

Kayel v El-Bab

2011 NY Slip Op 31522(U)

May 31, 2011

Supreme Court, Suffolk County

Docket Number: 21594/2005

Judge: William B. Rebolini

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Short Form Order

COPY**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 SUFFOLK COUNTY**

PRESENT:

WILLIAM B. REBOLINI
JusticeTimothy Kayel, Jr., an infant by his Father and
Natural Guardian, Michelle Kayel,

Plaintiff,

-against-

Zeinab M. Fath El-Bab, M.D., Andrew H. Nataloni,
M.D., J. Gerard Quirk, Jr., M.D., Paul L. Ogburn,
M.D., University Associates in Obstetrics &
Gynecology, P.C., Joseph A. Spataro, M.D.,
Zeinab, Nataloni & Spataro, M.D.'s, Central
Suffolk Hospital, Ernst Jean Paul, Jr., M.D.,
Eastern Long Island Hospital and Scott J. Flashner,
M.D. and Lawrence J. Kessler, D.O., P.C. d/b/a
United Emergency Physicians,

Defendants.

Index No.: 21594/2005Attorneys [See Rider Annexed]Motion Sequence No.: 009; MOT DMotion Date: 10/28/10Submitted: 1/19/11Motion Sequence No.: 010; MOT DMotion Date: 10/27/10Submitted: 1/19/11Motion Sequence No.: 011; MDMotion Date: 10/20/10Submitted: 1/19/11Motion Sequence No.: 012; MOT DMotion Date: 10/20/10Submitted: 1/19/11

Upon the following papers numbered 1 to 41 read on these motions to vacate the prior order, and to renew and reargue the prior motions: Notice of Motion/ Order to Show Cause and supporting papers, 1 - 4, 5 - 8, 9 - 12, 13 - 16; Answering Affidavits and supporting papers, 17 - 19, 20 - 22, 23 - 25, 26 - 28, 29 - 31, 32 - 34, 35 - 37; Replying Affidavits and supporting papers, 38 - 39, 40 - 41, 42 - 44, 45 - 47, 48 - 50.

In this medical malpractice action, plaintiff Michelle Kayel ("plaintiff"), as mother and natural guardian of the infant plaintiff, Timothy Kayel, Jr., seeks damages for alleged departures in accepted medical practice in her care, which caused permanent injuries to the infant plaintiff. A compliance conference was conducted in this action on November 19, 2008, and a note of issue and certificate of readiness were filed on June 6, 2009. The facts of the case were provided at length in the Court's prior order, dated July 21, 2010, and will not be repeated herein.

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At a compliance conference on May 19, 2010, pursuant to a so-ordered conference stipulation/order, the Court “extended the final submission of all reply papers to July 28, 2010”. In addition, the Court “vacated the note of issue and directed plaintiff to refile same within thirty days after service of the court’s decision”. In the interim, however, the Court inadvertently failed to consider the parties’ reply papers. More specifically, by order dated July 21, 2010, this Court granted the motion for summary judgment by Peconic Bay Medical Center,¹ Eastern Long Island Hospital (“ELI Hospital”), and Anthony Spataro, M.D. The Court denied the cross motion for summary judgment by defendants Zeinab M. Fath El-Bab (“defendant Zeinab”) and Andrew H. Nataloni, M.D. The Court also denied the motion for summary judgment by defendants Gerald Quirk, Jr., M.D., Paul Ogburn, M.D., and University Associates in Obstetrics and Gynecology, P.C. (“the Quirk defendants”). Finally, the Court denied the motion for summary judgment by Ernst Jean Paul, Jr., M.D., Scott J. Flashner, M.D., Lawrence J. Kessler, D.O., P.C., doing business as United Emergency Physicians (“the Paul defendants”) as untimely.

At a compliance conference on August 18, 2010, pursuant to a so-ordered stipulation, the Court “allowed the parties to extend the time to move for leave to renew or reargue the prior motions until September 29, 2010”. The Paul defendants now move for leave to reargue or renew their prior motion for summary judgment. Defendants Zeinab and Nataloni move to vacate the portion of the order which denied their motion for summary judgment, resubmitting the cross motions for summary judgment and for leave to renew or reargue their prior motion for summary judgment. Plaintiff moves for leave to reargue or renew the prior order of this Court, which granted summary judgment in defendant ELI Hospital’s favor. The Quirk defendants move to vacate the prior order, and for leave to reargue or renew their prior motion for summary judgment. The Court now considers the renewed motions for summary judgment with the exception of plaintiff’s motion to reargue the prior order which granted summary judgment to Eastern Long Hospital.

The elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (see, Thompson v. Ormer, 36 AD3d 791 [2nd Dept., 2007]; Lyons v. McCauley, 252 AD2d 516 [2nd Dept., 1998], *app denied* 92 NY2d 814; Bloom v. City of New York, 202 AD2d 465 [2nd Dept., 1994]). On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (see, Williams v. Sahay, 12 AD3d 366 [2nd Dept., 2004]). To prove *prima facie* case of medical malpractice, a plaintiff must establish that the defendant’s negligence was a substantial factor in producing the alleged injury (see, Derdarian v. Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v. Rafla-Demetrious, 224 AD2d 674 [2nd

¹ Peconic Bay Medical Center was formerly called Central Suffolk Hospital, and may have been used interchangeably by the experts in their affirmations.

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Dept., 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v. Galang*, 64 NY2d 999 [1985]; *Lyons v. McCauley*, 252 AD2d 516 [2nd Dept., 1998]).

It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of the prior motion, were not known to the party seeking renewal, and consequently, were not made known to the court (*see, Brooklyn Welding Corp. v. Chin*, 236 AD2d 392 [2nd Dept., 1997]). Further, leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original motion (CPLR §2221 (e) (3); *Cannistra v. Gibbons*, 224 AD2d 570 [2nd Dept., 1996]). A motion for reargument addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR §2221[d]).

Here, under the circumstances, renewal is granted to the moving parties inasmuch as the reply papers were not considered in the prior order. Turning to the application by the Paul defendants for an order, pursuant to CPLR §2221 (d), (e), and (f), to reargue their prior summary judgment motion which was denied as untimely, the application is granted inasmuch as the Court vacated the note of issue. In support of the motion for summary judgment, the Paul defendants submit, *inter alia*, the pleadings, the bill of particulars, a copy of plaintiff's ELI Hospital medical records, a copy of the plaintiff's Stony Brook medical records, a copy of Zeinab's office records, and the affirmations of Gregory Mazarin, M.D., Michael Nimaroff, M.D. and James T. Howard, Jr., M.D.

In the bill of particulars, plaintiff alleges that Ernst Jean Paul, M.D. departed from accepted medical standards by his failure to, *inter alia*, timely and properly evaluate and examine her, recognize the significance of and determine the etiology of plaintiff's vaginal bleeding, timely minimize plaintiff's vaginal bleeding, properly perform an internal vaginal examination on June 11, 2003, recognize that an internal vaginal examination in a patient with placenta previa was contraindicated, consult with plaintiff's obstetrician, consider plaintiff's request not to perform an internal vaginal examination, properly diagnose that plaintiff's cervix was fully dilated, timely administer magnesium sulfate, and transfer plaintiff to a facility which was equipped to handle obstetrical patients, causing preterm labor at 25 weeks gestation. Plaintiff further alleges that as a result, the infant plaintiff sustained developmental delays, and brain damage, and had to undergo lengthy hospitalizations, surgery, and physical therapy as a result of his premature birth.

The ELI Hospital medical record reveals that on June 11, 2003, plaintiff presented to the emergency room at 3:29 a.m. The triage note reveals that plaintiff had experienced vaginal bleeding and contractions since 1:00 a.m. and she was passing blood clots. The record reveals that plaintiff's

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estimated date of confinement was October 12, 2003, she had a condition known as placenta previa and abruptio, and had undergone a caesarean section nine months prior to admission. At 3:30 a.m., Paul performed a manual examination without palpating the cervix, and wrote that plaintiff was fully dilated, the baby's head was engaged, and that plaintiff was experiencing contractions every two minutes. He ordered magnesium sulfate. At 3:48 a.m., Paul called Stony Brook University Hospital ("Stony Brook") and spoke with Gerald Quirk, M.D., a member of University Associates in Obstetrics and Gynecology, P.C., who agreed to accept plaintiff for transfer. At 3:53 a.m., Paul ordered a test dose of magnesium sulfate, and also benadryl and solumedrol. At 4:15 a.m., Paul noted no reaction from the test dose of magnesium sulfate and ordered the infusion. At 4:30 a.m., Paul again noted no reaction from the infusion of magnesium sulfate. The nurses' notes revealed at 5:00 a.m. that plaintiff's contractions had stopped and the magnesium sulfate infusion was completed. At 5:05 a.m., the Stony Brook personnel arrived, initiated new magnesium sulfate and ampicillin infusions, and transported plaintiff to Stony Brook Hospital via helicopter.

The plaintiff's Stony Brook medical records, dated June 11, 2003, reveal that upon arrival, plaintiff was experiencing mild bleeding and no contractions. Paul Ogburn, Jr., M.D., also a member of defendant University Associates, was the attending physician in charge of plaintiff's care on June 11, 2003. From June 12, 2003 through June 14, 2003, Quirk was the attending physician in charge of plaintiff's care. In his discharge summary, Quirk stated that the examination upon admission showed that plaintiff's cervix was 1 cm dilated but long, as viewed via a sterile speculum examination. A sonogram was performed which revealed marginal placental previa. The magnesium sulfate infusion was discontinued. Ampicillin and steroids were administered. Plaintiff began to have contractions again and the magnesium sulfate was restarted. Quirk further stated that plaintiff had minimal bleeding during her hospital stay. The magnesium sulfate was discontinued on hospital day three. Plaintiff was discharged to home on June 14, 2003, with instructions to continue her prenatal vitamins, call the hospital for any contractions, vaginal bleeding, leakage of fluid, decreased fetal movement, temperature greater than 101 degrees Fahrenheit or any other concerning symptoms occurred. She was to follow-up on June 17, 2003 at 11:30 a.m. with Zeinab Fath El-Bab, M.D. and to obtain a sonogram at 12:00 p.m. on the same day. She was also instructed to continue her regular diet and pelvic rest. In addition to the above instructions, the individualized patient discharge plan advised plaintiff to avoid lifting, taking very hot showers or baths, excessive exercising, to drink lots of fluids and empty her bladder frequently, and to stay on bed rest or light ambulation at home.

The record reveals that on June 17, 2003, plaintiff returned to the office of defendant Zeinab. A sonogram of plaintiff's uterus was performed, which revealed a new development of a lentiform subamniotic hypoechoic area in the margin of the placenta suggesting a hematoma, which was not present on the prior examination.

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Dr. Mazarin avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in emergency medicine. He opines, within a reasonable degree of medical certainty, that the Paul defendants did not depart from good and accepted medical practice in their care and treatment of plaintiff. On June 11, 2003, the plaintiff was transferred from home via ambulance arriving at ELI Emergency Department at approximately 3:25 a.m. with complaints of vaginal bleeding and abdominal cramping since 1:00 a.m. Paul appropriately performed a vaginal examination, without palpating the cervix, revealing that she was fully dilated with the baby's head engaged. Paul noted that fetal monitoring revealed contractions every two minutes lasting for 10 - 15 seconds and ordered magnesium sulfate for pre-term labor. He appropriately contacted Stony Brook resulting in the plan that plaintiff would be transferred to Stony Brook via helicopter. It is Dr. Mazarin's opinion, within a reasonable degree of medical certainty, that defendant Paul's care and treatment of the plaintiff was entirely appropriate and within the applicable standard of care. In addition, it is Dr. Mazarin's opinion, within a reasonable degree of medical certainty, that the manual vaginal examination performed by Paul was entirely appropriate and within the standard of care in light of the plaintiff's presenting signs of active labor. It was necessary to determine that the patient was not in imminent danger of delivery. Inasmuch as defendant Paul did not palpate the cervix, it was entirely appropriate and within the applicable standard of care for defendant Paul to perform a vaginal examination.

Defendants also rely upon the affirmation of Michael Nimaroff, M.D., who affirmed his support of summary judgment on behalf of ELI Hospital. Dr. Nimaroff avers that he is a physician who is duly licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. He opines, within a reasonable degree of medical certainty, that the emergency department nursing staff appropriately followed the orders of emergency medicine physician Dr. Paul and timely and appropriately administered medication and documented plaintiff's condition after the administration of same. Dr. Nimaroff also opines that ELI Hospital properly promulgated the proper rules and regulations for handling high risk obstetric patients in the emergency department. Dr. Nimaroff opines that Paul used his clinical judgment in deciding to perform a vaginal examination on June 11, 2003, before transferring plaintiff to Stony Brook. He further states that there are no injuries of any kind to the mother plaintiff or infant plaintiff that are causally connected to Paul's vaginal examination. Dr. Nimaroff states that the Stony Brook record reveals that upon her transfer to Stony Brook, a sterile speculum examination revealed mild active bleeding, and a bi-manual vaginal examination on June 12, 2003 revealed scant dark and old blood and a closed cervix. Dr. Nimaroff concludes that there were no complications from Paul's vaginal examination on June 11, 2003, and there is no causal connection between the vaginal examination by Paul on June 11, 2003, and the delivery of the infant plaintiff on June 30, 2003.

Defendants also rely upon the affidavit by James T. Howard, Jr., M.D., who is duly licensed to practice medicine in the State of New York and is board certified in the specialty of obstetrics and

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gynecology. His affirmation was submitted in support of the Quirk defendants, wherein he opined that the Quirk defendants did not depart from accepted medical standards in their care and treatment of plaintiff, when they admitted and treated plaintiff from June 11, 2003 through June 14, 2003 at Stony Brook.

The Court finds that defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law by submitting evidence that defendant Paul did not depart from accepted standards of medicine (see, Starr v. Rogers, 44 AD3d 646 [2nd Dept., 2007]; Whalen v. Victory Memorial Hosp., 187 AD2d 503 [2nd Dept., 1992]). Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (see, Baez v. Lockridge, 259 AD2d 573 [2nd Dept., 1999]).

In opposition, plaintiff submits, *inter alia*, the affirmation of her medical expert, whose name has been redacted in accordance with Carrasquillo v. Rosencrans, 208 AD2d 488 [2nd Dept., 1994]),² the deposition testimony of Paul, and a Consent Agreement and Order by the New York State Department of Health Board for Professional Medical Conduct. The expert opines that the pelvic examination performed by defendant Paul at ELI Hospital, on June 11, 2003, was a departure from accepted medical practice. The expert states that it was obvious that Paul performed a manual vaginal examination by Paul's observation in the ELI emergency department record that the cervix was fully dilated and that the fetal head was engaged. The expert stated, however, in reality, that Paul probably palpated the placenta. The expert concedes, however, that the performance of a vaginal examination of a patient with placenta previa is indicated under certain conditions. In addition, the expert notes that Zeinab and Nataloni, in their depositions, testified that Paul probably caused further injury to the placenta and further bleeding with his examination.

Paul testified that he is duly licensed to practice medicine in the State of New York. At the time of plaintiff's presentation to ELI Hospital, he was employed by defendant United Emergency Physicians and was paid by them. Paul conceded that he signed a Consent Order with the New York State Office of Professional Medical Conduct, dated June 7, 2007, which included charges related to his care and treatment of plaintiff. He stated that on June 11, 2003, he performed a finger sweep of the vaginal vault during the manual examination and did not palpate the cervix. He stated that it was necessary to be sure that there were no fetal presentations in the vaginal vault prior to helicopter transport to Stony Brook. He stated that he thought that since plaintiff was allergic to sulfur, that she might have a reaction to the magnesium sulfate, which was why he ordered benadryl

² The unredacted affirmation of plaintiff's expert was submitted during the prior submission, and, in an in-camera inspection, the Court found it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name.

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and solumedrol. He did not, however, consider ordering solumedrol to assist fetal lung development. In addition, he stated that he was unable to order an ultrasound of plaintiff's abdomen because ELI Hospital did not have an ultrasound technician on call outside regular business hours.

In reply, defendants contend that plaintiff's expert failed to address their experts' opinions that plaintiff underwent two additional pelvic examinations at Stony Brook soon after she was transferred from ELI Hospital, and plaintiff experienced minimal bleeding throughout the Stony Brook admission. These conflicting opinions raise issues of credibility which preclude a finding of summary judgment (see, Viti v. Franklin General Hospital, 190 AD2d 790 [2nd Dept., 1993]). Accordingly, the motion for summary judgment is denied.

Turning to the application by defendants Zeinab and Nataloni for leave to renew or reargue, and to vacate that portion of the Court's order, dated June 21, 2010, which denied their motion for summary judgment dismissing the complaint. Upon renewal, the Court has reviewed the reply, wherein defendants' counsel contends that plaintiff's expert speculates as to the cause of plaintiff's alleged injuries without providing a foundation in the medical literature to support his opinions. Defendants submit a portion of plaintiff's ELI Hospital medical record which reveals the medications that were administered by defendant Paul on June 11, 2003, and an article from MedicineNet.com regarding the administration of methylprednisolone. Renewal is denied, since the purported new evidence submitted is insufficient to change this Court's initial determination of defendants' cross motion for summary judgment (see, Ford v. Lasky, 300 AD2d 536 [2nd Dept., 2002]). In addition, defendants' request for leave to reargue is denied as their submissions fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (see, Mooney v. Vecchio, 305 AD2d 415 [2nd Dept., 2003]; Foley v. Roche, 68 AD2d 558 [1st Dept., 1979], *app denied* 56 NY2d 507 [1982]).

The Court now turns to the application by plaintiff for leave to reargue the prior motion seeking summary judgment dismissing the complaint against ELI Hospital. The Court notes that plaintiff's submissions do not include the papers submitted on the original motion for which reargument and renewal are sought. In the absence thereof and other relevant documents providing a context for the position advanced, reargument is not available (see generally, Gerhardt v. New York City Transit Authority, 8 AD3d 427 [2nd Dept., 2004]). It is the responsibility of the moving parties to assemble complete papers which document the procedural history of the application and provide a proper foundation for the relief requested (see, Fernald v. Vinci, 13 AD3d 333 [2nd Dept., 2004]). Accordingly, the motion is denied.

Turning to the application by the Quirk defendants for an order vacating the Court's decision dated July 21, 2010, and for leave to reargue the prior motion for summary judgment. In its discretion, the Court declines to vacate the prior order. Defendants submit their reply to the prior motion, which was not considered by the Court. Upon renewal, defendants submitted a new expert

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affirmation by Dr. Howard, in response to plaintiff's expert's opinion. Dr. Howard affirmed that in his opinion, within a reasonable degree of medical certainty, defendants Quirk and Ogburn did not depart from accepted standards of medical care. In addition, the expert opines that defendant Ogburn was not involved in plaintiff's care after June 11, 2003, and did not participate in discharge planning, contrary to plaintiff's expert's opinion. In addition, he notes that plaintiff waived Ogburn's deposition during discovery.

In opposition, plaintiff submits a copy of the original expert opinion from the initial motion for summary judgment. Although plaintiff's expert discussed the events as they unfolded at Stony Brook, he failed to note that Ogburn cared for plaintiff on June 11, 2003 only. In addition, plaintiff's expert did not identify any departures by Ogburn. Therefore, the motion for summary judgment dismissing the complaint as asserted against the Quirk defendants is granted as to the claims asserted against defendant Ogburn and as to those claims against University Associates alleging vicarious liability for Ogburn's acts. However, the branch of the motion which requests leave to reargue portions of the prior motion seeking dismissal of plaintiff's claims against defendant Quirk and University Associates is denied as the Quirk defendants' submissions fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (see, Mooney v. Vecchio, 305 AD2d 415 [2nd Dept., 2003]; Foley v. Roche, 68 AD2d 558 [1st Dept., 1979], *app denied* 56 NY2d 507 [1982]).

In sum, the application by the Paul defendants is granted to the extent that reargument is granted, and upon reargument, the motion is denied. The application by plaintiff to reargue the prior motion which granted summary judgment dismissing the complaint against ELI Hospital is denied. The application by defendants Zeinab and Nataloni is granted to the extent that upon renewal, the Court adheres to its initial determination. The application by the Quirk defendants is granted to the extent that plaintiff's claims as asserted against Ogburn and as asserted against University Associates in Obstetrics and Gynecology, P.C. for alleged vicarious liability for Ogburn's acts are dismissed. The plaintiff's claims against defendant Ogburn and against defendant University Associates in Obstetrics and Gynecology, P.C. for alleged vicarious liability related to Ogburn's acts, dismissed herein, are severed, and plaintiff's remaining claims continue.

Based on the foregoing, it is

ORDERED that the motions (009, 010, 011, 012) are consolidated for the purpose of this determination, and it is further

ORDERED that the motions (009, 010, and 012) are considered as renewed motions for summary judgment and are determined as set forth herein; and it is further

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ORDERED that the motion (009) by defendants Ernst Jean Paul, Jr., M.D., Scott J. Flashner, M.D., Lawrence J. Kessler, D.O., P.C., doing business as United Emergency Physicians, pursuant to CPLR §2221 (d), (e), (f), for leave to reargue or renew a prior motion for summary judgment to dismiss the complaint, which was denied by order of this Court dated July 21, 2010, is granted, and, upon renewal, the motion is denied; and it is further

ORDERED that the motion (010) by defendants Zeinab M. Fath El-Bab, M.D. and Andrew H. Nataloni, M.D., pursuant to CPLR §2221 for leave to reargue or renew a prior motion for summary judgment, which was denied by order of this Court dated July 21, 2010, is granted to the extent set forth herein and is otherwise denied; and it is further

ORDERED that the motion (011) by plaintiff for an order pursuant to CPLR §2221 (d) for leave to reargue a prior motion for summary judgment to dismiss the complaint against defendant Eastern Long Island Hospital, which was granted in its favor by order of this Court dated July 21, 2010, is denied; and it is further

ORDERED that the motion (012) by defendants Gerald Quirk, Jr., M.D., Paul Ogburn, Jr., M.D., and University Associates in Obstetrics and Gynecology, P.C., for an order vacating this Court's order dated July 21, 2010, or granting leave to reargue or renew a prior motion for summary judgment to dismiss the complaint is granted to the extent set forth herein, and is otherwise denied.

Dated: May 31, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

RIDER

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