the Property.

Finally, in *Hawkins*, the Court analogized design and planning of drainage systems to

quasi-judicial, discretionary functions, as determined by the Texas Supreme Court. The Court stated:

> We find a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin. 358 S.C. at 294, 594 S.E.2d at 564.

The City of Rock Hill possesses the same discretionary authority, and the SCTCA plainly bars claims against the City regarding such discretionary actions. Thus, Plaintiff's claim of gross negligence based the City's discretionary must fail as a matter of law.

CONCLUSION

Based on the findings, conclusions and discussion herein, the arguments presented, the exhibits submitted for the Court's consideration, and the applicable law, it is ordered that the City's Motion for Summary Judgment be granted, and that Plaintiff's complaint be dismissed with prejudice.

AND IT IS SO ORDERED.

S. Jackson Kimball
Special Circuit Court Judge
York County

August 28, 2014

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