IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FL

CASE NO. SC15-1086

HEATHER WORLEY,

Petitioner,

v.

CENTRAL FLORIDA YOUNG MEN'S CHRISTIAN, ETC.,

Respondent.
_____/

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF PETITIONER

On review from the Fifth District Court of Appeal

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SUMMARY OF ARGUMENT AND INTEREST OF AMICUS CURIAE

The Florida Justice Association ("FJA") is a voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The FJA has been involved as amicus curiae in hundreds of cases in Florida appellate courts, including this Court.

The FJA also appeared as amicus in one of the seminal cases concerning financial discovery directed from retained experts, in Elkins v. Syken, 672 So.2d 517 (Fla. 1996). The application of Elkins to treating physicians has permeated in the trial and appellate courts over the last few years. The FJA also appeared as amicus in a recent case that has spearheaded this aspect of the law. See Katzman v. Rediron Fabrication, Inc., 76 So.3d 1060, 1061 (Fla. 4th DCA 2011) (acknowledging the role of the FJA in the rehearing phase of the case).

The decision on review to this Court presents an opportunity for this Court to address treating physician financial discovery. This appeal does not address whether any financial discovery should be permitted at all regarding treating physicians and any connection to plaintiff's counsel. Accordingly, the FJA does not use this forum to advocate for a categorical ban on this discovery.

Nonetheless, the FJA agrees with the Petitioner that the Fifth District's decision should be quashed. The FJA adds a perspective on the public-policy implications of the Fifth District's decision. The decision and others like it in recent years will likely hinder the ability of patients to receive quality medical care when they are injured in accidents and there is a possibility of litigation. These cases may also deny access to the courts for those patients who end up in litigation. The FJA strongly believes that if financial discovery is permitted, to minimize the chilling effect of intrusive discovery, rules should limit discovery to that available from retained expert witnesses. This Court previously approved rules for retained experts.

Many FJA members have vast experience representing plaintiffs who have received medical care. The FJA and its experienced members inform the Court that, because of the burdens of litigation, many medical providers already do not treat persons injured in accidents. The expansive financial discovery requested in this case and others will likely deter even more medical providers from treating patients who are involved in accidents. The FJA has a strong interest in ensuring plaintiffs can obtain necessary, reasonable, and quality medical care. Any ruling to emerge from this Court should ensure these interests are protected.

ARGUMENT

THIS COURT SHOULD CRAFT RULES ADDRESSING THE CASE-SPECIFIC PERMISSIBILITY AND SCOPE OF DISCOVERY CONCERNING THE RELATIONSHIP BETWEEN TREATING PHYSICIANS AND THOSE WHO REPRESENT ACCIDENT VICTIMS.

A. Contrary to the Decision on Review, there is Not Well-Established Precedent Permitting the Discovery Requested in this Case

As an initial matter, we believe the Fifth District and others recently addressing the issue of financial discovery and treating physicians have ignored the significant differences between retained experts hired for litigation and treating physicians who treat those injured in accidents that result in or are in litigation.

In this case, the Fifth District stated that, "[i]n Florida, it is well established that the financial relationship between the [Plaintiff's] law firm and the treating physician is not privileged and is relevant to show bias" (A9). In reality, this has not been well-established, but is a rapidly-developing area of the law -- with no input as of yet from this Court.

The Fifth District's so-called "well-established" precedent was primarily three decisions from the Fourth District. In fact, it appears the Fourth District is itself in internal conflict on whether there can be any such discovery and, if so, the threshold circumstances that allow for this discovery. In 2011, a panel of the Fourth District reasoned that the "direct referral" from law firm to treating

physician is a much different situation because "the physician has injected himself into the litigation." See Katzman v. Rediron Fabrication, Inc., 76 So.3d 1060, 1064 (Fla. 4th DCA 2011) (on rehearing)("Katzman I"). It was the direct referral relationship "that creates a circumstance that would allow the defendant to explore possible bias on the part of the doctor." Id. (emphasis added). That decision cannot be fairly read except to require a referral relationship as a threshold to the door opening to financial discovery.

A subsequent panel appears to have again held that discovery may be permitted under the facts of a case, and only when there is a direct referral relationship. Katzman v. Ranjana Corp., 90 So.3d 873, 878 (Fla. 4th DCA 2012) ("Katzman II"). The physician's voluntary insertion into the litigation was deemed analogous, at least for purposes of financial discovery, to retained expert witnesses and the discovery approved by this Court in that context. See Allstate Ins. Co. v. Boecher, 733 So.2d 993 (Fla. 1999); Elkins v. Syken, 672 So.2d 517 (Fla. 1996).

In Katzman II, the Fourth District remanded the discovery order on review because, during the appellate process, the appellate court had issued the prior treating physician/financial discovery opinion, Katzman I. The Fourth District explained in Katzman II, 90 So.3d at 878-79 (emphasis added):

> We denied relief in Katzman I [to the treating physician] largely because there was only one surgical procedure involved there, with a record of evidence to show it was controversial and suggest that it may have been ordered

> more frequently and at a higher charge in litigation cases than non-litigation cases by the expert/treating witness. There was also the referral by the lawyer to the doctor in that case, but that was only one of the circumstances leading to the conclusion that the discovery sought should be allowed. As demonstrated here, there are many grounds to distinguish this case from Katzman I with its own facts and circumstances. We are not ruling in this case that [the defendant] is not entitled to any discovery from [the treating physician and his P.A.]. Rather, we return this case to the trial court for consideration of what range and scope of discovery is appropriate given petitioners' challenges identified above. We believe the trial court should have the opportunity to do this against the backdrop of the clarified [Katzman I] opinion and with this court's decision in this case.

Thus, the rule to emerge from these decisions is that that there had to be a (1) direct referral relationship + (2) specific factual circumstances. In Steinger, Iscoe & Greene, P.A. v. GEICO, 103 So.3d 200, 205 (Fla. 4th DCA 2012), the Fourth District held that where there "is a preliminary showing that the plaintiff was referred to the doctor by the lawyer (whether directly or through a third party) or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor."

There was other language in Steinger, Iscoe, & Greene that may have appeared to relax the direct referral relationship requirement (103 So.3d at 205-06). If that was the panel's intent, however, it was not clearly laid out. Then last year, in Lytal, Reiter, Smith, Ivey & Fronath v. Malay, 133 So.3d 1178 (Fla. 4th DCA 2014), the Fourth District's brief Opinion allowed the defendant to obtain financial

discovery of the treating physician's relationship to the plaintiff's law firm. The decision made no mention of whether there was a referral relationship, and no mention of the specific factual circumstances that could warrant the discovery.

In this case, the panel correctly noted that the Fourth District had also relied on a decision of the Second District for support (A9) (citing Morgan, Colling, & Gilbert, P.A. v. Pope, 798 So.2d 1 (Fla. 2d DCA 2000)). See also Brown v. Mittelman, 152 So.3d 602 (Fla. 4th DCA 2014) (stating that the treating physician financial discovery was "similar" to that approved in Pope, supra) rev. pending, SC15-101. But in Pope, the court denied certiorari relief to plaintiff's law firm from a trial court order permitting defendant to obtain copies of invoices submitted by the plaintiff's expert witnesses, ("trial experts") to the plaintiff's law firm over the last three years. The Second District noted that the plaintiff's law firm had "hire[d]" these "trial experts" in a medical malpractice action (798 So.2d at 3).

Accordingly, the panel in this case (like the Fourth District) missed the mark in claiming there is well-established precedent for its decision. There is precedent, but it is hardly well-established. And it has never been approved by this Court outside the arena of retained expert witnesses.

Moreover, just as significantly, whatever one is to say of the recent precedent in the intermediate district courts, fact-specific circumstances mattered in at least some of these outcomes. See, e.g., Katzman II. It does not appear the

panel in this case gave any consideration to those fact-specific circumstances. To the extent YMCA contends the charged medical bills are exorbitant, the financial discovery is not directed at addressing the cost of the medical care.[1]

We point out the Fifth District's mistaken view of the past precedent only because it leads to more important matters at hand. These past decisions failed to recognize the essential premise that treating physicians serve a fundamentally different role than retained expert witnesses. For over three decades, courts recognized that treating physicians are not analogous to retained experts for the purposes of Fla.R.Civ.P. 1.280. See, e.g., Frantz v. Golebiewski, 407 So.2d 283, 285 (Fla. 3d DCA 1981) (expert witness discovery rule did not apply to statement taken from treating dentist). More important than whether Rule 1.280 is a guide, though, is the rationale for why treating physicians are not analogous.

The distinction is based on two important themes: (1) a treating physician "does not acquire his [or her] expert knowledge for the purpose of litigation, but rather simply in the course of attempting to make his [or her] patient well," id., and (2) a treating physician "is typically testifying … concerning his [or her] … own medical performance on a particular occasion and is not opining about the performance of another." Fittipaldi USA, Inc. v. Castroneves, 905 So.2d 182, 186

[1] Indeed, as touched on below, if anything it is Ms. Worley's Letter of Protection with her treating physicians that YMCA could argue is connected to Ms. Worley's allegedly exorbitant medical bills.

(Fla. 3d DCA 2005); see also Ryder Truck Rental, Inc. v. Perez, 715 So.2d 289 (Fla. 3d DCA 1998) (injured motorist's treating physicians should not have been classified as expert witnesses, nor subject to one expert per specialty rule imposed by trial court). Winn-Dixie Stores, Inc. v. Miles, 616 So.2d 1108 (Fla. 5th DCA 1993) expanded upon this theme. In Miles, the Fifth District addressed a defendant's request to learn whether the treating physician had derived a significant part of his income from plaintiff's attorney. Contrasting treating physicians with retained experts, the court stated (Miles, 616 So.2d at 1111):

> [E]xpert witnesses inject themselves into litigation and, by so doing, impliedly waive any right to object to invasive discovery requests designed to reveal bias. In the instant case, however, [the treating chiropractor] is not an expert witness. Rather, he is the plaintiff's *treating physician*. He did not choose to participate in this litigation but merely agreed to treat a patient who sought out his services.

(emphasis in original). The court concluded that where no specific evidence had been presented as how the requested financial information would show bias by the treating physician, the defendant would be prohibited from obtaining this information from the treating physician. The direct evidence of a referral relationship in the particular case and case-specific circumstances should be threshold factors. The panel in this case lost sight of these important considerations; we urge this Court to do so now.

B. The Fifth District's Decision Will Likely Chill the Participation of Treating Physicians for Patients Who are Involved in Accidents

We agree in full with Ms. Worley's argument presented in Point III of her Initial Brief. Ms. Worley is one litigant rightly concerned about having a fair trial. This organization, with over 4,000 attorneys, is well-aware of the ongoing impact in hundreds of thousands of cases on an annual basis concerning the financial discovery requested in this case, and the implications on patients, physicians who treat victims injured in accidents, and attorneys who represent these victims.

It is no exaggeration to state that if it is open-season on financial discovery, treating physicians will be more wary of treating patients who may be end up in litigation. The FJA is very concerned about this result, which will hinder the ability of patients injured in an accident to receive quality medical care. This is particularly true when intrusive, detailed financial discovery is either requested or (so far as) authorized as in the instant case. There is also no sound reason financial discovery can be broader for treating physicians than for retained expert witnesses. The Fifth District's decision will lead to this unmistakable path.

Indeed, the consequence of the Fifth District's decision is that trial judges will be left to fend to themselves to address treating physician discovery. Such ad-hoc case-by-case inconsistency is unfair to unfair to those injured in accidents, unfair to treating physicians, and unfair to those attorneys who represent these

people. It is also, frankly, unfair to trial judges who must wade through an area of the law without any guidelines from a rule of civil procedure or this Court.

Ms. Worley's Initial Brief addresses the history of retained expert bias discovery. Rule 1.280 (b) discovery of retained experts emerged from the Third District's crafting of rules in Elkins, which were then approved in full by this Court. See Syken v. Elkins, 644 So.2d 539 (Fla. 3d DCA 1994), approved, 672 So.2d 517 (Fla. 1996). The FJA believes it is essential to trial judges and attorneys if this Court similarly crafted a series of rules concerning treating physicians. Within these rules, financial discovery, if permitted, should be no greater than that permitted under Rule 1.280 for retained expert witnesses.

The FJA is concerned that the impact of the panel's decision will be to deter and chill treating physicians from treating patients who are either in litigation, or who may be in litigation in the future. This is the reason why this Court placed limits on discovery for those expert witnesses (plaintiff and defendant) who voluntarily inject themselves into litigation as retained expert witnesses. See Elkins; Boecher, supra. The decision on review has now expanded the discovery from treating physicians who do not voluntarily inject themselves into litigation; indeed, they often begin treatment when there is no litigation at all.

Even setting aside for the moment the cost for compliance, the discovery requested in this case is more expansive than for retained experts. While the trial

court has, so far, not granted the entirety of YMCA's discovery requests, it appears this will occur if YMCA establishes a referral relationship. (And regardless of the specific factual circumstances at issue in this case). YMCA requested discovery far beyond that which this Court approved for expert witnesses under Rule 1.280, absent "unusual or compelling circumstances." Fla.R.Civ.P. 1.280(b)(5)A)(iii). The retained expert witness exception has also been narrowly interpreted by many courts. E.g., Grabel v. Roura, 2015 WL 5244652 (Fla. 4th DCA Sept. 9, 2015). Why should there be more expansive rules for treating physicians? The retained experts have voluntarily injected themselves into cases, and are compensated for their opinions that they have been hired to give. Ms. Worley's treating physicians provided her medical care. It is not sensible that there would be no rules in place for these treating physicians, yet there are rules in place for retained expert witnesses. Those expert witnesses appear because of the opinion they will offer in that case; otherwise they become replaced experts, or never-retained experts.

The FJA has observed up close the concerns expressed by treating physicians who are inundated by these discovery requests. Many treating physicians will be deterred from treating patients who are involved in accidents. It is well-known that in many communities there are shortages of physicians who treat patients injured in motor vehicle crashes or, indeed, in any situation where litigation is possible. Many physicians do not want to have their practices

disrupted by the possibility of litigation through depositions and trials. Many physicians do not want to face the possibility that they could be accused of worsening the condition of someone injured by some prior incident.

It is precisely because of this shortage of physicians that in many communities there is a small group of treating physicians who treat many of the patients who are injured. In turn, there often are only a small group of treating physicians who become involved in litigation through depositions and trials.

Requiring treating physicians to keep Boecher-like records and be subject to Boecher discovery (or be subject to even broader record-keeping as a general principle, as now authorized by the panel) would likely have a devastating effect on these physicians' willingness to treat patients injured from accidents. Again, a treating physician does not voluntarily inject himself or herself into litigation. Having one's credibility questioned and undermined as reflected in the discovery in this case, where the only concern is to make patients better, is an issue that many more treating physicians will sit out.

This Court, in the context of discovery pertaining to hired expert witnesses, recognized that the scope of discovery requests can have a "chilling effect on the availability of expert witnesses." Elkins, 672 So.2d at 519 (emphasis added). This Court's limit on expansive discovery was "forestalling" any such effect, and its decision "equally" affected plaintiffs and defendants. Id.

The possibility of a chilling effect regarding treating physicians is not fanciful. Retained experts inject themselves into litigation, often at high compensation and instead of providing medical care to patients. There is no equality regarding patients and their relationships to treating physicians. Patients do not choose to become injured. The plaintiff only chose to receive medical treatment so she could feel better and recover to the best of her capability from those injuries. If the number of physicians willing to treat patients who have been injured on account of negligence decreases, patients will have even fewer physicians to choose from. The fewer the physicians, the greater the ratio of patients to physicians. Naturally, such an influx could lead to: greater distances patients must travel to obtain treatment, decreased quality of treatment due to a high number of patients; increased costs for medical treatment, and increased wait times for treatment. In turn, this will also disproportionately impact those who lack health insurance or the ability to pay for medical care.

It is also obvious that as there are fewer physicians willing to treat those injured in accidents, those victims will naturally ask their counsel for recommendations on where to receive the treatment. It is ironic that defendants who succeed in driving treating physicians out of providing medical care for accident victims will then claim there is "bias" by the small number of remaining

treating physicians willing to still provide the medical care, on account of some connection to the plaintiff's counsel.

Many defendants are also near-sighted with these broad, intrusive and expensive discovery requests. Less available medical care, and less competent medical care, will result in worsening injuries. The tortfeasor will be liable for subsequent medical care which makes an injury worse. See, e.g. Nason v. Shafranski, 33 So.3d 117 (Fla. 4th DCA 2010). Even if there is not worse medical care, the treating physicians will not do as good a job to alleviate medical conditions. This will increase the amount of compensation sought by plaintiffs in litigation, which will lead to lengthier case management, and additional costs imposed on defendants. Public-policy is not furthered by those consequences.

C. The Effect of this Court's Ruling May Serve to Deny Access to the Courts

Besides the repercussions that will affect the ability of patients to receive quality medical care, with the panel's decision, patients face the genuine possibility that when they receive medical care, the treating physicians will be limited in their capacity as witnesses. This may result in a denial of access to the courts.

In this case, the Fifth District ignored the implications of its decision as to Ms. Worley, and any others who will obviously face similar discovery requests. Ms. Worley objected to the discovery in part because she was being ordered to

produce non-existent documents (A14). The Fifth District commented that if Morgan & Morgan does not have existent documents in response to the discovery requests, all that Ms. Worley will do is "state as much, and her obligation to produce the first type of discovery under the court's order would be satisfied" (A14).

But the Fifth District failed to consider the next step. Where a retained expert does not comply with Elkins and Boecher discovery, a party may move to strike that retained expert witness. See, e.g., Sardinas v. Lagares, 805 So.2d 1024 (Fla. 3d DCA 2002) (trial court excludes defense compulsory medical examiner for failing to produce documents); and Allstate Ins. Co. v. Mazzorana, 731 So.2d 38 (Fla. 4th DCA 1999) (although reversing trial court's decision to strike defense expert for giving incomplete deposition and interrogatory answers, noting that the trial court could strike the expert if violating a court order). These consequences may be warranted in light of the fact there was:

- An en banc Opinion from the Third District, crafting rules of the limited scope of financial discovery for retained expert witnesses;
- This Court's approval of those rules; and
- This Court's approval of Rule 1.280 (b)(5)(A).

There are, of course, presently no rules in place for treating physicians. But since the panel in this case analogized the discovery directed at Ms. Worley to that

of retained experts, it is obvious what the next step is: YMCA and like-minded defendants will move to strike the treating physicians from testifying as witnesses. Of course, a plaintiff does not choose to retain a treating physician for trial. A plaintiff is treated by the physician, often over years. A plaintiff treated by her physician cannot recover compensation without the treating physician's testimony at trial. Without the testimony, plaintiffs will be unable to prove their case.

There can be no comparison to sanctions against retained expert witnesses who do not retain Boecher records, or decline to provide those records. (Or plaintiff's attorneys who do not retain the records, or do not turn over the records). Those hired experts, again, voluntarily inject themselves into litigation. If they do not keep or turn over those records, and are stricken from a trial, the party who hired that expert (the plaintiff or defendant) will bear the consequences for the hiring decision. See Elkins, 644 So.2d at 547 (plaintiff and defense attorneys are "on notice to only retain reputable physicians").

The Fifth District also rejected Ms. Worley's argument that the order improperly required her counsel to produce the discovery (A14). The Fifth District noted in passing that Ms. Worley "can of course" seek the information from her attorney if necessary (A14). [2] Again, though, there is no meaningful comparison to

[2] The Fifth District did not consider the possibility a person's attorney declined to produce the information, or declined to pay the costs, such as the costs in the instant case.

lawyers who retain expert witnesses for litigation, and law firms who have had a financial relationship with those retained expert witnesses in other cases. Ms. Worley cannot compel her attorney to produce the information, and her cause of action will likely be eviscerated without the treating physician's testimony. A party can proceed in a case without a retained expert witness, including simply retaining another expert witness. A plaintiff cannot replicate the testimony of her treating physician with another medical doctor. Again, there is no meaningful comparison to sanctions where retained expert witnesses do not retain or decline to provide Boecher records.

Indeed, before the decision to hire a retained expert is made, the plaintiff or defendant's agent can specifically ask that (soon-to-be retained) expert whether the information is being maintained at a minimum over the last three years. If the answer is no, that plaintiff or defendant can choose to hire a different expert who is willing to inject herself into the lawsuit while complying with record-keeping as mandated under Elkins and Boecher.

There is no analogy where a patient independently selects a treating physician. It is not realistic to expect a person to ask a treating physician if he or she keeps records of financial relationships to law firms, and specific, detailed income records for the past three years of the physician's entire medical practice. A layperson likely has no idea there are any such requirements for any witnesses.

Moreover, it would be fundamentally unfair to require patients to solicit the information requested in the discovery request from physicians before they begin or during their medical treatment. Patients should be permitted to be treated by the doctor they feel will provide the most competent medical care, not the doctor who is adept at keeping financial records regarding other patients. The end result is that the panel decision will lead to treating physicians stricken from testifying in cases where patients are powerless to avoid that consequence. Yet, the patient made a simple choice to seek out the most competent medical care instead of concerning herself with a doctor's relationship with a law firm and recordkeeping habits. Such a result is neither sound nor just and would deny a plaintiff his or her day in Court.

Notably, the Fifth District's decision authorizes financial discovery even where there is no connection in the case at issue between the plaintiff's counsel and the treating physician. The circuit court's order in this case, after all, expressly allows wide-ranging discovery (costing Morgan & Morgan approximately $120,000) without the evidence of a referral relationship, and without fact-specific circumstances (A5-6). How can Ms. Worley face the consequences -- and costs of compliance -- if she was never referred to a treating physician at all? Or without consideration to the medical treatment she receives? It is not logical that Ms. Worley and others like her are placed in the middle of financial discovery of "bias"

because of decisions made in other cases, and other factors concerning the quality of medical care available to accident victims.

D. The Use of a Letter of Protection Already Provides Evidence of Alleged Bias

The premise behind allowing YMCA access to either the so-called limited discovery so far, or the more "expansive" discovery still contemplated in this case, is that the treating physicians are biased to testify in favor of Ms. Worley. Yet, she signed a Letter of Protection, thereby ensuring her treating physicians already have a direct outcome in the litigation because of this agreement she executed. See Carnival Corp. v. Jimenez, 112 So.3d 513, 517 n.3 (Fla. 2d DCA 2013) (explaining Letters of Protection).

The use of a letter of protection in this case was routine, as this is par for the course in most accident cases involving people who lack health insurance or funds for up-front medical care. The letter of protection will be admissible at trial to establish bias. Pack v. Geico Gen. Ins. Co., 119 So.3d 1284 (Fla. 4th DCA 2013). This raises the obvious question: what is to be gained from any of the financial discovery requested by YMCA? The jury will already hear the defense argue that the treating physicians have a direct interest in testifying favorably for the plaintiff: if the jury awards money for past medical bills, the bill gets repaid. If the jury awards only some of the money or no money, the treating physician will have to

seek recovery from a plaintiff who lacks funds to pay. The jury will understand the potential bias, in other words.

It follows that the discovery requested in this case will add nothing to the case. You cannot bring more bias to a case than having a direct financial stake in the outcome of what the jury awards. The discovery requested in this case suggests at best, an implication of an indirect financial stake. The Fifth District ignored that the requested discovery adds nothing to this case. This Court should craft a series of rules that applies the fact-specific circumstances in cases. The panel decision, left intact, is harmful to those who are injured in accidents that may result in litigation.

CONCLUSION

For the reasons stated above, and for the reasons set forth in Petitioner's Initial Brief, this Court should quash the Fifth District's decision. If this Court is to authorize discovery at issue in this case and other cases, this Court should craft limited, defined rules. There are marked differences between retained experts and treating physicians in the litigation process, and rules should take these differences into account.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on November 2, 2015.

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CERTIFICATE OF TYPE SIZE & STYLE

Amicus Curiae, the Florida Justice Association, hereby certifies that the type size and style of the Amicus Brief of the Florida Justice Association In Support of Petitioners is Times New Roman 14 pt.

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