NO. 90502-9

SUPREME COURT OF THE STATE OF WASHINGTON

COURTNEY ROBINSON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON, and,
FOOTBALL NORTHWEST, LLC,

Respondents.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER

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I. INTRODUCTION

The Department of Labor and Industries (Department) opposes further review of this Industrial Insurance Act case. *See Robinson v. Dep't of Labor & Indus.*, __ Wn. App. __, 326 P.3d 744 (2014). Substantial evidence supports the Court of Appeal's determination that a professional football player interviewing for a position with the Seattle Seahawks did not become a Seahawks employee when he tried out for the team. Courtney Robinson's attempt to reweigh the evidence in this regard does not present an issue meriting review.

Job applicants are not employees under RCW 51.08.180 and RCW 51.32.010. A claimant must establish he or she was an employee at the time of injury to receive workers' compensation benefits.[1] RCW 51.08.180; RCW 51.32.010. Robinson's request to circumvent RCW 51.08.180 and RCW 51.32.010 with an extra-statutory exception for athletes injured while trying out for a professional sports team does not warrant review. His request does not present an issue of substantial public interest because it is inconsistent with decades of precedent requiring an employment relationship for workers' compensation coverage as

[1] The only exception from the requirement of an employment relationship in RCW 51.08.180 is for certain independent contractors. This case does not implicate such workers.

confirmed by the plain language and purpose of the Industrial Insurance Act, RCW Title 51. Robinson's petition should be denied.

II. COUNTERSTATEMENT OF ISSUES

Review is not warranted in this case, but if review were accepted, the issues presented would be:

1. Does substantial evidence support the superior court's findings that the Seahawks lacked the right to control Robinson's physical conduct in the performance of his duties and that there was no mutual consent to the formation of an employment relationship when Robinson was free to leave the tryout at any point, the parties did not enter into an employment contract, and Robinson acknowledged he was not a Seahawks employee?

2. Under RCW 51.08.180 and RCW 51.32.010, workers' compensation benefits are only available to employees injured in the course of employment. Do RCW 51.08.180 and RCW 51.32.010 provide an exception to the employment requirement for job applicants injured while trying out for professional football teams when the parties agree no employment relationship exists?

III. COUNTERSTATEMENT OF THE CASE

A. Robinson Voluntarily Participated in the Job Interview Tryout and Agreed in Writing That He Was Not an Employee of the Seahawks

Robinson injured his knee while trying out for a defensive back position with Football Northwest, LLC, commonly known as the Seattle Seahawks. At the time of the injury, Robinson was a free agent. BR

Robinson 54-56.[2] He understood the process for obtaining a contract with a National Football League team, as he had previously tried out with other teams and contracted with the Philadelphia Eagles. BR Robinson 28-29.

The pool of potential Seahawks players is in the thousands. BR John Idzik 7-9. The Seahawks invite potential players to interview with the team by participating in mini-camps. BR Idzik 6. The tryout gives an applicant a chance to compete for a job by showing off his "skills and talents[.]" BR Paul Bradley 8; BR Robinson 53-54. Participation in the tryout is "purely voluntary on the part of the player" and involves no "contractual commitments[.]" BR Idzik 10, 11. In 2010, approximately 100 players tried out for or visited the Seahawks; of those, 22 were offered contracts. BR Idzik 12.

From the team's perspective, the tryout allows them "to bring the player in, meet the player, talk to him, give him a physical exam . . . and actually run him through the paces and witness his movement firsthand[.]" BR Idzik 10. Unlike a real football game, players do not wear the normal amount of protective padding and no physical contact between players is allowed. BR Idzik 29-30. Additionally, while the team may ask an applicant to participate in drills and a physical examination, "if the player does not desire to do any of that, he does not have to." Br Idzik 17. The

[2] The certified appeal board record is cited as "BR." Witness testimony is referenced by the witness's name.

only players the team "can govern, with mandatory rules and discipline, would be players under contract." BR Idzik 17.

Robinson was invited to try out for the Seahawks by participating in a mini-camp in April 2010. BR Robinson 29. As part of the interview process, the Seahawks arranged and paid for Robinson's flight, transportation, lodging, and meals. BR Idzik 19. They did not compensate Robinson for his time or pay him a per diem. BR Idzik 19.

The first day of the mini-camp interview involved a physical examination and orientation. BR Robinson 31-32. During the orientation, Seahawks personnel explained participation in the tryout did not guarantee an applicant a contract with the team. BR Idzik 12; BR Bradley 8. Applicants were also presented with a release form stating they were not Seahawks employees and were assuming the risk of any injury that might occur during the camp. BR Idzik 10-11. The release was then verbally explained to the applicants. BR Idzik 11. Robinson signed the release stating he was not a Seahawks employee. BR Ex. 1; BR Robinson 54.

On the second day of the interview, while participating in a physical agility drill, Robinson injured his knee. BR Robinson 36. The Seahawks arranged for him to return home. BR Robinson 42. Robinson was not offered a contract with the Seahawks. BR Idzik 16.

B. The Board and the Trial Court Found Robinson Did Not Prove Control or Mutual Consent to Form an Employment Relationship by Voluntarily Participating in a Job Interview

Robinson filed a claim for workers' compensation benefits. BR Robinson 47. The Department rejected his claim because he was not a Seahawks employee at the time of his injury. BR 33-35. Robinson appealed to the Board of Industrial Insurance Appeals (Board). BR 30-32. After an evidentiary hearing, the Board affirmed the Department's order rejecting Robinson's claim. BR 1, 12-17. The Board found Robinson was not an employee at the time of his injury because he understood his participation was voluntary, agreed he was not an employee, received no wages, and the Seahawks gained no benefit from his participation. BR 16-17.

Robinson appealed to superior court. The superior court found Robinson was a free agent, understood his participation was voluntary, and was free to leave the tryout at any time. CP 45. It also found Robinson knew he did not have a contract with the Seahawks and an employment relationship was not formed by merely participating in a try-out. CP 45-47. The court found Robinson did not receive any wages. CP 46. Similarly, it found neither Robinson nor the Seahawks gained "any benefit or value" from Robinson's participation in the mini-camp. CP 46.

Based on its findings, the superior court determined Robinson was not a Seahawks employee at the time of his injury. CP 47.

C. The Court of Appeals Decided Robinson Was Not a Seahawks Employee Because Substantial Evidence Supported Finding No Employment Relationship

Robinson appealed to the Court of Appeals. The Court of Appeals affirmed the denial of Robinson's claim, determining substantial evidence supported the superior court's findings and concluding Robinson was not an employee at the time of his injury under the test set forth in *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 558 P.2d 1174 (1979). *Robinson*, 326 P.3d at 754-55. The court concluded the Seahawks did not have the right to control Robinson's physical conduct, "there was no mutual agreement to an employment relationship between Robinson and the Seahawks, and no objective evidence supports the reasonable belief that Robinson was an employee." *Id.* at 752. Robinson petitioned this Court for review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court should deny Robinson's petition for review because his challenge to the sufficiency of the evidence and his request to disregard RCW 51.08.180 and RCW 51.32.010 in the case of athletes injured while trying out for a professional sports team do not present issues of substantial public interest under RAP 13.4(b)(4). Applying well-

established Supreme Court precedent, the Court of Appeals correctly determined no implied employment agreement was formed because substantial evidence supported the superior court's findings that the Seahawks lacked the right to control Robinson's physical conduct and there was no mutual agreement to form an employment relationship. From these findings, the Court of Appeals properly concluded, applying the test set forth in *Novenson*, no employment relationship existed at the time of injury. This routine review of the facts under uncontested law presents no issue of substantial public interest.

The Court should also decline Robinson's request to consider creating an exception to RCW 51.08.180 and RCW 51.32.010 because no issue of substantial public interest is established by a request to fashion a special remedy for a discrete class of individuals for reasons contrary to the language, intent and purpose of the Industrial Insurance Act.

A. Review for Substantial Evidence Under Established Law Does Not Present an Issue of Substantial Public Interest

The Court should deny Robinson's petition for review as his request for yet another appellate review to reweigh the evidence presented is not an issue of substantial public interest. Robinson was an interviewee seeking potential future employment with the Seahawks. The Industrial Insurance Act does not cover job applicants. Rather, workers' compensation bene-

fits are available to all workers injured in the course of employment. RCW 51.32.010. "Worker" is defined as

> *every person in this state who is engaged in the employment of an employer* under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor[.]

RCW 51.08.180 (emphasis added). The terms "worker" and "employee" are used interchangeably. RCW 51.08.185.

Well-established law provides that for purposes of the Industrial Insurance Act, an employment relationship exists when there is evidence of: (1) the employer's right to control the alleged employee's physical conduct in the performance of his or her duties; and (2) a mutual agreement to establish an employment relationship.[3] *Novenson*, 91 Wn.2d at 553. Whether these elements are met is a question of fact subject to substantial evidence appellate review. *Smick v. Burnup & Sims*, 35 Wn. App. 276, 279, 666 P.2d 926 (1983); *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009).

[3] In addition, courts have considered the existence of some form of remuneration for services performed as a factor in determining whether an employment relationship exists. *Doty v. Town of South Prairie*, 155 Wn.2d 527, 537, 40-42, 120 P.3d 941 (2005); *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P.2d 777 (1942). The superior court found, "[t]he Seahawks did not pay Mr. Robinson wages or per diem, but they paid for his air-fare, transportation, lodging and provided him food while at the tryout during the mini-camp." CP at 46 (Finding of Fact 16).

1. Substantial Evidence Supports the Superior Court's Finding That the Seahawks Did Not Have the Right to Control Robinson's Physical Conduct

Applying routine substantial evidence principles, the Court of Appeals properly determined the superior court's finding that the Seahawks did not have the right to control Robinson's physical conduct in the performance of his duties was supported by substantial evidence when viewing the evidence in the light most favorable to the Seahawks.

To establish the right to control, Robinson must show the Seahawks controlled the means and manner by which he physically performed job duties. *Novenson*, 91 Wn.2d at 553. Advisory direction or permission to engage in a certain activity does not constitute control. *See Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69-71, 129 P.2d 777 (1942); *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 866, 86 P.3d 826 (2004). For example, controlling who may participate in a program is insufficient to establish an employment relationship if there is no physical control over the alleged employee's job activities. *See Bennerstrom*, 120 Wn. App. at 866. The provision of guidelines as to how work should be performed is also insufficient to establish control if the alleged employee is not required to follow the guidelines. *Id.* at 863-64. Additionally, control in and of itself is insufficient to establish employment if the control does not provide a meaningful business benefit to the potential

employer. *In re Darlene Cate*, No. 00 20324, 2002 WL 529507, *6 (Wash. Bd. of Indus. Ins. Appeals Feb. 5, 2002).

The superior court properly determined Robinson failed to establish the Seahawks had the right to control his physical conduct in the performance of job duties. The purpose of the interview was to provide both parties with an opportunity to evaluate whether they wanted to enter into an employment agreement. CP 45 (Finding of Fact (FF) 5).[4] Although the Seahawks asked Robinson to attend certain meetings and perform certain drills, he was not required to do so and the Seahawks could not control his conduct "with mandatory rules and discipline[.]" BR Idzik 17. Asking someone to participate in a tryout to demonstrate physical capabilities is not the equivalent of dictating how a person must perform duties required under a particular job description. It is advisory direction that does not amount to control. *See Clausen*, 15 Wn.2d at 69-70; *Bennerstrom*, 120 Wn. App. at 866.

While the interview process was governed by a schedule developed by the Seahawks, Robinson's participation was voluntary, he was not obligated to follow Seahawks personnel's directions at the risk of being discharged or disciplined, and he could leave at any time without incurring

[4] Notably in Robinson's statement of the issues, he does not renew his claim that this and other findings of fact are not supported by substantial evidence and therefore these findings are verities on appeal.

any liabilities for breaching an employment agreement. BR Robinson 33, 49; BR Idzik 11, 17; CP 46 (FF 11, 17). Finally, any control the Seahawks may have had was not in furtherance of its business interests, as Robinson did not substitute for a Seahawks employee or perform tasks that financially benefited the team. CP 46 (FF 20); BR Idzik 26.

The Seahawks' lack of control over Robinson distinguishes this case from an employment relationship. Robinson's argument that the voluntariness of his participation in the tryout is the equivalent of any at-will employment situation, Pet. at 9, misconstrues the *Novenson* test. The central focus is whether the Seahawks had "the right to control the servant's *physical conduct in the performance of his duties*[.]" *Novenson*, 91 Wn.2d at 553 (emphasis added). It is the fact that Robinson voluntarily participated in the drills and the Seahawks could not force him to do so by imposing discipline, withholding pay, or terminating him that demonstrates the lack of control, not his ability to walk away from the interview. Moreover, Robinson cannot prove the Seahawks had the right to control the manner in which he performed his job duties because, as an applicant, he did not have any job duties.

2. Substantial Evidence Supports the Superior Court's Finding That the Seahawks and Robinson Did Not Agree to the Formation of an Employment Relationship

No review is warranted to reevaluate whether substantial evidence supported finding there was no mutual consent to an employment relationship. The formation of an employment relationship requires proof of a mutual agreement, contrary to Robinson's claim.[5] *Contra* Pet. at 10. "A mutual agreement must exist between the employee and employer to establish an employee-employer relationship." *Novenson*, 91 Wn.2d at 553; *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 345, 428 P.2d 586 (1967) (court has "consistently held" an employment relationship requires "a consensual relationship involving the consent of both persons."); *Fisher v. City of Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963) ("Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a *mutual* agreement must exist between the employer and employee."); *Jackson v. Harvey*, 72 Wn. App. 507, 515, 864 P.2d 975 (1994) ("the employment relationship must be entered into mutually by the employer and employee."). "A worker's bare assertion of belief that he or she worked for this or that employer does not establish an

[5] Consent is not required if the relationship between the parties is one of involuntary servitude. *Bolin v. Kitsap Cnty.*, 114 Wn.2d 70, 72-74, 785 P.2d 805 (1990) (determining jury service constituted employment). *Bolin* is distinguishable from this case because Robinson's participation in the tryout was completely voluntary.

employment relationship." *Bennerstrom*, 120 Wn. App. at 859 (internal quotation and citation omitted).

Robinson does not challenge the superior court's findings indicating he knew the process for obtaining a contract with a professional football team, understood attending a tryout did not create or guarantee an employment relationship, and acknowledged in writing that no employment relationship existed. *See* CP 45-46 (FF 9-11, 15). Instead, he argues merely by consenting to control in the tryout process, he agreed to the formation of an employment relationship, thereby creating an implied employment relationship. Pet. at 13-14. His argument fails.

When looking at the consent test, the determinative issue is whether the parties have consented to an employment relationship, not whether one party has consented to following the directions required for applying for a job. *See Novenson*, 91 Wn.2d at 553. Robinson's proposed test is inconsistent with well-established precedent requiring mutual consent to the formation of an employment relationship and would circumvent the Legislature's intent to limit coverage to those engaged in employment.

Robinson was not offered employment with the Seahawks, explicitly or implicitly. No one guaranteed him a position, nor was he told it was highly likely that he would be offered a contract. BR Idzik 21; BR

Bradley 8, 10-11, 13.[6] Instead, he was repeatedly informed participation in the mini-camp did *not* guarantee a contract. BR Idzik 12. Furthermore, participation in tryouts has not historically guaranteed an applicant a contract with the Seahawks. There were 16 tryout players at the mini-camp Robinson attended; only five were offered contracts. BR Idzik 24. In 2010, approximately 100 players either tried out for or visited the Seahawks; only 22 were offered contracts. BR Idzik 12-13. The tryout was merely an interview. The Seahawks did not offer or agree, implicitly or explicitly, to the formation of an employment agreement.

Robinson's attempt to reweigh the evidence and evade the requirements of *Novenson*, RCW 51.08.180, and RCW 51.32.010 does not present an issue of substantial public interest.

B. Robinson's Attempt to Circumvent RCW 51.08.180 and RCW 51.32.010 to Create an Exception for Professional Football Players Does Not Present an Issue of Substantial Public Interest

An attempt to circumvent the plain language of the Industrial Insurance Act does not create an issue of substantial public interest. By statute, industrial insurance benefits are available for employees injured in

[6] The Court of Appeals properly distinguished this case from the circumstances present in the Board's decision in *In re Kimberly Bemis*, No. 90 5522, 1992 WL 160668 (Wash. Bd. of Indus. Ins. Appeals May 1, 1992). In *Bemis*, the Board concluded an implied employment agreement could be formed if an entity guarantees an applicant employment upon successful completion of mandatory training. 1992 WL 160668, at *6. *Bemis* is distinguishable because Robinson was not guaranteed future employment if he participated in the tryout.

the course of employment, not job applicants. RCW 51.08.180; RCW 51.32.010. Robinson asks this Court to ignore the statutory requirements and create an exception for athletes trying out for a professional football team because of the hazardous nature of playing football. His argument does not merit the Court's review as it involves a discrete group of individuals and is contrary to well-established Washington law.

From its earliest inception, the Industrial Insurance Act has required an employment relationship. *See Cartsen v. Dep't of Labor & Indus.*, 172 Wash. 51, 52, 19 P.2d 133 (1933); *Clausen*, 15 Wn.2d at 69 (factors to consider in determining the existence of an employment relationship include the right of control, payment of wages, and a contractual relationship); *Fisher*, 62 Wn.2d at 804; *Doty v. Town of South Prairie*, 155 Wn.2d 527, 535, 120 P.3d 941 (2005) ("For an injured person to fall within the statute's protection, they must in fact be a worker."). In 1937, the Legislature added certain independent contractors. *See White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 473-74, 294 P.2d 650 (1956). But no provision for job applicants has ever been added by the Legislature or recognized by the courts.

Furthermore, Robinson concedes a person interviewing for an office position should not be entitled to workers' compensation benefits if he or she is injured during the interview. Pet. at 16. Yet, there is no

legitimate reason under the Industrial Insurance Act to distinguish between a professional football player and an administrative assistant. Robinson's attempt to carve out an exception for "a highly skilled professional, in a high-risk, ultrahazardous, physically demanding occupation[,]" Pet. at 7, is contrary to the language, purpose and intent of the Industrial Insurance Act.

The Industrial Insurance Act originally applied only to employees engaged in extra-hazardous work. *Doty*, 155 Wn.2d at 531; *Scott v. Dep't of Labor & Indus.*, 77 Wn.2d 888, 892, 468 P.2d 440 (1970) (noting the Industrial Insurance Act only applied to employments that were "'inherently constantly dangerous' in the light of 'modern industrial conditions'"). In 1971, the Legislature extended coverage to all types of employment, with a few statutorily enumerated exceptions. *Doty*, 155 Wn.2d at 531. The law now states, "[t]here is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state." RCW 51.12.010.

There is no basis in the Industrial Insurance Act for distinguishing between a person interviewing for a defensive back position who is asked to perform a physical agility test and a person interviewing to be an administrative assistant who is asked to take a keyboarding test. *See Wash. State Sch. Dirs. Assoc. v. Dep't of Labor & Indus.*, 82 Wn.2d 367,

372, 510 P.2d 818 (1973) (noting "[t]he secretary who trips and falls over a piece of carpet is as injured and in need of the coverage provided by the act as is the workman in the lumber mill who trips and falls."). The Court should reject Robinson's invitation to create an exception to the statutory requirements of the Industrial Insurance Act solely for those people interviewing for hazardous positions as such a distinction is contrary to RCW 51.12.010.

Robinson's suggestion that the Court should follow the approaches taken by California and Alaska should also be disregarded as it would require the Court to reject its prior case law and ignore the plain language of the Industrial Insurance Act. The reasoning of these out-of-state cases, which emphasized extending workers' compensation coverage to tryouts for hazardous jobs, is inapplicable under Washington's current Industrial Insurance Act. The court must interpret the Act, which is distinct, not the laws of other states. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 815, 16 P.3d 583 (2001). Furthermore, many other states have determined applicants who are injured during an interview process before being offered or guaranteed employment are not employees. *E.g.*, *Boyd v. City of Montgomery*, 515 So.2d 6 (Ala. Civ. App. 1987); *Younger v. City of Denver*, 810 P.2d 647, 653 (Colo. 1991); *Bugryn v. State*, 97 Conn. App. 324, 330, 904 A.2d 269 (App. Ct. 2006); *Sellers v. City of Abbeville*, 458

So.2d 592 (La. Ct. App. 1984); *Leslie v. Sch. Servs. & Leasing, Inc.*, 947 S.W.2d 97 (Mo. Ct. App. 1997); *Cust-O-Fab v. Bohon*, 876 P.2d 736 (Okla. Ct. App. 1994); *Dykes v. State Accident Ins. Fund*, 47 Or. App. 187, 613 P.2d 1106 (Ct. App. 1980).

Next, the fact Robinson signed a waiver does not justify creating an extra-statutory exception for athletes injured while trying out for a professional football team. *Contra* Pet. at 16-17. Robinson claims he should be treated differently than office-based job applicants because he signed a waiver. Pet. at 16. The fact an adult who is about to engage in a high risk sport signs a waiver purporting to limit the team's tort liability should not serve as a basis to ignore the requirements of RCW 51.08.180 and RCW 51.32.010. Employment status and the right to workers' compensation benefits are not contingent on potential tort claim status. Furthermore, Robinson has not pursued a common law remedy against the Seahawks and a court has not had the opportunity to consider whether the waiver he signed was valid.[7] The effect such a waiver might have on Robinson's common law remedies is, at this point, speculative and should not serve as the basis for carving out an exception to the statutory

[7] Exculpatory clauses are enforceable under Washington law "unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others or (3) they are inconspicuous." *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 492, 834 P.2d 6 (1992).

requirement that an employment relationship must exist to receive workers' compensation benefits.

Finally, liberal construction does not justify ignoring the plain language of RCW 51.08.180 and RCW 51.32.010, which require an employment relationship. *Doty,* 155 at 533. Robinson's request for the Industrial Insurance Act to be expanded to persons who are not employees under RCW 51.08.180 is more properly directed to the Legislature than the Court. An attempt to circumvent the Legislature's intent to cover only injured employees, and not job interviewees, does not present an issue of substantial public interest.

VI. CONCLUSION

The Department requests the Court deny Robinson's petition for review, as the Court of Appeals' decision is supported by substantial evidence and consistent with existing Washington law. Furthermore, Robinson's request for an exemption from the requirements of RCW 51.08.180 and RCW 51.32.010 for a small group of professional football

interviewees who expressly assume the risk of playing football is not an issue of substantial public interest meriting the Court's review.

RESPECTFULLY SUBMITTED this 22nd day of July, 2014.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of July, 2014, at Spokane, WA.

Marcie W Bergman

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Attached for filing is the Department of Labor and Industries Answer re: Courtney Robinson v. Dept. of Labor & Industries and Football Northwest, LLC, Supreme Court No. 90502-9, from Annika M. Scharosch, AAG, Phone (509) 458-3518, WSBA 39392, AnnikaS@atg.wa.gov.

Thank you.

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