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SUMMARY
October 26, 2023

2023COA99

No. 22CA1298, *Far Horizons v. Flying Dutchman* — Real Property — Colorado Common Interest Ownership Act — Enforcement — Attorney Fees

A division of the court of appeals holds, as a matter of first impression, that amendments to section 38-33.3-123(1)(c), C.R.S. 2023, a part of the Colorado Common Interest Ownership Act, enacted in 2006 require a court to determine which party was the overall prevailing party for purposes of awarding attorney fees under that statute. Prior decisions by divisions of the court of appeals holding that the determination of the prevailing party must be made on a claim-by-claim basis were abrogated by the 2006 amendments.

COLORADO COURT OF APPEALS **2023COA99**

Court of Appeals No. 22CA1298
Summit County District Court No. 19CV30136
Honorable Karen A. Romeo, Judge

Far Horizons Farm, LLC, a Missouri limited liability company,

Plaintiff-Appellant,

v.

Flying Dutchman Condominium Association Inc., a Colorado nonprofit corporation,

Defendant-Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE J. JONES
Johnson and Schutz, JJ., concur

Announced October 26, 2023

The Klug Law Firm LLC, Noah Klug, Breckenridge, Colorado, for Plaintiff-Appellant

Stuart D. Morse & Associates, LLC, Stuart Morse, Kira L. Case, Denver, Colorado, for Defendant-Appellee

¶ 1 This case involves a dispute — centering on a parking space and a basketball hoop — between a condominium unit owner, plaintiff, Far Horizons Farm, LLC (Far Horizons), and the unit owners' association for the condominium complex, defendant, Flying Dutchman Condominium Association, Inc. (the UOA).[1] Far Horizons appeals the district court's order awarding attorney fees and costs.

¶ 2 We conclude first that the district court erred by determining the "prevailing party" on a claim-by-claim basis in applying section 38-33.3-123(1)(c), C.R.S. 2023, which allows for an award of attorney fees and costs in an action under the Colorado Common Interest Ownership Act (CCIOA), sections 38-33.3-101 to -401, C.R.S. 2023, or the declaration, bylaws, articles, or rules and regulations of a unit owners' association. Because of relevant amendments to that statute in 2006, the court must determine which party is, overall, the prevailing party in the action.

[1] We use "UOA" to refer to the defendant because the Colorado Common Interest Ownership Act refers to an association of unit owners as a "unit owners' association." *E.g.*, § 38-33.3-103(3), C.R.S. 2023.

¶ 3 We conclude second that the district court erred by awarding costs to the UOA under the offer of settlement statute, section 13-17-202(1)(a)(II), C.R.S. 2023, thereby reducing the award of costs to Far Horizons. Because, when judged according to the terms of the UOA's offer, Far Horizons' recovery exceeded the amount offered by the UOA, the UOA isn't entitled to recover costs under that statute.

¶ 4 Therefore, we reverse the district court's order awarding attorney fees and costs and remand the case for further proceedings consistent with this opinion.

I. Background

¶ 5 As an owner of a unit in the Flying Dutchman Condominiums, Far Horizons is entitled under the recorded condominium declaration (the Declaration) to "[t]he exclusive right to use one parking space" to be "reasonably designate[d]" by the UOA. Far Horizons demanded that the UOA designate such a space for its unit. The UOA ignored that demand.

¶ 6 Far Horizons sued the UOA. It asserted claims for declaratory relief/quiet title and breach of the Declaration. The district court granted summary judgment in Far Horizons' favor on its declaratory relief claim, concluding that "the Declaration provides each unit

owner the right to the use of a particular parking space to [the] exclusion of any other person."[2] The court then ordered the UOA to designate a spot for Far Horizons' unit no later than a specified date.

¶ 7 Far Horizons' breach of the Declaration claim was tried to a jury. The jury found that the UOA hadn't breached the Declaration.[3]

¶ 8 The UOA designated a parking spot for Far Horizons' unit that was relatively far from that unit and located under a basketball hoop. The UOA then moved the space a few feet to the right of the basketball hoop. *See* Appendix A. Far Horizons asserted that the designation of the parking spot didn't comply with the court's declaratory judgment. After taking additional evidence, the court found that the location of the spot isn't unreasonable but that, as originally located and as moved, it isn't exclusive because of its

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[2] The district court denied Far Horizons' request for a declaration that it is entitled to the particular parking spot it asked for and its request for a declaration of quiet title.

[3] Far Horizons filed a post-trial motion asking the court to rule under C.R.C.P. 59 that the UOA had breached the Declaration as a matter of law by failing to designate an exclusive parking spot or, alternatively, to order a new trial. The court denied that motion.

proximity to the basketball hoop. The court ordered the UOA to take certain steps to render the spot exclusive.

¶ 9 After the jury ruled in its favor on the breach of the Declaration claim, the UOA filed a motion for an award of attorney fees incurred in defending against that claim under section 38-33.3-123 of CCIOA. It also filed a motion for an award of costs, invoking the offer of settlement statute and the other more generally applicable costs award provisions.

¶ 10 As to the UOA's motion for an award of attorney fees, Far Horizons responded that consideration of such an award was premature because the current version of section 38-33.3-123(1)(c) requires that a party prevail in the litigation as a whole to receive such an award and the court had not yet entered a final judgment. Alternatively, Far Horizons argued that it was the prevailing party because it had received much of the relief it had requested. As to the UOA's motion for an award of costs, Far Horizons responded, as now relevant, that (1) the UOA's offer didn't qualify under the offer of settlement statute because it included a nonmonetary condition and (2) Far Horizons had recovered more than the UOA had offered.

¶ 11 After the court determined whether the space the UOA designated was reasonable and exclusive, it ruled on the UOA's attorney fees and costs motions. It concluded, "Undoubtedly, [Far Horizons] is the prevailing party in this litigation. . . . [Far Horizons] initiated this litigation to obtain an individually assigned parking spot[,] and at the conclusion of this case . . . [Far Horizons] obtained that spot. Therefore, [Far Horizons] is the prevailing party in the suit as a whole . . . ." But, citing *Giguere v. SJS Family Enterprises, Ltd.*, 155 P.3d 462 (Colo. App. 2006), the court also ruled that it had to award attorney fees under section 38-33.3-123(1)(c) of CCIOA by determining the prevailing party on a claim-by-claim basis. After determining that Far Horizons prevailed on the declaratory relief claim and the UOA prevailed on the breach of the Declaration claim, it awarded attorney fees to both parties accordingly. The court awarded Far Horizons its costs incurred before the UOA submitted its offer of settlement and awarded the UOA its costs incurred after it submitted its offer of settlement.

¶ 12 The parties then provided the court with documentation to support their respective requested amounts of attorney fees and costs. Far Horizons claimed $41,670.50 in attorney fees and

$1,176 in costs.[4] The UOA claimed $7,023.10 in attorney fees and $2,860.26 in costs.

¶ 13 The court ultimately awarded Far Horizons $22,279 for attorney fees and $1,176 for costs and awarded the UOA $7,023.10 for attorney fees and $2,580.69 for costs. The court then offset the respective amounts of attorney fees and costs and entered judgment in Far Horizons' favor and against the UOA in the amount of $13,851.30.

¶ 14 Far Horizons appealed the judgment against it on its breach of the Declaration claim, but a motions division dismissed that appeal as untimely. It now appeals the district court's order awarding attorney fees and costs. (The UOA hasn't appealed any aspect of the judgment.)

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[4] Far Horizons purported to limit its fees to amounts incurred in pursuing its declaratory relief claim after the court ruled that it was limited to seeking recovery of fees on that claim. It claimed to have incurred more than $55,000 in attorney fees for the case as a whole.

II. Discussion

¶ 15 As noted, Far Horizons challenges the district court's awards of both attorney fees and costs, albeit for different reasons. We address those challenges in turn.

A. Attorney Fees Under CCIOA

¶ 16 Far Horizons' challenge to the district court's award of attorney fees boils down to whether, in 2006, the General Assembly amended section 38-33.3-123(1)(c) in a way that requires the court to determine the "prevailing party" based on which party prevailed on CCIOA-covered claims as a whole. Far Horizons argues that it did, meaning that, because the court determined that it was the prevailing party "in the suit as a whole," it is entitled to an award of all its reasonable attorney fees incurred in this case and that the UOA isn't entitled to recover any fees. We agree with Far Horizons.[5]

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[5] The UOA seems to argue that we don't need to address this issue because the result is the same in any event. It says that because the court must calculate a lodestar amount of fees and adjust it based on various considerations — including the degree of success on the merits — the district court would have to reduce the amount sought by Far Horizons based on its lack of success on its breach of the Declaration claim. But the UOA ignores the fact that the court awarded fees to the UOA based on the court's claim-by-claim approach. If we agree with Far Horizons, the UOA isn't entitled to

1. Standard of Review

¶ 17 We review a district court's determination of which party prevailed in the litigation for an abuse of discretion. *Giguere*, 155 P.3d at 471. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension or misapplication of the law. *Credit Serv. Co. v. Skivington*, 2020 COA 60M, ¶ 17.

¶ 18 Far Horizons contends that the district court misapprehended and misapplied the law: its challenge is one based on statutory interpretation. We review such issues de novo. *Colo. Oil & Gas Conservation Comm'n v. Martinez*, 2019 CO 3, ¶ 19.[6]

2. Analysis

¶ 19 Divisions of this court interpreted the prior version of section 38-33.3-123(1)(c) to require a court to determine the prevailing party in an action subject to CCIOA on a claim-by-claim basis.

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an award of attorney fees and we would need to reverse the portion of the court's order awarding fees to the UOA. Also, we don't know how an adjusted lodestar amount calculation would shake out on remand.

[6] The UOA contends that Far Horizons didn't preserve this issue for review. But as noted above, Far Horizons clearly raised this issue in the district court and therefore preserved it.

Giguere, 155 P.3d at 471-72; *Dunne v. Shenandoah Homeowners Ass'n*, 12 P.3d 340, 345 (Colo. App. 2000); *Hallmark Bldg. Co. v. Westland Meadows Owners Ass'n*, 983 P.2d 170, 174 (Colo. App. 1999); *see also Pagosa Lakes Prop. Owners Ass'n v. Caywood*, 973 P.2d 698, 703 (Colo. App. 1998). But those divisions so held based expressly on statutory language then in effect requiring an award to the prevailing party "[f]or each claim or defense." The statute, as then worded, provided in full as follows:

> *For each claim or defense*, including but not limited to counterclaims, cross-claims, and third-party claims, and except as otherwise provided in paragraph (d) of this subsection (1), in any legal proceeding to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award to the party prevailing *on such claim* the prevailing party's reasonable collection costs and attorney fees and costs incurred in asserting or defending *the claim*.

§ 38-33.3-123(1)(c), C.R.S. 2005 (emphasis added).[7]

¶ 20 But in 2006, the General Assembly substantially amended this statute. As amended, it now provides in full as follows:

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[7] Actually, the statute was amended in 2005 to say "claim or defense." Before that, it said only "claim." § 38-33.3-123(1), C.R.S. 2004.

> In any *civil action* to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award reasonable attorney fees, costs, and costs of collection to the prevailing party.

§ 38-33.3-123(1)(c), C.R.S. 2023 (emphasis added).[8]

¶ 21 So while the prior version of the statute tied the determination of the prevailing party to individual claims and defenses, the current version of the statute no longer does so; instead, it ties the determination of the prevailing party to the "civil action." Contrary to the UOA's suggestion, we don't read this change as merely one to

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[8] The 2006 bill amending section 38-33.3-123(1)(c) showed the changes as follows:

> ~~For each claim or defense, including but not limited to counterclaims, cross-claims, and third party claims, and except as otherwise provided in paragraph (d) of this subsection (1),~~ In any ~~legal proceeding~~ CIVIL ACTION to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court shall award ~~to the party prevailing on such claim the prevailing party's~~ reasonable ~~collection costs and~~ attorney fees, ~~and~~ costs, ~~incurred in asserting or defending the claim~~ AND COSTS OF COLLECTION TO THE PREVAILING PARTY.

Ch. 266, sec. 4, § 38-33.3-123(1)(c), 2006 Colo. Sess. Laws 1217-18.

clarify or simplify the statute. The prior version of the statute wasn't unclear. And the language of the statute is now materially different: all language relating to individual claims and defenses has been deleted in favor of language that refers instead to "any civil action." A "civil action" is the whole of a court case; a claim or defense isn't. *See Hernandez v. Downing*, 154 P.3d 1068, 1070 (Colo. 2007) ("[A]n 'action' is 'a *proceeding* on the part of one person, as actor, against another, for the infringement of some right of the first, before a court of justice, in the manner prescribed by the court or law.'" (quoting *Clough v. Clough*, 10 Colo. App. 433, 439, 51 P. 513, 515 (1897))) (emphasis added); *see also Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, 2017 CO 69, ¶ 44 (same).

¶ 22 That the General Assembly intended to change the meaning of "prevailing party" is supported not only by the changed language itself, *see Krol v. CF & I Steel*, 2013 COA 32, ¶ 15 (we give words and phrases in a statute their plain and ordinary meanings, and view the language in the context of the statute as a whole), but by at least two other canons of statutory construction. One, we presume that the General Assembly was aware of existing case law

construing a statute when it amended the statute. *See Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997); *Colo. Civ. Rights Comm'n ex rel. Ramos v. Regents of the Univ. of Colo.*, 759 P.2d 726, 735 (Colo. 1988). And two, "[a] legislative amendment either clarifies or changes existing law, and we presume that by amending the law the legislature has intended to change it." *Johnson v. Sch. Dist. No. 1*, 2018 CO 17, ¶ 28 (quoting *City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007)).

¶ 23 So we presume that the General Assembly intended to change the meaning of "prevailing party" in section 38-33.3-123(1)(c), and did so aware that divisions of this court had construed the prior version of the statute to require a determination of the prevailing party on a claim-by-claim basis.

¶ 24 A party may rebut the presumption that the General Assembly intended to change the law when amending a statute by showing that the amendment was "intended only to clarify an existing ambiguity in the statute." *Mesa Cnty. Land Conservancy, Inc. v. Allen*, 2012 COA 95, ¶ 9 (citing *Acad. of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 466 (Colo. 2001)). In determining whether the amendment was only a clarification, we

may consider the legislative history of the amendment, the plain language used, and whether the provision was ambiguous before it was amended. *Acad. of Charter Schs.*, 32 P.3d at 464; *Allen*, ¶ 10.

¶ 25 The UOA doesn't direct us to any legislative history of the amendment supporting its position.[9] And as noted above, "civil action" and "claim or defense" aren't synonymous — they plainly mean different things. As also noted above, we don't see any ambiguity in the prior version of the statute. Though the UOA asserts that the amendment merely "cleaned-up the statute" or "uncomplicate[d] the statute by making it plainer," the prior version

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[9] Given the substantial gap in time between the 2006 amendment and our conclusion in this case that the amendment worked a significant change in the law as yet unacknowledged by any Colorado appellate court decision, we add that the legislative history supports our construction of the statute as amended. The amendment was sought as part of a larger package of amendments to CCIOA proposed by an entity known as the Community Associations Institute. It explained the purpose of the proposed amendment as follows: "The 'claim by claim' award of fees can overly complicate a court hearing for attorney fees and can lead to unfair or unanticipated results. A revision would be more in line with typical statutory and contract fee shifting provisions . . . ." Staff Summary of Hearing on S.B. 89 before the S. Comm. on Judiciary, 65th Gen. Assemb., 2d Reg. Sess. (Feb. 6, 2006), attach. C (Cmty. Ass'ns Inst., HOA Reform Bills: Comparison of SB 05-100 and SB 06-89).

wasn't ambiguous and the UOA doesn't point to any decisional law expressing uncertainty about the statute's meaning.

¶ 26 The UOA makes two additional arguments, however, why Far Horizons' proposed statutory interpretation is incorrect. We reject both.

¶ 27 First, the UOA says there isn't any decisional law adopting Far Horizons' proposed statutory interpretation. True, but irrelevant. After all, there's a first time for everything. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6 (1st Cir. 1997) (lack of precedent supporting the court's application of a statute was of no import, in part because "[t]here is a first time for everything"). And the UOA doesn't cite any prior case actually addressing the effect of the 2006 amendments. We acknowledge that, in *Town of Vail v. Village Inn Plaza-Phase V Condominium Ass'n*, 2021 COA 108, the division appears to have applied the *Giguere* division's construction of the statute. *Id.* at ¶ 48. But the division did so without any analysis,

and it appears that the issue of whether the 2006 amendments had changed the relevant law wasn't presented.[10]

¶ 28 Second, the UOA argues that Far Horizons' proposed statutory interpretation, with which we agree, can't be right because it would mean that an award of fees would be required "for the pursuit or defense of each and every claim, CCIOA or not, regardless of outcome." We don't think this necessarily follows from our interpretation of the statute. But in any event, we leave that issue for another day. All claims asserted in this case are indisputably subject to CCIOA.

¶ 29 In sum, we conclude that section 38-33.3-123(1)(c), as amended in 2006, requires a court to determine the prevailing party in the action as a whole, and not on a claim-by-claim basis. The district court has already determined that Far Horizons was the prevailing party in the action as a whole, and the UOA hasn't challenged that determination. We therefore reverse those portions

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[10] In *DeJean v. Grosz*, 2015 COA 74, ¶¶ 43-45, the division appeared to accept a party's contention that a party "must prevail in the litigation as a whole" to receive an award of fees under the statute. But, in fairness, we don't want to place much reliance on that case because there was no analysis of the specific question before us.

of the order reducing Far Horizons' recovery of attorney fees based solely on its lack of success on the breach of the Declaration claim and awarding the UOA its fees incurred in connection with that claim. On remand, the court must determine the reasonable amount of attorney fees to which Far Horizons is entitled as the prevailing party in the case, applying the usual analysis. *See Accetta v. Brooks Towers Residences Condo. Ass'n*, 2021 COA 147M2, ¶ 44.

B. Costs Under the Offer of Settlement Statute

¶ 30 About six months after the court granted summary judgment for Far Horizons on its declaratory relief claim, and a little more than one month before the trial on the breach of the Declaration claim, the UOA served Far Horizons with an offer of settlement under section 13-17-202. As now relevant, it offered, "for all claims asserted and that may be asserted, . . . **FIVE THOUSAND DOLLARS AND 00/100 ($5,000)**, inclusive of attorney's fees. This sum also includes interest and costs accrued to date." Far Horizons didn't accept the offer.

¶ 31 Following the trial on the breach of the Declaration claim, the UOA filed a motion for an award of costs based, in part, on the offer

of settlement. It argued that because Far Horizons hadn't recovered any damages on that claim (the jury found no breach), it hadn't recovered more than the offered $5,000 and therefore the UOA was entitled to an award of its actual costs incurred after the offer.

¶ 32 In its order resolving the parties' respective motions for attorney fees and costs, the court found that, because Far Horizons "failed to recover greater than [$5,000] at trial," the UOA was entitled to an award of actual costs it incurred after the offer under section 13-17-202(1)(a)(II).

¶ 33 On appeal, Far Horizons contends that the court erred by awarding costs to the UOA under the offer of settlement statute because (1) the offer included a nonmonetary condition — namely, that Far Horizons compromise and release claims that it could have asserted in the case but did not; and (2) Far Horizons recovered more than $5,000 when attorney fees and costs are considered. We agree with Far Horizons' second contention and therefore don't address the first one.

1. Standard of Review

¶ 34 As a general matter, we review a court's award of costs for an abuse of discretion. *Belinda A. Begley & Robert K. Hirsch Revocable*

Tr. v. Ireson, 2020 COA 157, ¶ 62. But we review the district court's legal conclusions forming the basis for that decision de novo. *In re Marriage of Turilli*, 2021 COA 151, ¶ 36.

¶ 35 The issue that Far Horizons raises and we address — whether the district court failed to account for Far Horizons' recovery of attorney fees and costs when comparing the offer and the final judgment — is one of law. Because it is undisputed that Far Horizons recovered attorney fees and costs totaling more than $5,000, if we conclude that the court erred by failing to take those attorney fees and costs into account, it necessarily follows that the court abused its discretion. *See Belinda A. Begley & Robert K. Hirsch Revocable Tr.*, ¶ 62 (a court abuses its discretion if it "misapplies or misconstrues the law").

2. Analysis

¶ 36 Section 13-17-202(1)(a)(II) provides in relevant part that

> [i]f the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff.

¶ 37 This provision has been construed to require the court to consider the offer and the judgment "in a like manner." *Miller v. Hancock*, 2017 COA 141, ¶ 34 (emphasis omitted) (quoting *Rubio v. Farris*, 51 P.3d 992, 994 (Colo. App. 2002)). So, for example, if the offer includes "all costs and interest," the actual costs and interest incurred by the plaintiff prior to the offer of settlement and ultimately awarded must be included in determining whether the final judgment exceeds the offer. *Rubio*, 51 P.3d at 994-95. Also, examination of an offer of settlement of "all claims" must include the amount of attorney fees authorized by statute. *Bumbal v. Smith*, 165 P.3d 844, 846 (Colo. App. 2007) (an offer to settle "all claims" under the Colorado Consumer Protection Act includes all attorney fees awardable under the statute); *see also Miller*, ¶¶ 36-39 (an offer to settle "all issues" includes costs).

¶ 38 The UOA's offer of $5,000 was expressly inclusive of "attorney's fees" and "interest and costs accrued to date."[11] The

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[11] In quoting the settlement offer in the answer brief, the UOA's then counsel in this case truncated the sentence offering $5,000, omitting "inclusive of attorney's fees." And she omitted the entire following sentence saying "[t]his sum also includes interest and costs accrued to date." We remind counsel of her duty of candor to

attorney fees and costs ultimately awarded to Far Horizons included in excess of $5,000 incurred prior to the offer of settlement. Therefore, comparing apples to apples, *Miller*, ¶ 34, Far Horizons recovered more than the UOA offered. The district court therefore erred by awarding the UOA costs under the offer of settlement statute.

C. Attorney Fees Incurred on Appeal

¶ 39 Far Horizons requests an award of its attorney fees incurred on appeal under section 38-33.3-123(1)(c). We grant that request. We exercise our discretion under C.A.R. 39.1 to remand the case for the district court to determine the reasonable amount of those fees.

III. Disposition

¶ 40 The district court's order on attorney fees and costs is reversed, and the case is remanded to the district court to redetermine the amount of attorney fees and costs to which Far Horizons is entitled.

JUDGE JOHNSON and JUDGE SCHUTZ concur.

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the court. *See* Colo. RPC 3.3(a)(1). (Current counsel for the UOA entered their appearances shortly before oral argument.)

APPENDIX A

Basketball Hoop
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