No. 94872-1

SUPREME COURT OF THE STATE OF WASHINGTON

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LISA BARTON, an individual,

Appellant,

v.

DR. STEVEN SANDIFER, D.C., and JANE DOE SANDIFER, individually and the marital community, and CHAMPION CHIROPRACTIC CENTER, INC., a Washington Corporation,

Respondents,

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# RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## A. IDENTITY OF RESPONDENTS

The Respondents are Steven Sandifer, D.C., and Champion Chiropractic Center, Inc., who are also the defendants in the trial court.

## B. ISSUE PRESENTED FOR REVIEW

Should the Supreme Court deny discretionary review since the Court of Appeals applied well-established legal principles and soundly opined that because Petitioner Barton failed to produce competent expert testimony to support essential elements of her medical malpractice and informed consent claims, summary judgment dismissal was proper. None of the considerations governing acceptance of review under RAP 13.4(b)(1)-(4) are met; review should be denied.

## C. STATEMENT OF THE CASE

### 1. MS. BARTON'S INITIAL VISIT

Appellant Lisa Barton (DOB 09/30/80) visited Respondent Dr. Sandifer on July 14, 2014, complaining of lower back and neck pain, headaches, and nausea.[1] Clerk's Papers (CP) 17. Ms. Barton stated that

[1] Dr. Sandifer submitted medical information from Ms. Barton's medical records to the trial court and here simply for background and context of her treatment before she filed a lawsuit. In the trial court, Ms. Barton did not object to the medical reports, and instead relied on them in her Response to Summary Judgment. *See* CP 66-67. Dr. Sandifer could and can just as easily rely exclusively on Ms. Barton's Complaint in moving for summary judgment dismissal. *See* CR 56(b) (the defending party "may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.") Ms. Barton's Complaint alleges that "On or about July 22, 2014, Defendant performed chiropractic manipulation upon the plaintiff. The manipulation was performed negligently and without Plaintiff's informed consent. As a direct and proximate result, Plaintiff sustained a stroke, and accompanying injuries and damages." CP 4:22-5:2.

nothing helped relieve her pain and that it interfered with her sleep. CP 17. During the initial visit, Dr. Sandifer performed an extensive examination, including x-ray imaging, and determined that Ms. Barton suffered from a loss of cervical spine curve; mild post-body spurring at C3 vertebrae; rotation at C1/C2 vertebrae; and rotations at T11 and T2 vertebrae. CP 21-22. Dr. Sandifer diagnosed Ms. Barton with Spinal NMS dysfunction, cervical/cranial headaches, lumbar radiculitis, postural imbalance, and decreased range of motion. CP 23; CP 25. Dr. Sandifer's treatment plan was to perform chiropractic spinal adjustments three times per week for one week, two times per week for three weeks, and one time per week for six weeks; the treatment plan also included extremity treatment on Ms. Barton's hip joint. CP 23.

### 2. MS. BARTON SIGNED AN INFORMED CONSENT FORM.

Prior to treatment, Ms. Barton signed and dated an informed consent form. CP 32. Her signature acknowledged that receiving chiropractic adjustments and therapy exposed her to "some risks to treatment including, but not limited to, fractures, disc injuries, **stroke**, dislocations, sprains/strains, physiotherapy burns, and soft tissue injury." CP 32. Ms. Barton also acknowledged that there were other "forms of treatment" to chiropractic care and the ability to "opt[ ] out of any and all

treatment." CP 32. Ms. Barton admits that she signed the informed consent form. App. Opening Br. at 4.

### 3. MS. BARTON HAD TWO CHIROPRACTIC ADJUSTMENTS.

On July 16, 2014, Ms. Barton returned to Dr. Sandifer for her first chiropractic adjustment. CP 29. The medical records do not indicate that Ms. Barton complained of any pain or discomfort. CP 29. When Ms. Barton returned for her second adjustment on July 22, 2014, she reported that her pain symptoms *improved* after the first July 16 adjustment. CP 30. Her Complaint only alleges that the July 22, 2014 treatment was negligent. CP 4.

### 4. TWO DAYS LATER, MS. BARTON HAD A STROKE: CAUSE UNKNOWN.

On July 24, Ms. Barton was admitted to Mason General Hospital where an MRI report stated "three foci of acute ischemia" stroke. CP 43. She was then transferred to Providence St. Peter Hospital ("Providence") and received extensive testing, including a full serological workup, an MRI of her brain and spinal cord, an ultrasound of her lower extremities, an echocardiogram, and a computed tomography angiogram of her neck. CP 40-43.

The MRI report regarding the imaging of Ms. Barton's brain states "no frank blood clot or luminal irregularity of the visualized bilateral distal vertebral artery and basal artery." CP 43. The MRI report of Ms.

Barton's cervical spine showed was similarly unremarkable, showing no evidence of focal disc hernia, fracture, or soft issue injury; and further, the report states "[n]o evidence of vertebral artery dissection or luminal irregularity" and no focal blood clot adjacent to the bilateral vertebral arteries. CP 43. The CTA report stated similar results, finding no evidence of a right vertebral artery dissection. CP 43.

Based on the MRIs and other testing, specialists at Providence reported "no clear cause for a stroke was found" and reported a diagnosis of "cryptogenic bilateral cerebellar hemispheric ischemic strokes." CP 42; CP 40. Providence discharged her on July 28, 2014. "Cryptogenic" means "unknown etiology."

A few weeks later, Ms. Barton followed up with her neurologist, Dr. Ramneantu, because she was experiencing cervical pain, mild depression, mild ataxia, and impairment of coordinated eye control. CP 45-46. Because Ms. Barton's stroke etiology was undetermined, Dr. Ramneantu recommended lifelong aspirin therapy, and advised that she could return to work. CP 46.

### 5. MS. BARTON FILED SUIT AGAINST DR. SANDIFER, ALLEGING MEDICAL MALPRACTICE AND FAILURE TO GIVE INFORMED CONSENT.

Several years later, in February 2016, Ms. Barton filed a lawsuit against Dr. Sandifer and Champion Chiropractic Center, simply alleging

that the July 22 adjustment "was performed negligently and without Plaintiff's informed consent." CP 4:23. She alleged that as "a direct and proximate result, Plaintiff sustained a stroke, and accompanying injuries and damages." CP 5:1-2. Dr. Sandifer's Answer denied allegations of liability or causation, and asserted affirmative defenses. CP 7-8.

### 6. DR. SANDIFER MOVED FOR SUMMARY JUDGMENT DISMISSAL.

Seven months later, on September 2, 2016, Dr. Sandifer moved for summary judgment dismissal of Ms. Barton's two claims because she had no competent medical expert witness opining that: (1) Dr. Sandifer breached the requisite standard of care; (2) the breach more likely than not proximately caused her injuries; and (3) Dr. Sandifer failed to inform her of a material fact relating to the treatment; she consented to the treatment without being aware or fully informed of the material fact relating to her treatment; and that the treatment proximately caused her injury. CP 11; CP 57-61.

In response, Ms. Barton did not submit medical expert testimony to support her medical negligence and informed consent claims. She did not rely on deposition testimony, interrogatory answers/responses, answers to requests for admissions, or any other form of admissible discovery.

Instead, she relied on the medical records submitted by Dr. Sandifer (for context), and her own declaration. CP 66-67; CP 75-78. Ms. Barton admitted that she signed the informed consent form (CP 76:3-4), but stated that "nobody went over its contents with me." CP 76:4-5. Ms. Barton's declaration also opined that in January 2015, Dr. Sandifer "apologized profusely" and "told me that he had '"had not been able to sleep for a month'" after my stroke because he was so upset at having caused it." CP 77:4-6. Dr. Sandifer's alleged statements to Ms. Barton were not gleaned from discovery answers, requests for admissions, depositions, or any other form of admissible discovery.

The parties continued the September 2 summary judgment hearing twice: to September 23, 2016, then to September 30. CP 91. Despite that one-month delay, Ms. Barton still did not secure expert medical opinion to support her claims, nor did she depose Dr. Sandifer. On September 30, 2016, the Honorable Carol Murphy heard oral argument. Verbatim Report of Proceedings (VRP) 4-21 (Sept. 30, 2016)).

Ms. Barton argued she was not seeking a continuance of the summary judgment hearing, (VRP 10:19-20) but that she had another three and a half months to identify experts according to the deadline in the Case Scheduling Order, therefore the motion for summary judgment was premature. (VRP 10:22-11:3) "I clearly believe this motion should be

denied, because it's in direct conflict with the letter and certainly the spirit of the case schedule[.]" (VRP 14:8-11)

The trial court challenged her argument, stating that "every case schedule has deadlines for disclosure, but when a motion for summary judgment is filed, the non-moving party then has obligations under the rules." (VRP 14:21-24) In response, Ms. Barton explained that her own process was to first depose the defendant; obtain medical records; then "we begin the process of finding experts who are willing to step into a medical malpractice case and form opinions." (VRP 15:24-16:3-5) Here, Ms. Barton had not taken Dr. Sandifer's deposition and had not retained a medical expert witness—contending that she still had three months to identify one. (VRP 17:2-7) Her response is significant because: (1) none of the steps in the process was taken; and (2) she clearly acknowledged the necessity of "finding experts who are willing to step into a medical malpractice case and form opinions."

Ms. Barton also argued that her own declaration, wherein she stated that Dr. Sandifer "agreed that his treatment caused her stroke" was (1) admissible; and (2) sufficient to defeat the summary judgment motion. (VRP 11:4-18) She also contended that Dr. Sandifer's apology was sufficient to prove that he breached the standard of care and that the breach proximately caused his injuries. (VRP 12:1-13).

The trial court challenged these arguments. "Counsel, are you aware of any cases in which the defendant's own words have been used to justify a denial of summary judgment when the defendant's words to the court record only through the declaration of the plaintiff?" (VRP 12:15-18) Ms. Barton's counsel answered "No, I am not aware of any reported case discussing that issue, but I think you get there through the traditional Rules of Evidence." (VRP 12:19-21)

Dr. Sandifer objected to Ms. Barton's declaration and argued that he had expressly denied negligence in his Answer, and that Ms. Barton's self-serving declaration "is not the proper medical expert testimony establishing a breach in the standard of care and a proximate cause of the plaintiff's injuries. That is simply not the law in the state of Washington." (VRP 17:19-23)

Ms. Barton admitted that expert testimony is required to support her informed consent claim. "In terms of the informed consent issue, the law requires some expert testimony of the risks involved, and their informed consent form, which they offer as evidence of satisfaction of their duty to inform my client of the risk, I submit is sufficient evidence that there is some risk of this." (VRP 13:19-24)

Judge Carol Murphy granted Dr. Sandifer full summary judgment dismissal, with prejudice. CP 101-02. The trial court ruled that: (1) even

though the motion for summary judgment was filed earlier than usual, "the legal standard that is imposed on the non-moving party" is "quite clear." (VRP 19:17-19) The trial court noted that Ms. Barton had not moved for a continuance under CR 56(f), and that the record did not support a continuance, even if she had. (VRP 19:20-23)

Ms. Barton appealed the order of dismissal. CP 103. On July 25, 2017, the Court of Appeals affirmed (without oral argument) the dismissal in an unpublished decision (appended to Petitioner's Petition for Discretionary Review). The Court of Appeals found that Ms. Barton failed to produce competent expert testimony to support essential elements of her claims. *Barton v. Sandifer*, No. 49516-3, slip op. (WA Div. II July 25, 2017).

## D. ARGUMENT

### 1. THIS CASE DOES NOT SATISFY THE CONSIDERATIONS GOVERNING REVIEW.

Rules of Appellate Procedure (RAP) 13.4(b)(1)-(4) explain the "only" considerations the Supreme Court will apply when deciding whether to accept discretionary review. Here, Petitioner wholly ignores the criteria in his Petition. However, none apply because the Court of Appeals' decision does not conflict with a decision of the Supreme Court or Court of Appeals; does not involve a significant question of law under the state or federal Constitution; and does not involve an issue of

substantial public interest. RAP 13.4(b)(1)-(4). Because none apply, discretionary review should be denied.

### 2. SUMMARY JUDGMENT STANDARD OF REVIEW

The Court reviews summary judgment orders de novo and considers the evidence in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). The "'purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial[;] it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.'" *Keck*, 184 Wn.2d at 369 (alternation in original, emphasis omitted, internal quotations marks omitted) (quoting *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960)).

Summary judgment is appropriate only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c). A moving defendant may meet his burden to show no genuine issue of material fact by showing an absence of evidence to support the plaintiff's case. *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961, 964, 335 P.3d 1014 (2104). "The burden then shifts to the plaintiff to come forward with sufficient evidence to establish the existence of each essential element of the plaintiff's case." *Id.* at 964. "A

complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Repin v. State*, 198 Wn. App. 243, 262, 392 P.3d 1174 (2017).

### 3. THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT DISMISSAL BECAUSE MS. BARTON FAILED TO PRODUCE COMPETENT EXPERT TESTIMONY THAT (1) DR. SANDIFER BREACHED THE STANDARD OF CARE; AND (2) THE BREACH CAUSED MS. BARTON'S STROKE.

To establish medical malpractice, a plaintiff must prove (1) failure to meet the standard of care; and (2) proximate cause, namely that:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040; *see also Keck*, 184 Wn.2d at 370.

As a threshold matter, to defeat a dispositive motion, Ms. Barton needed to produce admissible expert testimony of "'what a reasonable doctor would or would not have done, that the [d]octor failed to act in that manner, and that this failure caused her injuries.'" *Barton v. Sandifer*, No. 49516-3-II, slip op. at 6 (WA Div. II July 25, 2017) (quoting *Keck*, 184 Wn.2d at 371).

Here, Ms. Barton failed to provide testimony from a competent medical expert witness that—on a more probable than not basis—Dr. Sandifer's July 22 chiropractic treatment fell below the standard of care. Instead, she submitted excerpts from her own self-serving declaration interpreting a conversation that she had with Dr. Sandifer after her stroke as "proof" that his treatment fell below the standard of care and proximately caused her injury. The Court of Appeals construed Dr. Sandifer's alleged apology as an admission of a party opponent. *See Barton v. Sandifer*, No. 49516-3-II, slip op. at 6 and 6 n.3 (quoting ER 801(d)(2)(i)).

Assuming arguendo that Ms. Barton's characterization of her conversation with Dr. Sandifer is admissible under ER 801(d)(2)(i), the Court of Appeals correctly determined that Dr. Sandifer's apology did not establish the standard of care or that he breached that standard. "Dr. Sandifer did not identify how he might have been negligent or what he did wrong. He did not state what a reasonable chiropractor would have done or how Sandifer failed to meet such a standard." *Barton v. Sandifer*, No. 49516-3-II, slip op. at 6. Ms. Barton agrees with the Court of Appeals because she expressly states that: "The Court correctly pointed out that Dr. Sandifer 'did not identify how he might have been negligent or what he did wrong. He did not state what a reasonable chiropractor would have

done or how Sandifer failed to meet such a standard.'" Petition at 8 (quoting *Barton v. Sandifer*, No. 49516-3-II, slip op. at 6).

Ms. Barton suggests that the statutory burden of proof in RCW 7.70.040 does not apply to her case because Dr. Sandifer purportedly offered a "profuse apology" and he has personal knowledge of his care and treatment. Petition at 9. Ms. Barton further analogizes a medical malpractice lawsuit to a *res ipsa loquitur* personal injury lawsuit. *See* Petition at 9. But she disregards the well-established law that RCW 7.70 exclusively governs all Washington civil actions based in tort, contract, or otherwise from damages arising from health care after June 25, 1976. RCW 7.70.010.

"RCW 7.70 modifies procedural and substantive aspects of *all* civil actions for damages for injury occurring as a result of health care, regardless of how the action is characterized." *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999); *see also Orwick v.* Fox, 65 Wn. App. 71, 86, 828 P.2d 12 (1992) ("By its terms, RCW 7.70 applies to all actions against health care providers, whether based on negligence or intentional tort.") Health care is "the process in which [a health care provider] utilize[es] the skills which [he or she] has been taught in examining, diagnosing, treating or caring for" the patient. *Branom*, 94 Wn. App. at 970-71 (citations omitted).

The Legislature has expressly limited medical malpractice actions against health care providers "to claims based on the failure to follow the accepted standard of care, the breach of an express promise by a health care provider, and the lack of consent." *Sherman v. Kissinger*, 146 Wn. App. 855, 866, 195 P.3d 539 (2008) (citing RCW 7.70.030).

For Ms. Barton's medical negligence claim to survive summary judgment, Ms. Barton was required to make a *prima facie* showing that: (1) Dr. Sandifer breached the acceptable standard of care; and (2) the breach was the proximate cause of Ms. Barton's injuries. RCW 7.70.040. The Court of Appeals properly affirmed dismissal, applying a de novo review. The Court should deny discretionary review of that decision.

Here, as in the Court of Appeals, Ms. Barton cites *White v. Kent Med. Ct.*, 61 Wn. App. 163, 172, 810 P.2d 4 (1991) for the proposition that experts need not use specific "standard of care" terminology, again in an effort to construe a purported apology as satisfying RCW 7.70.040. *See* Petition at 10. However, the Court of Appeal's holding is consistent with the rule from *White*: "here, Sandifer's apology is insufficient not because Sandifer failed to utter the phrase 'standard of care' but because the *substance* of Sandifer's apology was deficient." *Barton v. Sandifer*, No. 49516-3-II, slip op. at 7 (emphasis in original). Ms. Barton fails to address this critical distinction in her Petition for Discretionary Review.

Ms. Barton cites *Young v. Group Health Coop.*, 85 Wn.2d 332, 534 P.2d 1349 (1975) for the proposition that "admissions in the form of opinions are admissible." Petition at 13. However, her reliance on *Young* is misplaced. In *Young*, a defendant doctor made a statement in his *deposition* that conflicted with his *trial testimony*. *Id.* at 335-36. The Supreme Court held that the trial court erred in refusing to allow the plaintiffs to impeach the doctor *at trial* with his prior inconsistent opinion/statement made in his *deposition*. *Id.* at 335.

The Supreme Court also analyzed whether the agent/doctor's opinion/statement was admissible against the principal/defendant Group Health. The Court stated that "[w]hile we have been hesitant to allow the opinions of agents to serve as admissions in a suit brought against the principal, we feel that under the facts of this case it would have been proper." *Id.* at 337. Because the doctor was a speaking agent for Group Health, "his [deposition] statement does constitute an admission against Group Health." *Id.* at 338.

As the Court of Appeals explains here, "Barton's 'complete failure of proof' concerning an essential element of her medical malpractice case 'necessarily renders all other facts immaterial." *Barton v. Sandifer*, No. 49516-3-II, slip op. at 7 (quoting *Repin*, 198 Wn. App. at 262). Accordingly, the Court of Appeals held that the superior court properly

granted summary judgment and dismissed Barton's medical malpractice claim. *Barton v. Sandifer*, No. 49516-3-II, slip op. at 7.

### 4. THE COURT OF APPEALS CORRECTLY AFFIRMED DISMISSAL OF MS. BARTON'S INFORMED CONSENT CLAIM BECAUSE SHE FAILED TO PRODUCE COMPETENT EXPERT TESTIMONY.

Ms. Barton contends that because the informed consent form listed "stroke" as an "extremely rare" risk of treatment, she has shown that a stroke was a "material" risk of treatment, and that she can rebut the presumption of informed consent by her signature on the form. Petition at 12. But these are not the legal principles for informed consent cases in Washington.

To establish a prima facie case of informed consent, the plaintiff must show:

> (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
>
> (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
>
> (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
>
> (d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1); *see also Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 664, 975 P.2d 950 (1999). "Washington takes an 'objective approach' to lack of informed consent, so that the relevant inquiry is what a reasonably prudent patient under similar circumstances would have done." *Barton v. Sandifer*, No. 49516-3-II, slip op. at 8 (quoting *Backlund*, 137 Wn.2d at 666 (citing RCW 7.70.050(1)(c)).

A "material fact" is a fact that "a reasonably prudent person in the position of the patient . . . would attach significance to [when] deciding whether or not to submit to the proposed treatment." RCW 7.70.050(2). Here, Ms. Barton must establish the following material facts by expert testimony:

> (a) The nature and character of the treatment proposed and administered;
>
> (b) The anticipated results of the treatment proposed and administered;
>
> (c) The recognized possible alternative forms of treatment; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

RCW 7.70.050(3) (a)-(d).

The materiality determination is a two-step process. First, the scientific nature of the risk must be determined, including the nature of the

harm and the probability of its occurrence. *Seybold v. Neu*, 105 Wn. App. 666, 681, 19 P.3d 1068 (2001) (citing *Smith v. Shannon*, 100 Wn.2d 26, 31, 666 P.2d 351 (1983)). The trier of fact then determines whether that probability of harm is a risk a reasonable patient would consider in deciding on treatment. *Id.*

The first step requires expert testimony because "'[o]nly a physician (or other qualified expert) is capable of judging what risks exist and their likelihood of occurrence. . . . Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an informed decision.'" *Id.* at 682 (quoting *Smith*, 100 Wn.2d at 33-34). For this reason, expert testimony is required to "prove the existence of a risk, its likelihood of occurrence, and the type of harm in question." *Id.; see also Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 634, 784 P.2d 1288 (1990) (affirming trial court's summary judgment dismissal where plaintiff failed to adduce any expert support for informed consent claim).

Because Ms. Barton failed to produce medical expert testimony to support her informed consent claim, the Court of Appeals affirmed the trial court's dismissal, as a matter of law. Here, the Supreme Court should likewise deny discretionary review because the Court of Appeals' decision

is well-grounded in settled law. None of the criteria in RAP 13.4(a)-(d) apply.

## 5. CONCLUSION

Respondents Dr. Sandifer and Champion Chiropractic respectfully request that the Supreme Court deny discretionary review because the Court of Appeals applied well-established legal principles and soundly opined that because Petitioner Barton failed to produce competent expert testimony to support essential elements of her medical malpractice and informed consent claims, summary judgment dismissal was proper.

Respectfully submitted this 2nd day of October, 2017.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the dated noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner noted below:

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DATED this 2nd day of October, 2017.

Susan L. Klotz
Legal Assistant

## FLOYD PFLUEGER & RINGER PS

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