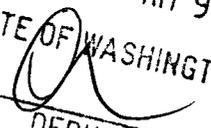


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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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SOUND SUPPORT, INC. and  
JAMES L. and MARY ANNA N. SIBBETT,

Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES and its subdivision, DIVISION OF DEVELOPMENTAL  
DISABILITIES,

Respondent.

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**OPENING BRIEF OF APPELLANTS**

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ORIGINAL

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**I.**  
**INTRODUCTION**

COME NOW Appellants, by and through their counsel, Jeffrey D. Stier, and submit their Opening Brief in this matter.

**II.**  
**APPELLANTS' ASSIGNMENT OF ERROR AND ISSUES**

Assignment of Error No. 1: The trial court erred in granting summary judgment on Plaintiffs' breach of contract claim where such decision was necessarily based on a finding that "reasonable minds could not differ on this record that the State through the actions of DSHS/DDD had a reasonable basis for the decision to terminate Sound Support's contract." especially where there were concurrent findings, based on investigations and evaluations performed by Residential Care Services ("RCS") that there were no significant problems with Sound Support's operations, and that there was no abuse or neglect by Sound Support's personnel, and where Sound Support's principal was assured by RCS personnel, just weeks before termination, that "DDD will not take your contract".

**Issues Pertaining to Assignment of Error No. 1**

- a. Was there a "reasonable basis to believe" that Sound Support failed to protect, or had the potential of failure to protect, the health or safety of any of its clients, especially where there were concurrent findings by RCS to the contrary?
- b. Is the question of whether an action is "reasonable" a question of fact for the jury?

- c. Have Plaintiffs created a question of fact by providing evidence that contradicts the views of DDD?

Assignment of Error No. 2: The trial court erred in granting summary judgment on Plaintiffs' breach of contract claim where such decision was necessarily based on a finding that the covenant of good faith and fair dealing did not apply.

**Issues Pertaining to Assignment of Error No. 2**

- a. Does DDD have unfettered discretion under the CSC so that the covenant of good faith and fair dealing did not apply?
- b. Was there any genuine issue of a material fact that should be considered by a jury at the trial court level?

Assignment of Error No. 3: Even though the final order was not based upon the fact that the Client Service Contract ("CSC") between DDD and Sound Support contained an automatic termination for convenience clause, certainly DDD argued that clause as a bases for its Motion for Summary Judgment. Presumably, that issue will come up again as an alternative justification for the trial court's Order. In that event, is it an error of law to deny Plaintiffs' breach of contract claim where such decision appears to have been based on a finding that there was no remedy because the CSC between DDD and Sound Support contained an automatic termination for convenience clause?

**Issues Pertaining to Assignment of Error No. 3**

- a. Does DDD's position that the automatic conversion to termination for convenience allows it to terminate the contract without consequence render the contract void as illusory or invalid for lack of consideration?

- b. Before DDD is allowed to terminate for convenience, must it make a showing as to what convenience interests were served by such termination, and should the reasonableness or validity of such asserted convenience interests be decided by the jury?
- c. Should a jury consider the award of lost profit and wind-up costs in this case?

Assignment of Error No. 4: The trial court erred in granting summary judgment on Plaintiffs' claim for negligent investigation, where DDD terminated Sound Support Inc.'s Client Service Contract disregarding the input of Residential Care Services in violation of pertinent WACs and the investigation performed by DDD was deficient and defective.

#### **Issues Pertaining to Assignment of Error No. 4**

- a. Are Plaintiffs within the classes of persons that can pursue a legal claim for negligent investigation?
- b. Did DDD conduct its own "investigation" while ignoring adverse findings (to DDD) from its authorized investigative arm, RCS?
- c. Did DDD ignore numerous mitigating factors that were considered by RCS?
- d. Do the facts support a finding of material breach of the contract by Sound Support?
- e. Do the facts support a finding of negligent investigation of its Sound Support's "conduct?"
- f. Was there any genuine issue of a material fact that should be considered by a jury at the trial court level?

Assignment of Error No. 5: The trial court erred in granting summary judgment on Plaintiffs' claim of tortious interference with business expectancy.

**Issues Pertaining to Assignment of Error No. 5**

a. Did Plaintiffs show a genuine issue of material fact regarding the existence of a valid contractual relationship or business expectancy?

b. Did Plaintiffs show a genuine issue of material fact regarding whether DDD had knowledge of that contractual relationship or business expectancy?

c. Did Plaintiffs show a genuine issue of material fact regarding whether DDD intentionally interfered with Sound Support's contractual relationship or business expectancy?

d. Did Plaintiffs show a genuine issue of material fact regarding whether DDD intentionally interfered with Sound Support's contractual relationship or business expectancy for an improper purpose or used improper means?

e. Did Plaintiffs show a genuine issue of material fact regarding damages associated with DDD's intentional interference with Sound Support's contractual relationship or business expectancy?

Assignment of Error No. 6: The trial court erred in granting summary judgment on Plaintiffs' Motion for Summary Judgment on the Plaintiffs' claim for negligent infliction of emotional distress.

**Issues Pertaining to Assignment of Error No. 6**

- a. Should Plaintiffs have a claim in tort for direct negligent infliction of emotional distress?
- b. Did DDD rely solely on bystander cases in the trial court, which are inapplicable to Mr. Sibbett's claims?
- c. Did Mr. Sibbett raise a genuine issue of material fact regarding objective symptoms evidence?
- d. Did Mr. Sibbett raise a genuine issue of material fact regarding expert evidence of a "diagnosable mental disorder?"
- e. Is lay testimony is allowed and sufficient to prove a claim for negligent infliction of emotional distress?
- f. Was there a genuine issue of a material fact on the negligent inflictions of emotional distress that should be considered by a jury at the trial court level?

Assignment of Error No. 7: The trial court erred in granting summary judgment on Plaintiffs' Motion for Summary Judgment on the Plaintiffs' claim for intentional infliction of emotional distress.

**Issues Pertaining to Assignment of Error No. 7**

- a. Does a claim for intentional infliction of emotional distress lie in contract and tort?
- b. Was there sufficient evidence presented on this issue to create a genuine issue of material fact regarding whether the conduct of DDD was outrageous, thus requiring that this issue be submitted to the jury?

Assignment of Error No. 8: The trial court erred in denying Plaintiffs' Motion to Strike Portions of the Supporting Declarations of Beth Fee-Kreibal and Lonnie Keesee.

**Issues Pertaining to Assignment of Error No. 8**

- a. Did DDD renege on its September 28, 2011, designation of documents that formed the basis of its termination of Sound Support's CSC for default?
- b. Did DDD rely on inadmissible hearsay in the declarations of Beth Fee-Kreibal and Lonnie Keesee?
- c. Without those allegations, should Summary Judgment have been granted?

**III.  
STATEMENT OF THE CASE**

Appellant, Sound Support, Inc. ("Sound Support"), was a Provider that provided aid to persons with developmental disabilities under a Client Service Contract ("CSC") with the Division of Developmental Disabilities ("DDD"). Sound Support and co-Appellants James and Mary Anna N. Sibbett ("Mr. Sibbett" and "Mrs. Sibbett", respectively), were Plaintiffs in the Superior Court actions, Nos. 10-2-01963-1 and 10-2-02722-4.

DDD provides aid to persons with developmental disabilities. RCW §§ 71A.10.011, 71A.10.015. Mr. Sibbett was the administrator of a Provider, Sound Support, and, along with his wife, Mrs. Sibbett, the owner of Sound Support since Sound Support was incorporated in January 2000.<sup>1</sup> Since that time, Sound Support had always

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<sup>1</sup> Prior to the creation of Sound Support, Mr. Sibbett was the administrator and owner of another provider-agency, Kokua, Inc. ("Kokua") that had similarly operated under CSCs with DDD since its inception in September 1990. In essence, then, Mr. Sibbett, through these two entities, had been providing services to

operated under a CSC with DDD and was operating under a CSC that was terminated by DDD for default on September 2, 2009. CP 780. Based on that termination, which Plaintiffs contend was improper, Plaintiffs filed the above-mentioned suits,<sup>2</sup> one in contract and the other in tort,<sup>3</sup> from which this appeal is taken. In short, Plaintiffs asserted claims for relief and sought damages under both contract and tort theories.

After significant discovery had been conducted,<sup>4</sup> on January 13, 2012, DDD moved for summary judgment on all claims. CP 264-293. Plaintiffs opposed the motion for summary judgment by filing a Response to Motion for Summary Judgment on February 3, 2012, CP 839-71, which Response was amended by a Second Amended Plaintiffs' Response to Motion for Summary Judgment filed on April 16, 2012. CP 979-1003. Plaintiffs' Response was initially supported by Declarations of James L. Sibbett, CP 731-838, Cary Deaton, (Plaintiffs' economic expert), CP 872-884, and Jeffrey Stier (one of Plaintiffs' attorneys), CP 620-730. Plaintiffs filed a Second Amended Response Brief supported by the Supplemental Declaration of Jeffrey D. Stier (CP 1008-1041) and the Surrebuttal Declaration of Jeffrey D. Stier CP 1096-1137). Defendants filed a Reply Brief in support of its Motion for Summary Judgment on February 7, 2012, CP 930-943, and a Supplemental Reply Brief in support of its Motion for Summary Judgment on April 27, 2012. CP 1042-68.

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various "Clients" (i.e., developmentally disabled persons), and in turn to DDD, for nineteen (19) continuous years until the termination of Sound Support's CSC in September 2009. CP 731 (Sibbett Decl.)

<sup>2</sup> Later consolidated into one case. CP 1398-1400.

<sup>3</sup> After giving the required notice on the tort claims.

<sup>4</sup> Due to recalcitrance of various persons affiliated in some manner with Respondent, Appellants were not able to perform all of the discovery they wished to conduct. Although there were several discovery issues raised before the trial court, Appellants do not here appeal the discovery issues, but do not waive the right to pursue such issues on remand.

After the motion was thus briefed, and after oral argument, on May 10, 2012, the trial court issued a Letter Opinion (“Letter Opinion”). CP 1138-1144. While technically not the subject of appeal as it is not the Final Order of the trial court granting summary judgment, the Letter Opinion contains significant language by the trial court that demonstrates the flawed legal reasoning supporting the ultimate award of summary judgment.

Plaintiffs sought reconsideration of the Letter Opinion by motion and memorandum filed on May 21, 2012. CP 1162-1163. In addition to Plaintiffs’ earlier submittals, they also offered a Supplemental Declarations of James Sibbett of James Sibbett, (CP 1188-1303) and of Jeffrey D. Stier (CP 1172-1187).

After a hearing on Plaintiffs’ Motion for Reconsideration, the trial court issued a Revised Letter Opinion on June 11, 2012 (“Revised Letter Opinion”) that also contains significant language by the trial court that demonstrates the flawed legal reasoning supporting the ultimate award of summary judgment. CP 1355-1359.

Thereafter, on June 22, 2012, the trial court issued its “Order Regarding Defendants’ Motion for Summary Judgment, Plaintiffs Motion for Reconsideration and for Dismissal of Claims with Prejudice” (“Final Order”), which granted summary judgment on all claims in DDD’s favor. CP 1360-1364. Plaintiffs appeal the Final Order, as to all claims for relief.

#### IV. ARGUMENT

##### A. Standards for Review of Motion for Summary Judgment.

This Court should review the trial court's grant of summary judgment *de novo*. *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 782, 171 Wn.2d 204 (Wash. 2011); *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 383, 198 P.3d 493 (2008).

Thus, the trial court's grant of summary judgment is afforded no deference, and may only be upheld by this court if there was "*no* genuine issue of *any* material fact . . ." before the trial court when DDD's summary judgment motion was being considered. *Braaten*, *Id.*, Wash. R. Civ. P. 56 (c). (Emphasis added). When considering the evidence presented in a motion for summary judgment, such "[e]vidence is construed in the light most favorable to the nonmoving party." *Osborn v. Mason County*, 157 Wash.2d 18, 22, 134 P.3d 197 (2006); *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Thus, the trial court's grant of summary judgment may only be affirmed if, from all the evidence, reasonable persons could reach but one conclusion.

A summary judgment proceeding involves whether, or not, questions of material fact must be decided by a jury, and should not be granted based upon an error of law. *Olympic Fish Products, Inc. v Lloyd*, 113 Wn.2d 596, 611 P.2d 737 (1980); *Jacobsen v State*, 89 Wn.2d 104, 569 P.2d 1152 (1977); *Maxwell v Ricks*, 294 Fed. 255 (9<sup>th</sup> Cir, 1923); CR 56.

When considered in light of these stringent standards, DDD's motion for summary judgment was improperly granted, as there were genuine issues of material fact

and errors of law were committed by the trial court. Due to these errors by the trial court this Court should reverse the grant of summary judgment, and remand this case to the trial court for jury trial.

**B. There was a Genuine Issue of Material Fact as to Whether Sound Support was in Default of the CSC, and whether DDD was Legally Justified in Terminating Sound Support's CSC.**

Pursuant to the CSC, DDD was allowed to summarily terminate the agreement between the parties only where “DSHS has a reasonable basis to believe that the Contractor has . . . [b] failed to protect the health or safety of any DSHS client . . . .” CP 747-763. Stated conversely, if there was not a reasonable basis to believe that Sound Support, or its agents failed to protect the health or safety of any DSHS client, termination is improper under the CSC, thereby resulting in an actionable breach. As demonstrated below there is a question of fact on this issue, and summary judgment was improperly granted.

The only grounds from the CSC which the court analyzed in determining whether the termination of Sound Support was proper was whether DDD had a “reasonable basis to believe” that Sound Support failed to protect the health or safety of any of its clients. CP 1138-1144, 1355-1359. Thus, Plaintiffs’ threshold challenge on this appeal is to that “reasonable basis” finding and conclusion by the trial court.

The question of whether an action is “reasonable” is typically a question of fact. This principle has been established in numerous contexts under Washington law. *See, e.g., Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583, 101 Wn.App. 777 (2000), (whether reasonable grounds exist for detaining a shoplifter is a question of fact); *Sargent v. Safeway Stores, Inc.*, 410 P.2d 918, 67 Wn.2d 941, 947 (1966) (held: trial court properly

gave jury instruction to the effect that plaintiff in a slip and fall case has the duty to use reasonable care for her own safety, and whether she used such reasonable care was a question of fact for the jury); *Smith v. Smith*, 484 P.2d 409, 411, 4 Wn.App. 608 (1971) (where contract for ongoing support of child while in college was silent as to duration, it is implied that performance is required for a reasonable time, and “[w]hat constitutes a reasonable time is a question of fact . . . .”); *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 118 Wn.2d 512, 529 (1992) (modifications to employment agreement enforceable where reasonable notice provided; reasonableness of notice is a question of fact); *Makoviney v. Svinth*, 584 P.2d 948, 955, 21 Wn.App. 16 (1978) (whether landowner has taken reasonable care to protect business invitees is a question of fact); *M.W. v. Department of Social and Health Services*, 39 P.3d 993, 997, 110 Wn.App. 233 (2002) (in reversing trial court’s grant of summary judgment in favor of DSHS for claims involving negligent investigation of child abuse case, appellate court stated: “Generally, whether a party acts reasonably is a question of fact and summary judgment is inappropriate if reasonableness is a material issue in litigation.” (Citing *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974)).

Accordingly, the question of whether Defendants had “reasonable basis” for their termination of the subject CSC is a question of fact which should have been decided by the jury. This is particularly true because there was significant material evidence before the trial court that Defendants did not have a reasonable basis for termination. This evidence included the following:

- 1) Various employees of DDD, primarily Ms. Nancy Pesci (officially designated Field Coordinator,<sup>5</sup> but unofficially the second in command for then-Region 6 of DDD) had apparently decided to terminate Sound Support's CSC<sup>6</sup> even before Residential Care Services ("RCS"), the proper investigative arm of DDD,<sup>7</sup> had weighed in on actual, or institutional potential for, abuse and neglect by Sound Support; and RCS ultimately did not issue negative findings regarding Sound Support, or its agents.
- 2) Despite the information conveyed to it by Ms. Pesci and her delegates all three (3) certification (institutional safeguards) investigators<sup>8</sup> of RCS, the proper investigative arm of DDD, did not find anything amiss in the conduct of Sound Support, or its agents (CP 812-816 (*Sibbett Decl.*)), and thus did not support the actions of DDD to terminate Sound Support's CSC.<sup>9</sup> Certainly, a material question of fact must exist.
- 3) When Ms. Pesci learned, on August 12, 2009, that the results of the August 10 inspection and evaluation by the RCS certification team were going to be

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<sup>5</sup> CP 214 (*Pesci Decl.*)

<sup>6</sup> The entire record indicates that the decision to terminate Sound Support's CSC was primarily made by Ms. Pesci and that her supervisor, Mr. Hartford, her superior, simply supported that decision. Her decision was largely based on information reported to her by various members of her own staff members, which included Lonnie Kessie and Beth Fee-Kriebel. and Anna Facio.

<sup>7</sup> CP 733. Also see DSHS website address of [asda.dshs.wa.gov/professional/rcs/htm](http://asda.dshs.wa.gov/professional/rcs/htm) which states: RCS is responsible for licensing and oversight of . . . certified residential programs.

<sup>8</sup> The August 10, 2009, institutional safeguards evaluation by RCS was performed by Pat Karman, Sharon Robinson Holmes, and Chris Rushmeier whom Tom Farrow, an RCS supervisor, characterized as "one of our strongest teams." CP 811 (*Sibbett Decl.*)

<sup>9</sup> Ms. Pesci originally requested that RCS inspect Sound Support's facilities and operations. CP 809-810 (*Sibbett Decl.*). On August 10, 2005, RCS began that inspection. Significant results of that investigation were that, (i) RCS did not revoke Sound Support's certification, , CP 812-816 (*Sibbett Decl.*); and (ii) Chris Rushmeire informed Mr. Sibbett that DDD was "not going to take SSI's Sound Support's contract." CP 738 (*Sibbett Decl.*). In addition, Mr. Tarr, an RCS abuse and neglect investigator, issued an "Investigation and Summary Report" in which he concluded: "[b]ased on the investigation there is not sufficient reason to believe either suspect [i.e., Mr. Sibbett or Mr. Dubble] neglected [KG]." CP 643 (*Stier Decl.*).

positive for Sound Support, she again contacted RCS and alleged abuse and neglect of KG by Mr. Sibbett and an employee, Mr. Todd Dubble. CP 809-810 (*Sibbett Declaration*). The RCS investigator concluded that there was no abuse and neglect of KG by Mr. Sibbett or Todd Dubble. CP 643 (*Stier Decl.*).

- 4) Throughout the period of investigation and termination, Sound Support (i) was operating under a certification, issued as a result of program evaluations by RCS in 2008 and 2009 (CP 764-810 (*Sibbett Decl.*)); (ii) there were no findings or allegations regarding a deterioration in the care of clients, and (iii) there were no recommendations for Sound Support or Mr. Sibbett to change any of Sound Support's operations, or to change any of its structure or tasks that had been delegated to Sound Support's administrative staff.

What more "genuine issue of material fact" could there be than concurrent findings by RCS in favor of Sound Support? Those findings clearly create a genuine issue of material fact as to whether DDD had a reasonable basis for terminating Sound Support's CSC or, at the very least, corroborate the explanations proffered by Sound Support for the allegations against it.<sup>10</sup>

Plaintiffs merely request that the Court view any allegations offered by DDD to support their decision to terminate Sound Support's CSC for default in the light of the following factors: (i) the facilities maintained by Sound Support were for persons with various developmental disabilities, and due to the very nature of the clients served by

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<sup>10</sup> Which became a moving target because of the actions of DDD to disregard the representations made by Mr. McIlhenny in his letter of September 28, 2011. CP 651-653 (*Stier Decl.*).

such programs, there will inevitably be issues of concern at any given time;<sup>11</sup> (ii) in the court below, Plaintiffs rebutted all significant concerns expressed by DDD, sufficiently to create a genuine issue of material fact;<sup>12</sup> and (iii) despite being charged by Ms. Pesci to try to support her decision to terminate Sound Support for default, or to find abuse and neglect on the part of Messrs. Sibbett and Dubble, RCS's investigation and evaluation did not support these decisions, as set forth *supra*.

Because there were genuine issues of material fact as to the reasonableness of DDD's decision to terminate Sound Support's CSC, the trial court erred in granting DDD's Motion for Summary Judgment on the default allegations. This Court should reverse, and remand the matter for trial.

**C. The trial court erred in granting summary judgment on Plaintiffs' breach of contract claim where such decision was necessarily based on a finding that the covenant of good faith and fair dealing did not apply.**

Plaintiffs contended to the trial court that DDD breached its covenants of good faith and fair dealing in this case but the trial court granted summary judgment on that claim.

Inherent in every contract under Washington law is the requirement that the parties cooperate, act fairly, and avoid bad faith activities, such as interfering with

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<sup>11</sup> The case of KG, which appears to have been of particular concern for Defendants, is illustrative on this point. As set forth in the *Sibbett Decl.*, CP 733-734: "KG is a difficult, autistic Client who has a tendency to engage in behavior that is harmful to herself and others-e.g. eating raw meat, flushing food down the toilet, urinating and defecating outside of a toilet, hitting staff, and throwing furniture, garbage, and food in the neighboring yard, on the roof of her house, or into the garage of her house." Clearly, given these types of behaviors, despite reasonable efforts, there will periodically be times when any given facility will not be in as good of condition as anyone, including Plaintiffs, would prefer, and it is not surprising that issues of concern would be observed in "spot check" investigations such as those engaged in by Ms. Pesci or her staff. Thus, the investigations performed by RCS, and Sound Support's longstanding performance and then-current certification status, are more probative of whether the proper standard of care, as recognized in the industry, was met by Sound Support.

<sup>12</sup> Despite the fact that those allegations were, at best, a "moving target" because of Mr. McIlhenny's decision to renege on his September 28, 2011, letter designating documents that DDD was relying upon. See §IV.I below.

another party's performance. *King v. Seattle*, 84 Wn.2d 239,525 P.2d 228 (1974). The "implied duty of good faith and fair dealing" in every contract "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). The covenant of good faith and fair dealing applies when the contract gives one party discretion in determining whether a term of the contract has been met.

At the trial court level, DDD contended that it was entitled to terminate Sound Support's CSC unfettered by the covenant of good faith and fair dealing because the covenant "cannot be used by a plaintiff in order to contradict a term of the contract", citing the case of *Johnson v. Yousoofian*, 84 Wa. App. 755, 930 P.2d 921 (1997). In other words, DDD said that it had no obligation to justify its decision where the contract gave it unlimited discretionary authority. Clearly, DDD's discretionary authority was not "unlimited" where default was concerned. Default is tantamount to a termination for cause.

In addition, in the case of *Myers v. State*, 152 Wa. App. 823, 218 P.3d 241 (2009), review denied, 168 Wn.2d 1027, 230 P.3d 1060 (2010), cited by DDD at the trial court level, the agency acted upon that primary finding of neglect by an Adult Protective Services Caseworker. It was found enough that an automatic conversion clause in the contract allowed for a termination for convenience. See CP 747-763 (*Sibbett Decl.*). DDD contended that it had an unfettered right to terminate Sound Support's CSC for convenience if it cannot sustain its burden to prove a termination for default.<sup>13</sup> Plaintiffs

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<sup>13</sup> This appears to be a concession by DDD that it must show some justifiable convenience interest to it, rather than what it contends is the law that they are allowed unfettered discretion where a termination for convenience is permitted.

contend that there should be discretion exercised even in a termination for convenience (see §IV.D below) and the covenant of good faith and fair dealing is applicable.

**D. The trial court erred in granting summary judgment on Plaintiffs' breach of contract claim where such decision was apparently based on a finding that there is no remedy because the Client Service Contract contained an automatic termination for convenience clause.**

The trial court also informally ruled (but apparently did not decide in its Final Order. CP 1360-64) that an important alternative ground existed for DDD to terminate Sound Support's CRC under the automatic conversion language in the CRC allowing DDD to terminate the CSC for convenience when it cannot prove the default. CP 1138-44 (*Letter Opinion*). The trial court relied on *Myers, Id.*, for this proposition. To the extent that *Myers* applies to the instant facts, it cannot be read to mean that DDD, on a whim (i.e., in this instance, because it has failed to show default by Plaintiffs), can merely recite "for convenience" and thereby leave Plaintiffs to bear all the costs and obligations they incurred to meet their obligations under the CSC.

First of all, the concept that a termination for convenience is an event unfettered by the need to exercise any reasonable discretion by a party is erroneous:

. . . a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void . . .

*Torncello v U.S.*, 681 F. 2d 756 (U.S. Ct. Claims 1982); also see *Linn-Faye Construction Co., Inc. v Housing Authority of the City of Camden*, 49 F.3d 915 (3rd Cir. 1995).

*Torncello* provides valuable insight into the "for convenience" doctrine. The *Torncello* court recognized that "for convenience" termination was created

out of the need for the federal government to have great flexibility in its military procurement contracts during war. For convenience termination was adopted to allow such flexibility, with an important component thereof being a provision allowing the party against which such a doctrine is exercised to be compensated for “accrued costs and a reasonable portion of anticipate profit.” *Torncello* at 765.

Later, the government exercised a “termination for convenience” clause in what the court termed a “termination for convenience for exculpation.” The Court of Claims considered such termination in *Colonial Metals v. U.S.*, 204 Ct. Cl. 320, 494 F.2d 1355 (1974). The *Colonial Metals* court (i.e., which was also the Court of Claims, which later decided *Torncello*), allowed the government in that case to terminate without compensation to the other party. It later (i.e., in *Torncello*) realized that such a ruling “for exculpation” was in error. *Torncello* recognized that its *Colonial Metals* ruling was a “clear break with all of the prior law on the subject”. It cited, and ultimately agreed with, commentary which roundly criticized the “for exculpation” nature of the *Colonial Metals* holding. It ultimately concluded that “for exculpation” termination was not allowed, because to do so would render such contracts illusory, *Torncello* at 760, and void for lack of consideration, *Torncello* at 769-71. After detailed analysis, the *Torncello* court succinctly held: “[w]e must conclude that free termination for convenience is not supportable.” *Id.* at 771.

Under the reasoning of *Torncello*, (as well as basic principles of contract law), DDD’s position that “for convenience” allows it to terminate the contract

without consequence, and without any showing of “convenience”, renders the contract void as illusory and lacking consideration. If illusory, the contracting party should nevertheless be allowed to recover damages under the principles of *quantum meruit*, or other quasi-contractual theories. Such theories involve questions of rectitude sufficient to form an implied contract. *Johnson v Nasi*, 50 Wn.2d 87, 309 P.2d 380 1957) which is a question of fact for a jury.

To the extent that *Myers, supra*, stands for unfettered “termination for convenience”, as urged by DDD and apparently accepted by the trial court, then it is reversible on that basis. Public policy cannot allow for the innumerable contracts that persons enter into with this State and its various agencies to be terminated “for convenience” if that means that the State incurs no liability for such termination. Such a holding would mean no one would contract with the State for any purpose.

Further, the CSC in the case at bar is silent on how a termination for convenience is to be priced. By its grant of summary judgment, the trial court has ruled that there should not be any damages whatsoever, so there is nothing for the jury to rule on in this regard. Plaintiffs contest that position. They contend that it is for the jury to determine how to make the terminated party whole again.

In Washington State damages have been authorized where a contract was terminated for convenience. *Lampson Rigging v. WPPSS*, 44 Wn.App. 237, 721 P.2d 996 (1986). Perhaps, by analogy, this recognizes that a contracting party sometimes incurs great expense to meet his/her/its obligations under the contract. The allowance of lost profit and wind-up costs clearly stems from the doctrines of detrimental reliance and

quantum meruit. *Johnson v Nasi*, supra., *Taylor v. Shigaki*, 84 Wa.App. 723, 930 P. 2d 340 (1997). Without any contractual guideline, it is up to the finder of fact to determine damages. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990); Restatement 2d of Contracts, §204.

Plaintiffs therefore submit that, even if “for convenience” termination could be considered proper, Plaintiffs are entitled to lost profits from the contract and other wind-up costs. See CP 872, (Deaton Decl.). This issue of damages should be decided by a jury, and summary judgment was improper.

**E. The trial court erred in granting DDD’s Motion for Summary Judgment on Plaintiffs’ claim for negligent investigation, where DDD terminated Sound Support’s CSC disregarding the input of RCS in violation of pertinent WACs and the investigation performed by DDD was completed deficient and defective.**

Most of the cases on “negligent investigation” relate to CPS, or criminal investigative agencies. They say that while no common law cause of action exists courts still allow complaints for “negligent investigation” by classes of persons that the statute mentions in its mandate-e.g. children, parents, guardians, custodians in a child abuse investigation. *Tyner v DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000). In this case Plaintiffs contend that DDD proceeded against the authority of DSHS’s own directives to conduct its own “investigation” despite adverse findings (to DDD) from RCS.

In addition, Plaintiffs contend that DDD’s extra-legal “investigation” was negligently performed-i.e. numerous mitigating factors considered by RCS were completely ignored by DDD contrary to DSHS rules and regulations.

Case law indicates that a cause of action must be material to be actionable. *Colorado Structures, Inc. v. Insurance Co. of West*, 125 Wn.App. 907, 106 P.3d 815

(2005). Here, Sound Support's termination from its sole contract, and the havoc rendered upon Mr. and Mrs. Sibbetts' lives, must be "material." Plaintiffs contend that the facts do not support a finding of material breach of the contract by Sound Support and, thus, termination for default (and convenience for that matter) is a question of fact for the jury.

**F. Plaintiffs Stated a Valid Claim for DDD's Tortious Interference with a "Buyout" Agreement that Plaintiffs had Negotiated with an Approved Provider.**

To prevail on an action for tortious interference with a business expectancy, a plaintiff must prove: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship or expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage. *Woody v. Stapp*, 146 Wa. App. 16, 189 P.3d 807 (2008); *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

As to the first element, ("the existence of a valid contract or business expectancy"), when it became clear that Defendants had determined, no matter what Sound Support did, to transfer all of Sound Support's clients to other providers, Sound Support negotiated an agreement with another provider, named St. Andrews Acquisitions, Inc., d/b/a Acres WA, LLC ("Acres"), to purchase Sound Support's operations. CP 731. This contract was valued by Plaintiffs' expert, Mr. Cary Deaton, at \$392,538.00. *Deaton Decl.*, CP 872, Report at 2.

Regarding the second element, (that "defendants had knowledge of the relationship or expectancy") it is undisputed that DDD had knowledge of Sound

Support's expectancy as demonstrated by Mr. Sibbett's summary of his August 13 and 14, 2009, conversations with Mr. Hartford. CP 731 (*Sibbett Decl.*).<sup>14</sup>

As to the third element, (an "intentional<sup>15</sup> interference inducing or causing a breach or termination of the relationship or expectancy"), the result is clear: despite having previously agreed to allow Mr. Sibbett some time, (*albeit* a minimal three days), to attempt to negotiate a "buyout" from another provider, Mr. Hartford reneged on the promise to slow the transfer of Sound Support's clients, (while making the flippant comment "the horse is out of the barn on this one, buddy") and ultimately disapproved the transfer. See CP 731 (*Sibbett Decl.*).

As to the fourth element, (that "defendants interfered for an improper purpose or used improper means") there are firm guidelines for how the DDD deals with applications to sell Provider entities. See WAC 388-101-3060 through 388-101-3090. There can be no doubt that the "nonapproval" of the sale was an *ultra vires* act<sup>16</sup>, and certainly a question of fact exists as to why Mr. Hartford rubber-stamped Ms. Pesci's decisions regarding the transfer of Sound Support's clients and ultimately the termination of Sound Support's CSC. This is particularly true, given that DDD approved a transfer of many of Sound Support's clients to Acres just four (4) months later.

Finally as to the fifth element, ("resultant damage"), substantial evidence has been introduced that clearly puts this element at issue. CP 872-874 (*Deaton Decl.*).

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<sup>14</sup> This element was never rebutted by DDD, in part because Mr. Hartford was never deposed, despite efforts by Appellants to obtain his deposition. See CP 688 (*Stier Decl.*).

<sup>15</sup> Case law is clear that a party's intent is typically a question of fact. See, e.g., *Myers v. Western Farmers Ass'n*, 75 Wash.2d 133, 134--35, 449 P.2d 104, 106 (1969), (landlord's intent to interfere with tenant's rights in constructive eviction case is a question of fact); *White v. Wilhelm*, 34 Wash.App. 763, 772, 665 P.2d 407 (1983) (In determining the intent of parties to a contract, "[i]ntent is a question of fact to be discovered by reference to the instrument in its entirety and the manifest meaning of the language used by the parties"). Thus, a jury should be allowed to consider all evidence and make this determination of intent.

<sup>16</sup> If not *de jure* illegal.

The allegation that DDD negligently or intentionally interfered with Sound Support's prospective contract or business advantage with Aacres is clearly an issue of fact for the jury. Summary judgment was improper, and this Court should reverse.

**G. Plaintiffs have Stated a Valid Claim for Negligent Infliction of Emotional Distress.**

The trial court found that Plaintiffs' claim of negligent infliction of emotional distress was dismissed with prejudice because, as a matter of law, the State's conduct was not outrageous", and that "Plaintiffs' claim of negligent infliction of emotional distress is dismissed with prejudice because there is no legal basis for this claim in the record." CP 1360-1364. Plaintiffs respectfully submit that this summary ruling by the trial court was in error.

DDD based their argument that Plaintiffs do not have a cause of action for negligent/intentional infliction of emotional distress on the notion that the plaintiff (i) must show that he was in actual physical peril at the time; (ii) must establish objective symptoms resulting from the emotional distress; and (iii) must show that he has a "diagnosable mental disorder." CP 264-293 (*Defendants Motion for Summary Judgment*). Arguably, these are bystander liability standards which do not reply here. The instant case involves a direct liability situation based in tort where negligent infliction of emotional distress liability is actionable. *Price v State*, 114 Wn.App. 65, 57 P.3d 639 (2002); *Thomas v French*, 99 Wn.2d 95, 659 P.2d 1097 (1983).

With regard to DDD's arguments that the Plaintiff must establish objective symptoms,<sup>17</sup> Plaintiffs provided such evidence in the trial court. As set forth in Mr.

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<sup>17</sup> Assuming that some evidentiary showing must be made on the issue-even though the bystander logic does not apply.

Sibbett's answer to DDD's First Interrogatory No. 13 and response to First Request for Production No. G (CP 722-725 (*Stier Declaration*)). In those answers/responses, Mr. Sibbett gave a lengthy description of depressive symptoms he has suffered since the termination of his business. These included loss of personal satisfaction, losing face, embarrassment, fear, loss, financial worries, aversion and avoidance of others, a loss of usefulness, loss of concentration, sleep problems, listlessness, thoughts of death, avoidance of contact with family members, increased appetite and weight gain. Given that DDD's actions marked the termination of a nearly twenty year relationship, these objective symptoms (which are certainly not a surprise), are sufficient to create a question of fact as to the claim for emotional distress.

Regarding DDD's argument in the trial court that there must be a "diagnosable mental disorder" and there must be expert evidence establishing such,<sup>18</sup> Plaintiffs adduced such evidence in the trial court in the report of DDD's expert psychologist, Kevin B. McGovern, dated December 28, 2011. CP 726-731 (*Stier Declaration*). Dr. McGovern reported that, after the termination by DDD, Sibbett "has experienced anxiety, depressive symptoms, weight gain, and sleeplessness." Dr. McGovern further reported that Mr. Sibbett indicated that he lost self-esteem, desired to avoid interacting with people who are aware of Sound Support's termination, and felt that a number of people may have formed negative impressions of him and his former company, and that Mr. Sibbett had psychological stresses and related symptoms which were caused by the abrupt termination of his service contract. Dr. McGovern opined that, based on the "SLC-90R [evaluation], Mr. Sibbett's level of global distress appears to be in the clinical

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<sup>18</sup> Arguably, these are bystander liability standards which do not apply here.

range. The Somatization, Depression, and Obsessive Compulsive scales were in the symptomatic range. . . . The clinical scales reflected his medical concerns, hypersensitivity, depressive symptoms, anxiety and, at times, confused thinking about his current problems.” Finally, Dr. McGovern concludes: “It is highly recommended that Mr. Sibbett enroll in a brief course of outpatient counseling in order to learn more effective ways to manage his psychological concerns . . . .”

Moreover, lay testimony is allowed and sufficient to prove a claim for negligent infliction of emotional distress. As the court stated in *State v. Ashkam*, 120 Wa.App. 872, 86 P.3d 1224 (2004):

Mr. Askham argues that expert testimony was required to show the necessary level of emotional distress. We find no authority for the proposition that only expert testimony can establish the reasonable person standard for emotional distress. The reasonable person standard is an objective one within the ken of the average fact finder. *State v. Marshall*, 39 Wash.App. 180, 184, 692 P.2d 855 (1984).

Expert testimony is therefore not required. This is equally applicable to Mrs. Sibbett, who, as Mr. Sibbett’s wife of more than thirty years, has had to endure his considerable and understandable emotional agony, as well as endure her own emotional distress caused by this upheaval in their lives.

Accordingly, there is both expert evidence and lay testimony that can meet the requisite standard for emotional distress for bystander liability, so certainly that evidence can meet the standards for direct liability, at least in tort, and the summary judgment on Mr. Sibbett’s claim of negligent infliction of emotional distress should be reversed.

**H. Plaintiffs have stated a valid claim for intentional infliction of emotional distress.**

Certainly, a claim for intentional infliction of emotional distress lies in contract and tort. *Price v State, supra*. Despite the evidence presented on this subject, the trial court erroneously granted summary judgment on Plaintiffs' claim for intentional infliction of emotional distress. Again, under the liberal standard that applies in favor of the non-movant when analyzing a motion for summary judgment (i.e., that summary judgment is only proper where there is no genuine issue of material fact), Plaintiffs submit that, when the following facts are considered, a reasonable jury could determine that the actions of Defendants have been outrageous:

- (1) DDD knew that Mr. Sibbett had devoted nearly twenty (20) years of his adult life and his career performing his obligations under Sound Support's CSCs which Mr. Sibbett (first through Kokua and later through Sound Support) had with DDD. CP 731 (*Sibbett Decl.*)
- (2) DDD knew that Mr. Sibbett had devoted nearly twenty (20) years of his adult life and his career performing his obligations while being certified by RCS, which certifications Mr. Sibbett (first through Kokua and later through Sound Support) had obtained from RCS, or its predecessor(s). CP 731 (*Sibbett Decl.*).
- (3) DDD knew that as part of fulfilling Sound Support's CSCs, Mr. and Mrs. Sibbett were required to, and did, obligate themselves and Sound Support to the purchase or lease of certain real property and equipment. CP 731 (*Sibbett Decl.*).
- (4) Despite this knowledge, DDD (acting on unsupported and exaggerated information, and acting in the face of an evaluation conducted on August 10-

12, 2009, which detected no significant problems with Sound Support's ability to perform its duties to its clients in the future, (CP 731 (*Sibbett Decl.*)) and an investigation that found no abuse and/or neglect (CP 731 (*Stier Decl.*)), reached a decision to terminate Sound Support without giving Sound Support any meaningful notice or opportunity to cure. CP 731 (*Sibbett Decl.*).

- (5) DDD gave essentially no notice to Mr. Sibbett or other Sound Support personnel that, apparently in July, 2009, they had reached a determination to terminate the contract with Sound Support, and began taking Clients that had been assigned to Sound Support and assigning them to other vendors. CP 731 (*Sibbett Decl.*).
- (6) When Mr. Sibbett realized that DDD apparently had made up its collective mind to either terminate the Agreement and/or to assign all of Sound Support's clients to other providers, he found a buyer for the business and that sales contract was rejected by DDD on untenable grounds. See §IV.G. above.
- (7) Despite having previously agreed to allow Mr. Sibbett some time, (*albeit* a minimal three days), to attempt to negotiate a "buyout" from another provider, Mr. Hartford reneged on the promise to slow the transfer of Sound Support's clients, (while making the flippant comment "the horse is out of the barn on this one, buddy") and ultimately disapproved the transfer. See CP 731 (*Sibbett Decl.*).

Plaintiffs also incorporate by reference the arguments made in §III.H above regarding evidence of emotional distress.

Plaintiffs respectfully submit that, under the foregoing facts, a reasonable jury could find that DDD's actions were outrageous. DDD's Motion for Summary Judgment on the issue of Intentional Infliction of Mental Distress should be denied.

**I. The trial court erred in denying Plaintiffs' Motion to Strike Portions of the Supporting Declarations of Beth Fee-Kreibal and Lonnie Keesee.**

As stated above, DDD brought its Motion for Summary Judgment against the claims of Plaintiffs on January 13, 2012. Supporting evidence included declarations of Beth Fee-Kreibal and Lonnie Keesee. It is the position of Plaintiffs that portions of those declarations should be stricken on grounds that they relied on documents that were not disclosed by DDD, and were based on hearsay statements of, and photographs taken by Anna Facio who had not been made available for discovery by claim of illness.

DDD's is obligated to point out the basis for Sound Support's default(s), or at least to tell Plaintiffs where in the documents that basis can be found. This point was made to Mr. McIlhenny and in response Mr. McIlhenny produced his letter of September 28, 2011, that purportedly identified what DDD contended formed the basis of Sound Support's default(s). (CP 651-653 (*Stier Declaration*)) The Declaration of Beth Fee-Kreibal relies on documents that were not identified in Mr. McIlhenny's September 28, 2011, letter.<sup>19</sup>

Likewise, DDD cannot support a Motion for Summary Judgment with inadmissible hearsay. CR 56(e). It is Plaintiffs' position that everything said or done by Ms. Facio was hearsay, and to the extent that it was the source for information relied on in the declarations of Beth Fee-Kreibal and Lonnie Keesee should be stricken on those

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<sup>19</sup> 72.7% of that declaration was based upon documents that were not disclosed in Mr. McIlhenny's Letter of September 28, 2011.

points-e.g. as her reports are the only evidence in the record of “imprisonment” of HS, and of holes in the floor at the “JS” house, those parts of the declarations of Beth Fee-Kreibel and Lonnie Keesee should be stricken from the record of the Summary Judgment proceeding. These “facts”<sup>20</sup> apparently proved to be very important to the trial judge who cited them in her Letter Opinion. CP 1138-1144.

## V. CONCLUSION

This Court should review the trial court’s grant of summary judgment de novo. Also, when considering the evidence presented in a motion for summary judgment, such “[e]vidence is construed in the light most favorable to the nonmoving party.” In addition, a summary judgment should not be granted based upon an error of law.

Supporting evidence for DDD’s Motion for Summary Judgment included declarations of Beth Fee-Kreibal and Lonnie Keesee. It is the position of Plaintiffs that portions of those declaration should be stricken to the extent they relied on documents that were not disclosed by DDD and for hearsay and they were based on a witness (Anna Facio) that had not been made available for discovery by claim of illness.

Did DDD have a reasonable basis to believe that Sound Support had failed to protect the health or safety of any DSHS client. The question of whether an action is “reasonable” is typically a question of fact which should have been decided by the jury.

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<sup>20</sup> To the extent the allegations were properly considered by the trial court, despite hearsay, the trial court nevertheless erred, for summary judgment purposes, in apparently giving them dispositive weight, as they were each rebutted by Mr. Sibbett. Issues of fact remained as to these hearsay allegations by Ms. Facio, and Plaintiffs certainly are entitled to rebut these, and the trial court erred in granting summary judgment based thereon.

DDD breached the covenant of good faith and fair dealing in this case. At the trial court level, DDD contended that it had no obligation to justify its decision because the contract gave it unlimited discretionary authority. That was error. Clearly, DDD's discretionary authority was not "unlimited" where default was concerned. Default is tantamount to a termination for cause.

Likewise, discretion should be used in the case of an automatic conversion to a termination for convenience clause in the contract and the covenant of good faith and fair dealing is applicable.

The trial court erred in granting DDD's Motion for Summary Judgment on Plaintiffs' claim for negligent investigation, where DDD terminated Sound Support's CSC disregarding the input of RCS in violation of pertinent WACs and the investigation performed by DDD was completed deficient and defective.

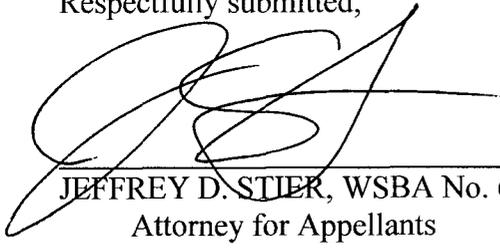
Plaintiffs stated a valid claim for DDD's tortious interference with a "Buyout" Agreement that Plaintiffs had negotiated with an approved Provider.

Plaintiffs have stated valid claim for negligent infliction of emotional distress in tort, if not in contract. Likewise, Plaintiffs have stated a valid claim for intentional infliction of emotional distress in tort and contract.

DDD and the trial court improperly relied on improper evidence in granting the Summary Judgment.

Plaintiffs respectfully submit that this case should be remanded to the trial court for trial of the facts before a jury.

Respectfully submitted,



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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

SOUND SUPPORT, INC., A  
Washington Corporation; JAMES L.  
SIBBETT and MARYANNA N.  
SIBBETT, husband and wife,  
Appellants,

NO. 43678-7-II

vs.

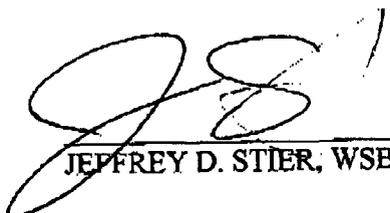
DECLARATION OF SERVICE OF  
OPENING BRIEF

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES and its  
subdivision, DIVISION OF  
DEVELOPMENTAL DISABILITIES,

Respondent.

I certify under penalty of perjury under the laws of the State of Washington that on  
September 28, 2012, I served a copy of the Opening Brief to the opposing attorney of record in  
this matter by placing a copy thereof in the U.S. Mail, 1<sup>st</sup> Class postage prepaid addressed as  
follows:

DATED this 3rd day of October, 2012.

  
JEFFREY D. STIER, WSBA No. 6911

Copy mailed to:

John K. McIlhenny, Jr.  
7141 Cleanwater Drive SW  
Olympia, WA 98504-0108

DECLARATION OF SERVICE OF  
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