

STATE OF SOUTH CAROLINA )

COUNTY OF SPARTANBURG )

HGM Enterprises, LLC )

Plaintiff )

v. )

Douglas C. Brackett, Dorothy M. Brackett, Linda D. Finley, And Wachovia Bank, N.A., Successor To First Union Home Equity Corporation,

Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.  
2006-CP-42-2998

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney:  
Greg Morton, Bar No. 4109  
Address:  
4 Arborland Way, Greenville, SC 29615  
phone: 864-675-6010 fax: 864-675-6015  
e-mail: gmorton@dmdslaw.com other:

Defendant's Attorney:  
, Bar No.  
Address: SEE ATTACHED  
phone: fax:  
e-mail: other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Plaintiff's motion to alter or amend order granting summary judgment.  
Estimated Time Needed: 30 minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for  Plaintiff /  Defendant

December 14, 2009  
Date submitted

**SECTION III: Motion Fee**

- PAID - AMOUNT: \$25.00
- EXEMPT:
  - Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SCRPC)
  - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: \_\_\_\_\_
- Other: \_\_\_\_\_

**JUDGE'S SECTION**

- Motion Fee to be paid upon filing of the attached order.
- Other: \_\_\_\_\_

JUDGE \_\_\_\_\_

CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Date Filed: \_\_\_\_\_

Collected by: \_\_\_\_\_

MOTION FEE COLLECTED: \_\_\_\_\_

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CONTESTED – AMOUNT DUE: \_\_\_\_\_

**ADDITIONAL COUNSEL OF RECORD**

Charles M. Sprinkle, Esquire  
Haynsworth Sinkler Boyd, P.A.  
P. O. Box 2048  
Greenville, SC 29602  
Attorney for Wachovia Bank, N.A.  
Successor to First Union Home Equity Corporation

Kenneth C. Anthony, Jr., Esquire  
The Anthony Law Firm, P.A.  
P. O. Box 3565  
Spartanburg, SC 29304  
Attorney for Defendants Douglas C. Brackett and Linda M. Brackett

Scott F. Talley, Esquire  
Pye & Talley, Inc.  
959 John B White, Sr. Blvd.  
Spartanburg, SC 29306  
Attorney for Defendant Linda D. Finley

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS

HGM ENTERPRISES, LLC, )

PLAINTIFF, )

VS. )

DOUGLAS C. BRACKETT, )  
DOROTHY M. BRACKETT, )  
LINDA D. FINLEY, AND )  
WACHOVIA BANK, N.A. )  
SUCCESSOR TO FIRST UNION )  
HOME EQUITY CORPORAION )

DEFENDANTS. )

C. A. No.: 2006-CP-42-2998

PLAINTIFF'S MOTION TO  
ALTER OR AMEND ORDER  
GRANTING SUMMARY  
JUDGMENT

Pursuant to South Carolina Rule of Civil Procedure 59(e), Plaintiff hereby moves to alter or amend the Order granting summary judgment to Defendants on the vast majority of Plaintiff's causes of action, and denying Plaintiff's motion for summary judgment.<sup>1</sup> Plaintiff also hereby reiterates its pending motion to compel discovery, which was not addressed by the Court. The basis for this motion to alter or amend includes that the current Order:

1. Does not properly apply the legal principles governing summary judgment, does not set forth all the pertinent facts, and does not view the facts, and inferences to be drawn from the facts, in the light most favorable to the Plaintiff;
2. Does not address all of Plaintiff's arguments previously made;
3. Does not properly apply the controlling legal principles;
4. Does not address the pending motion to compel discovery; and

<sup>1</sup> The Order was first received by the attorneys in this case when faxed by the Clerk's office on the afternoon of December 3, 2009.

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5. Does not address the arguments regarding discovery not being complete and the resolution on the merits being premature, nor the arguments concerning summary judgment being improper in unique, novel or unusual matters.

The basis for the motion is set forth more fully herein, as well as in Plaintiff's previously filed memorandum and Plaintiff's October 15, 2008 letter to the Court, both of which are incorporated herein by reference.

### General Legal Principles/Factual Issues

The law applicable to the resolution of a motion for summary judgment is well settled. Summary judgment is a procedure of "limited scope" and "is an extreme remedy to be cautiously invoked." Holloman v. McAlliser, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). It "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. And Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting from Watson v. Southern Ry. Co., 420 F. Supp. 483, 486 [D.S.C. 1975]). The Court is not allowed to weigh conflicting evidence nor make credibility determinations in disposing of the motion. L & W Wholesale, Inc. v. Gore, 305 S.C. 250, 253, 407 S.E.2d 658, 659 (Ct. App. 1991).

The burden is on the moving party to "clearly" establish the absence of any triable issue of fact. Standard Fire Ins. Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). All pleadings, discovery, and documents in the record "must be liberally construed in favor of the non-moving party who must be given the benefit of all favorable inferences that might reasonably be drawn from the record." Bates v. City of Columbia, 301 S.C. 320, 320, 391 S.E.2d 733, 733 (Ct. App. 1990). The moving party must show that "further inquiry into the facts is not needed to clarify the applicable law" PPG Indus. Inc. v. Orangeburg Paint and Decorating Ctr., Inc., 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct.

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App. 1988). Summary judgment must be denied even if the facts are not in dispute but there is a dispute as to the conclusions and inferences to be drawn from the facts. Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 33, 406 S.E.2d 176, 179 (Ct. App. 1990). Likewise, if there is a "scintilla of evidence warranting a determination by the jury," the motion must be denied. Anders v. South Carolina Farm Bureau Mut. Ins. Co., 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992).

Stated another way, "[b]y granting a summary judgment or a directed verdict, the judge in effect holds as a matter of law: 'The evidence is all on one side; the facts are not debatable; a jury must believe the movant's interpretation of the facts and the inferences to be drawn therefrom.'" Anders v. South Carolina Farm Bureau Mut. Ins. Co., 307 S.C. 371, 373, 415 S.E.2d 406, 407 (Ct. App. 1992). Additionally, it is improper to rely on conclusory testimony to grant summary judgment. Hamilton v. Miller, 301 S.C. 45, 48, 389 S.E.2d 652, 654 (1990).

In this particular case, Plaintiff filed numerous depositions, twenty-six exhibits, and a memorandum of law. Plaintiff's version of the facts, which is the only version to consider because this is a summary judgment motion, is set forth in these documents. It is not necessary to reiterate the entire factual scenario at length, but Plaintiff specifically notes that the Court's Order overlooks, or fails to address in the light most favorable to Plaintiffs, the following factual issues:

1. The extensive title history and estate history of the property was not properly considered. This was family property and was always treated as being one lot and one house, and was never subdivided by the family;

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2. The mortgage which was foreclosed upon refers to the tax map number, the street address, and refers to it as being the same property inherited from the prior family estates. Again, these are all indications that the two and one-half lots and house were involved;
3. The bank granted a home equity line secured by a home equity mortgage, which indicates there necessarily had to be a "home" involved somewhere;
4. The first Probate Court file for Albert M. Finley, Jr. involving Linda Finley lists the real property involved as being worth \$50,000.00, and the first deed of distribution to her lists the tax number for all the property, and she indicated she believed she had transferred it all at that time;
5. The foreclosure paperwork, including the *lis pendens* and the notice of sale, all include the tax map number and address for all of the property, including the house;
6. The bank mailed notices to Finley indicating the address of the property involved in the foreclosure was 1145 Maryland Avenue, which is the street address for the house;
7. The foreclosure order directs the sheriff to evict the occupants to the premises, which again necessarily indicates the house was involved in the foreclosure action;
8. The Court failed to consider the education and experience of Defendant Brackett, including the fact he is a member of the planning commission and he conducted extensive review of the real estate records prior to contacting Linda Finley;
9. The Court failed to consider, particularly in light of Brackett's testimony that he did not learn until after the deed from Finley that he had been deeded the house, that there was evidence in his own attorney's file that that information had been communicated to Brackett, and that Brackett thereafter switched from a Spartanburg attorney to a Greenville attorney to complete the transaction;
10. The Court's Order never considers or mentions the fact that Brackett contracted to purchase the house and land for the sum of \$45,000.00, and now claims he owns it for only the sum of \$1,800.00, (less one vacant lot);

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11. The Order fails to address the inconsistent testimony of Defendant Brackett as to what he knew and when he knew it as to the location of the house and whether it was included as part of the deed he obtained from Finley;
12. The Court's Order fails to consider Finley's testimony that she understood she had lost the house through foreclosure, she was giving it up through foreclosure, and she would never have signed documents with the Probate Court or Defendant Brackett if she knew Brackett was going to claim the house was involved, and she testified she is now surprised he is claiming he owns the house; and
13. The Court failed to consider the matters presented by Plaintiff regarding the wholly inadequate consideration on the Finley to Brackett deed.

In addition to these arguments on specific factual issues, Plaintiff also submits the following arguments as to the individual causes of action as addressed in the Order.

#### Construction and Reformation

Plaintiff's first argument on this cause of action was that the mortgage and accompanying documents did include, and should be construed to include, all the property located at 1145 Maryland Avenue. The Court's Order does not address this argument presented by Plaintiff. There were documents introduced from the bank's file, which clearly showed this was a "home equity line" mortgage. That would indicate a "home" is actually involved somewhere, not just a vacant lot. The bank's internal documents show the value of the home was included in their loan analysis. The loan documents, mortgage, and all the foreclosure papers have only one tax map number, which tax map undisputedly included all two and one-half lots and the house. The foreclosure order instructs the sheriff to evict the occupants of the property. Again, if only a vacant lot was involved in the foreclosure case, why would anyone have to be evicted from a vacant lot? Additionally, the Court's Order does not address the extensive title history where the family has always treated the two and one-half lots as one

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property and never subdivided it. The Court's Order does not address the fact the mortgage and the foreclosure documents state repeatedly and consistently that "this is the same property inherited by Alfred M. Finley, Jr. from the estates of Alfred Mack Finley, Sr., Probate File 35436; Cecil Jack Finley, Probate File 3113, Probate Court for Spartanburg, South Carolina...". Plaintiff produced exhibits from these estate files, and clearly the property involved in the old estate files was all two and one-half lots and the home. The mortgage documents, foreclosure order, and deed also list the property address as "1145 Maryland Avenue, Spartanburg, South Carolina 29302." There is only one home located at 1145 Maryland Avenue, and the street address verifies this fact. The vacant lot has no assigned address. Accordingly, Plaintiff moves to alter or amend the Order because it never addresses the "construction" argument raised by Plaintiff.

Turning to the reformation portion of this cause of action, the Order grants summary judgment to the Defendants based on a lack of "privity", citing a case involving an insurance company and an insurance policy. Plaintiff notes first that privity is an affirmative defense that was not raised by the pleadings. Moreover, Plaintiff disputes privity applies as a defense to these causes of action – privity is a defense in a breach of contract action. Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009).

Furthermore, the case cited by the Court held the third party beneficiary of insurance policy does have the right to sue. Similarly, privity is defined as "mutual or successive relationships to the same right of property." (Blacks Law Dictionary, 5<sup>th</sup> Edition, 1979). Accordingly, even if there is a privity requirement, Plaintiff would point out he is in privity – he paid the foreclosure sale price and holds the foreclosure deed. The Master issued the deed at the



request of and on behalf of the lender. Plaintiff, as grantee on the deed, is in privity to the extent there is even a privity requirement here.

Also, with regard to the reformation claim, the Court's Order states "it is undisputed that the mortgage, the subsequent foreclosure papers, and the foreclosure deed to Plaintiff all clearly indicate that the property being foreclosed upon and sold only included lot fifteen, not lot fourteen or lot thirteen." Again, this is a factual finding that resolves the facts in favor of Defendants, and ignores the facts and inferences in favor of Plaintiff. The mortgage and foreclosure papers have only one tax map number, which tax number undisputedly includes all two and one-half lots and the house. The papers have only one street address, which is for the house, not a vacant lot. The mortgage and foreclosure papers indicate it is the same property inherited from the two earlier Finley estates, which estates undisputedly involved all lots and the house. The loan is a home equity line, indicating a home is involved.

In short, Plaintiff's argument regarding construction of the loan, mortgage, and foreclosure documents has not been addressed, and the resolution of the reformation cause of action fails to view the record in the light most favorable to Plaintiff as well as disregards portions of the record.

**Equitable Relief, Equitable Estoppel, Equitable Subrogation**

The Court's Order dismisses Plaintiff's equitable claims based upon contributory negligence, and as not being a proper ground upon which to seek relief. It noted that Plaintiff's claims for equitable relief are broader than what is referenced in the Court's Order. Plaintiff briefed and argued for relief based upon the inadequate consideration in the deed from Finley to Brackett, particularly when considered in light of all the circumstances (Plaintiff's Memorandum at 12 to 13, 17 to 18). These arguments are not addressed in the Court's Order.

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Furthermore, contributory negligence is not an appropriate ground for summary judgment. First, whether Plaintiff was negligent is disputed. Second, even if Plaintiff is ultimately found to be negligent, there is a substantial question regarding proximate cause. The situation here is similar to a house burglary after the homeowner left the door unlocked or forgot to set his alarm. The burglar is not entitled to escape based on the argument that it was the homeowner's fault by not locking the door or setting the alarm. Finally, Plaintiff submits the contributory negligence is not a defense to a claim for equitable relief in this case, particularly when the other side has committed improprieties with regard to the Probate Court and is seeking a windfall. Plaintiff is simply seeking equitable relief, which is within the parameters of Janasik v. Fairway Oaks Villas Horizontal Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). (Estoppel may be used to save harmless or make whole the party in whose favor it arises and should not, in any case, be made the instruments of gain or profit.)

Accordingly, Plaintiff respectfully submits that summary judgment upon the claims for equitable relief was improper.

#### Mistake

The Order states that there is "no factual basis" for the claim of mistake. However, Defendant Finley testified she never knew Defendant Brackett was going to claim he was buying the house for \$1,800.00, and she testified she never would have reopened the Probate Court file or signed a deed to Brackett if she knew these facts. On the other hand, Brackett's testimony was contradictory. At one point he claimed he never knew he was getting the lot with the home until after a deed was signed by Finley to him and a survey was done at a later date and time. He explained his good fortune in "unknowingly" buying a house for \$1,800.00, by testifying "God is good" at his deposition. While Plaintiff disputes Brackett's denials and claims

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of lack of knowledge regarding the house, Plaintiff is clearly allowed to plead in the alternative. Based on Finley's deposition, and at least one version of Brackett's story, there certainly is a factual basis for the cause of action alleging mistake.

### Judicial Estoppel

"The purpose of the doctrine [of judicial estoppel] is to ensure the integrity of the judicial process..." Wright v. Craft, 372 S.C.1, 46, 640 S.E.2d 486, 506 (Ct. App. 2006). In this case, Defendant Brackett first assisted Defendant Finley in going to the Master in Equity and in collecting over \$11,000.00 in excess sales proceeds from the foreclosure sale of the house. Finley acknowledges this money was for the house, and that she moved out of the house when the foreclosure case started because she could not afford to keep it. She testified she knew she was losing the house by foreclosure. Accordingly, she got paid for the house when she went and collected the excess money and also received the benefit of having the loan paid off in full.

Brackett then took her to Probate Court to get her to reopen the probate estate file. She had previously signed probate court documents verifying the estate was closed and that everything had been distributed. Defendant Brackett paid her court costs to reopen the probate court case. He assisted and oversaw the completion of the Probate Court paperwork in the reopened file. In short, he shepherded her through the entire process, including showing the real property, under oath, as only having a value of \$1,800.00. Subsequently, he ensured that Finley deeded the property from the estate to herself, and then deeded it over to Brackett for a nominal sum. Now, Brackett contends he received the house via this process, and has testified under oath that he had no idea the real property in question involved the house until much later down the road.

Given this scenario, there are factual issues present regarding the conduct of both Finley and Brackett. The course of events indicates summary judgment was not warranted as to this cause of action.

#### Waiver or Payment

The Court Order cites Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992) in granting summary judgment. However, the Janasik court specifically recognized a savings clause, and stated the operation of waiver "should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit." Janasik, 307 S.C. at 345, 415 S.E.2d at 388. Here, Plaintiff paid full value for the house and land, and is not the one trying to gain or profit. It is Defendant Brackett seeking the windfall.

Additionally, the statement in the Court's Order that Defendant Finley had "good title" to the home contradicts Finley's testimony that she knew she lost the house in foreclosure, and that she got paid for it with the foreclosure proceeds.

#### Breach of Contract Accompanied by a Fraudulent Act

The Court's Order finds as a fact that Plaintiff, not Defendant Brackett, breached the prior sales contract for the property. However, Plaintiff's testimony was that Defendant Brackett advised him he had located another investment property and would not be purchasing from Plaintiff. It is Plaintiff's version of the facts that these were misrepresentations and made while Defendant Brackett was in the process of, or preparing to embark upon, his efforts to get Finley to deed the house to him. Furthermore, the Court's Order indicates Plaintiff can't prove "fraud". Plaintiff does not have to prove fraud to prove breach of contract accompanied by a fraudulent act. The fraudulent act here involves the representation to Plaintiff and the

subsequent course of conduct at the Probate Court file, as well as Bracketts testimony denying he knew he was engaging in a course of conduct which would eventually result in him claiming he owned the house.

Negligence

The Court's Order holds, as a matter of law, that no duty was owed to Plaintiff by the bank. However, the cases cited recognize a duty can arise via a property interest or special circumstances. Here, the bank commenced a foreclosure process on its mortgage. Clearly, the end result would be the sale of the property. The entire process, including the *lis pendens* and the notice of sale, included the tax map number and the street address. Both of these included all lots and the home. The foreclosure order directed the sheriff to evict the occupants of the property. Most importantly, the bank in fact received payment in full from Plaintiff via the foreclosure sale, and the money the bank received was based upon the value of a house along with land, not one vacant lot. Plaintiff submits that this scenario indicates summary judgment is not proper based upon issues related to a legal duty.

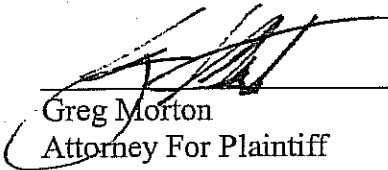
Additionally, the Court finds Plaintiff was contributory negligent as a matter of law. Again, this is ordinarily an issue for the finder of fact. However, the Order goes further and states Plaintiff failed to take "any" measures to investigate and examine the property. This is factually incorrect, as Plaintiff testified he reviewed the foreclosure file, the real property records and the tax records to verify the house was indeed involved in this sale. Consequently, the issue of contributory negligence would not be ripe for being resolved by a summary judgment. Additionally, as earlier noted, there is a substantial issue of proximate cause.

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CONCLUSION

This is a unique and novel factual and legal scenario. Discovery has not been completed, and Plaintiff's motion to compel has not been adjudicated. When the facts are viewed in the light most favorable to Plaintiff, with all inferences and ambiguities resolved in favor of the Plaintiff, Plaintiff respectfully submits the matter is not ripe for adjudication via summary judgment. Accordingly, Plaintiff requests that the Order be vacated, and that the matter proceed to trial rather than being delayed by an appeal. Plaintiff further requests oral argument as to this motion.

Respectfully submitted,



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Greg Morton  
Attorney For Plaintiff  
S.C. Bar No.: 4109

Donnan & Morton, P.A.  
4 Arborland Way  
Greenville, S.C. 29615  
Phone: (864) 675-6010  
Fax: (864) 675-6015

December 14, 2009

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STATE OF SOUTH CAROLINA )  
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IN THE COURT OF COMMON PLEAS

HGM ENTERPRISES, LLC, )  
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 SUCCESSOR TO FIRST UNION )  
 HOME EQUITY CORPORTAION )  
 )  
 DEFENDANTS. )

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Civil Coversheet, Plaintiff's Motion to Alter or Amend Order Granting Summary Judgment and Certificate of Service upon counsel for the Defendants by depositing same in the United States Mail with sufficient postage addressed to:

Charles M. Sprinkle, Esquire  
 Haynsworth Sinkler Boyd, P.A.  
 P. O. Box 2048  
 Greenville, SC 29602  
 Attorney for Wachovia Bank, N.A.  
 Successor to First Union Home Equity Corporation

Kenneth C. Anthony, Jr., Esquire  
 The Anthony Law Firm, P.A.  
 P. O. Box 3565  
 Spartanburg, SC 29304  
 Attorney for Defendants Douglas C. Brackett and Linda M. Brackett

Scott F. Talley, Esquire  
 Pye & Talley, Inc.  
 959 John B White, Sr. Blvd.  
 Spartanburg, SC 29306  
 Attorney for Linda D. Finley

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 MARC KITCHENS

This 14th day of December, 2009.

Martha C. Ballard  
Martha C. Ballard  
Secretary to Greg Morton

Donnan & Morton, P.A.  
4 Arborland Way  
Greenville, SC 29615  
(864) 675-6010

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