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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

District Court, Pueblo County, Colorado
The Honorable Allison P. Ernst
Case No. 2017-CV-30670

Plaintiffs/Appellants:
DELORES CRUZ AND JOE CRUZ

v.

Defendants/Appellees:
STATE OF COLORADO, COLORADO DEPARTMENT OF AGRICULTURE, THE COLORADO STATE FAIR AUTHORITY

◆COURT USE ONLY◆

Case No. 2018CA2236

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this Answer Brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specially, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g). It contains 4,184 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

__ For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

X In response to each issued raised, the appellees must provide under a separate heading before the discussion of the issue, a statement indicating whether appellees agree with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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Defendants/Appellees, State of Colorado, Colorado Department of Agriculture, and the Colorado State Fair Authority (collectively referred to as the State), by and through the Office of the Colorado Attorney General, pursuant to C.A.R. 28 and C.A.R. 31, file this Answer Brief in response to the Opening Brief filed by Plaintiffs-Appellants Delores and Joe Cruz (the Cruzes).

ISSUES FOR REVIEW

1. Is a claim that a public entity's failure to upgrade the design of a concrete ramp on one of its buildings from commercial to pedestrian use barred by the Colorado Governmental Immunity Act (CGIA)?
2. Is a claim that a public entity allowed a concrete ramp on one of its buildings to be used in an unsafe manner because it was used by pedestrians even though it was designed with a steep slope, no handrails, no steps, or slip-proof footing, barred by the CGIA?

STATEMENT OF THE CASE

This case arises from personal injuries that Delores Cruz sustained on the grounds of the Colorado State Fair when she fell on a

concrete ramp while exiting the Palace of Agriculture (the Palace). *CF,* pp. 1-40.[1] Her husband, Joe Cruz, filed a consortium claim. *Id.* at p. 13. The Palace houses the State Fair's trade show. *Exhibits,* p. 49; *CF,* p. 65, ¶ 9. The ramp is intended for use by vendors to move their wares into and out of the Palace for the trade show and as a way to move heavy equipment or vehicles into and out of the building. *CF,* p. 65, ¶ 9; *TR,* pp. 44:24-45:4; 51:13-20.[2] While the ramp is intended for vendor or motorized use, pedestrians also use the ramp as one of the ways to enter and exit the Palace. *TR*, p. 45:15-23.

The Cruzes allege that the State's immunity under the CGIA is waived pursuant to either § 24-10-106(1)(c), C.R.S. (dangerous condition of a public building) or § 24-10-106(1)(e), C.R.S. (dangerous condition of a public facility located in any park or recreation area), because the State did not upgrade the ramp's design to comply with building codes for pedestrian use by adding railings, steps, or slip-proof footing. *CF,* p.4, ¶¶ 33, 35-36; p. 4-5, ¶¶ 38-42; p. 8-9, ¶ 77. Nor did the State

[1] References to the "Court File" will be designated by "CF." References to documents from the Court File used as Exhibits at the *Trinity* hearing will be designated as "Exhibits." References to the hearing transcript will be designated as "TR."

[2] Ramp photos include the following: *CF,* pp. 33, 73-74.

prevent or otherwise warn pedestrians not to use the ramp. *Id.* at p. 4, ¶¶ 35-36.

RELEVANT FACTS AND PROCEDURAL HISTORY

In their complaint, the Cruzes allege that the concrete ramp where Mrs. Cruz fell constituted a dangerous condition because the State did not upgrade the ramp's design to comply with building codes for pedestrian use because of its slope. In particular, the Cruzes allege that the State should have modified the design by adding railings, steps, or slip-proof footing. *CF,* p. 4, ¶¶ 33, 35-36; p. 5, ¶ 42; pp. 8-9, ¶ 77. The Cruzes also allege that the State should have prevented or otherwise warned pedestrians not to use the ramp. *Id.* at p. 4, ¶¶ 35-36.

The Palace was built in the 1940s to house the State Fair's trade show. *Id.* p. 65, ¶¶ 7, 9; pp. 118, 132; *Exhibits,* p. 49. Today the Palace still houses the trade show. *Exhibits,* p. 49; *CF,* p. 65, ¶ 9. The Palace has several available entrances, including a handicapped accessible entrance that was added to the south side of the building. *CF,* p. 65, ¶ 10-11.

The ramp is intended for vendors to move their wares into and out of the Palace for the trade show and it is also a means to move heavy

equipment or vehicles into and out of the building. *CF,* p. 65, ¶ 9; *TR,* pp. 44:24-45:4; 45:15-23. While the ramp is intended for vender use, pedestrians also use the ramp to enter and exit the Palace. *TR*, p. 45:15-23. Michelle Hines, the State Fair's Director of Operations, does not know when the ramp was built as it does not show up on the Palace blue prints. *TR,* pp. 27:10-13; 30:11-19. There is not any record of any other injuries associated with the ramp. *CF,* p. 66, ¶ 15.

Following an evidentiary hearing, the district court found in favor of the State and dismissed the complaint pursuant to the CGIA. *CF,* p. 283-290. In particular, the district court held that the defects alleged by the Cruzes were related to the ramp's design and did not relate to the ramp's construction or maintenance. *Id.* at p. 287, ¶ 34; p. 288, ¶¶ 36-39; p. 290, ¶ 49. The district court also found that the failure to prevent the public from using the ramp, warning pedestrians about the ramp, or changing the ramp's use, did not fall within waived areas of immunity under the CGIA. *Id.* p. 289, ¶¶ 42-44. The Cruzes filed this appeal requesting that this Court reverse the district court's dismissal of their claims.

SUMMARY OF THE ARGUMENT

The Cruzes' claims arise from alleged inadequacies with the ramp's design and the alleged failure to warn pedestrians against using it. *CF,* p. 4, ¶-¶ 33, 35-36; p. 5, ¶ 42; pp. 8-9, ¶ 77; p. 11, ¶ 90. However, claims of inadequate design, failure to upgrade a design, or failure to warn do not fall within the CGIA's waived areas of immunity. § 24-10-103(1.3), (2.3), C.R.S. (2018); *Medina v. State,* 35 P.3d 445, 462 (Colo. 2001). Nor can the Cruzes sustain a claim against the State by alleging that allowing the ramp intended for vendors to be used by pedestrians constituted an unsafe use of the ramp. *See Padilla v. School Dist., No. 1,* 25 P.3d 1176, 1183 (Colo. 2001) (a government's alleged use of a facility in an unsafe manner does not fall within the waiver of immunity for a dangerous condition of a public building). Therefore, the district court was correct in finding that the Cruzes' claims were barred by the CGIA.

ARGUMENT

I. The Cruzes' claim that the State failed to upgrade the design of its concrete ramp for pedestrian use is barred by the CGIA.

Standard of review: A trial court's factual findings regarding governmental immunity are upheld unless they are clearly erroneous.

City and Cty. of Denver v. Crandall, 161 P.3d 627, 633 (Colo. 2007). A trial court's legal conclusions are reviewed de novo. *Id.*

Preservation of the issue: The Cruzes filed a complaint proceeding on a theory that their claims fell within a waived area of immunity under the CGIA. *CF,* pp. 1-40. The district court dismissed the complaint for lack of subject matter jurisdiction. Therefore, the issue of whether or not the district court had subject matter jurisdiction is preserved for appeal.

A. The Cruzes' claims do not constitute a "dangerous condition" for purposes of the CGIA.

Under the CGIA, a public entity is immune from liability in all claims for injury "which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant…." § 24-10-106(1), C.R.S. (2018). The waived areas of immunity set out in § 24-10-106(1), define the subject matter jurisdiction of the court to hear tort claims against public entities. *State Dep't of Highways v. Mountain States Tel. & Tel.*, 869 P.2d 1289, 1291 **(**Colo. 1994). The plaintiff has the burden of pleading and proving jurisdiction. *Trinity Broad. of Denver, Inc. v. City of Westminster,* 848 P.2d 916, 925 (Colo. 1993).

"Because the CGIA derogates the common law, its grant of immunity must be strictly construed" and "its waiver provisions are interpreted broadly." *Medina,* 35 P.3d at 453. "Nonetheless, the primary task in construing a statute is to determine and give effect to the intent of the legislature." *Id.* In reviewing statutory language, words and phrases are given their plain and ordinary meaning and a statute is interpreted in a way that "best effectuates the purpose of the legislative scheme." *Id.*

When the question of jurisdiction is raised pursuant to C.R.C.P. 12(b)(1), the court must resolve the question before trial. *Trinity Broad.,* 848 P.2d at 924. Disputed allegations contained in a plaintiff's complaint are not taken as true for the purposes of establishing the jurisdiction of the court. *Medina,* 35 P.3d at 452. In determining whether immunity applies, the court acts as the finder of fact. *Crandall,* 161 P.3d at 632.

Here, the district court conducted an evidentiary hearing to determine whether the Cruzes' claims fell within a waived area of immunity for either a dangerous condition of a public building or a

dangerous condition of a public facility located in any park or recreation area. *See* § 24-10-106(1)(c) and (e), C.R.S. (2018).

The CGIA defines a "dangerous condition" as:

> [E]ither a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility. For the purposes of this subsection (1.3), a dangerous condition should have been known to exist if it is established that the condition had existed for such a period and was of such a nature that, in the exercise of reasonable care, such condition and its dangerous character should have been discovered. *A dangerous condition shall not exist solely because the design of any facility is adequate.*

§ 24-10-103(1.3), C.R.S. (2018) (emphasis added).

The CGIA's definition provides the four-factor test for determining a waiver of immunity for a dangerous condition of a public building: "(1) the physical condition of a public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately

caused by the negligent act or omission of the public entity in constructing or maintaining the facility." *Padilla,* 25 P.3d at 1180.

B. The Cruzes' claims arise from allegations of inadequate design.

Here, the Cruzes allege that the ramp constitutes a dangerous condition for pedestrians because it was allegedly steep, with no railings or steps, did not have slip-proof footing, did not have warning signs, and violated 1986 ANSI standards. *CF,* p. 4, ¶¶ 33, 35-36; pp. 4-5, ¶¶ 38-42.

However, under the CGIA "a dangerous condition *shall not exist* solely because the design of any facility is inadequate." § 24-10-103(1.3), C.R.S. (2018) (emphasis added). "Design means 'to conceive or plan out in the mind.'" *Estate of Grant v. State,* 181 P.3d 1202, 1205 (Colo. App. 2008). Therefore, allegations that amount to a claim of inadequate or negligent design do not fall within a waived area of immunity under the CGIA.

For instance, in *Szymanski v. Dep't of Highways,* 776 P.2d 1124, 1125 (Colo. App. 1989), the court held that allegations regarding a blind spot at a traffic intersection, improper sight lines, a posted speed limit that was excessive, and lack of warning signs all related to claimed

inadequacies in the design of the intersection and, thus did not fall within a waived area of immunity under the CGIA.

On the other hand, the CGIA defines the term "maintenance" as "the act or omission of a public entity or public employee in keeping a facility in the same general state of repair or efficiency as initially constructed or in preserving a facility from design or failure." § 24-10-103(2.5), C.R.S. (2018).

The CGIA does not define the term "constructing" or "construction." The Colorado Supreme Court has used "[t]he ordinary meaning of the verb 'construct' [as] 'to form, make, or create by combining parts or elements.'" *Smokebrush Found. v. City of Colorado Springs,* 410 P.3d 1236, 1241 (Colo. 2018) (quoting Webster's Third New International Dictionary (2002)). "Similarly, 'construction' is defined to include 'the act of putting parts together to form a complete integrated object.'" *Id.*

Therefore, the Cruzes' claims are different from claims related to maintenance or construction. For instance, in *Springer v. City and Cty. of Denver,* 13 P.3d 794 (Colo. 2000), immunity was waived for an injury resulting from a threshold plate that was not constructed as designed or

Booth v. Univ. of Colorado, 64 P.3d 926 (Colo. 2002), where immunity was waived for an injury that occurred due to the public entity's alleged failure to securely affix an eraser board to a wall.

The Cruzes do not claim that the ramp was negligently constructed. Saying it another way, the Cruzes do not allege that the ramp's construction did not comply with design. Nor do the Cruzes' claims involve maintenance, as they are not claiming that their injuries arose due to the ramp's condition changing over time.

The district court found that "[n]o facts are alleged by [the Cruzes] for negligent construction or maintenance of the ramp." *CF,* p. 288, ¶ 39. The district court further found that "[i]nstead, [the Cruzes] assert that the ramp should have been upgraded when the ramp began to be used for fair participant access to the building to include a handrail, a lower slope, and traction." *Id.* at ¶ 40.

Therefore, the district court was correct in ruling that the Cruzes' claims involve design. *Id.* at ¶ 40; p. 290, ¶ 49. A claim for inadequate design or failure to upgrade design does not fall within a waived area of immunity. *See* § 24-10-103(1.3), (2.5), C.R.S. Accordingly, the district court was correct in dismissing the Cruzes' claims. *CF,* p. 290, ¶ 49.

The Cruzes argue that the ramp must have been added to the Palace after 2007 because it was not mentioned in a 2007 Historic Structures Assessment that was done for the fairgrounds. *Opening Br.,* p. 7. The record does not reflect when the ramp was constructed. *TR,* p. 30:11-19. However, given that the Palace's purpose was to house the State Fair's trade show, it stands to reason that the ramp would have been built at or around the time the Palace was constructed.

In any event, regardless of when the ramp was built, the Cruzes' claims are based on an alleged inadequate design; not maintenance or construction. Therefore, the Cruzes' claims do not fall within a waived area of immunity for either a dangerous condition of a public building or a dangerous condition of any public facility located in any park or recreation area. Accordingly, this Court should affirm the district court's dismissal of the complaint.

II. The Cruzes' claim that the State allowed its concrete ramp to be used in an unsafe manner is barred by the CGIA.

Standard of review: A trial court's factual findings regarding governmental immunity are upheld unless they are clearly erroneous.

Crandall, 161 P.3d at 633. A trial court's legal conclusions are reviewed de novo. *Id.*

Preservation of the issue: The Cruzes filed a complaint proceeding on a theory that their claims fell within a waived area of immunity under the CGIA. *CF,* pp. 1-40. The district court dismissed the complaint for lack of subject matter jurisdiction. Therefore, the issue of whether or not the district court had subject matter jurisdiction is preserved for appeal.

A. An alleged "change in use" does not state a claim under the CGIA.

The Cruzes focus on the phrase "or the use thereof" in the definition of a dangerous condition, arguing that by allowing fairgoers to use the same ramp as vendors, without upgrading the ramp, constitutes a waiver of immunity. *Opening Br.,* pp. 1, 15. Toward that end, the Cruzes further argue that a public entity should foresee that using a building in a certain way could constitute a dangerous condition, such as where that use violates building code requirements. *Id.* at pp. 15, 17. In support of that proposition, the Cruzes rely on *Walton v. State,* 968 P.2d 636 (Colo. 1998). *Opening Br.,* pp. 15-16.

In *Walton*, the court held that a dangerous condition of a university building existed where university officials asked students to use an unsecured ladder on a slippery floor for purposes of accessing an otherwise inaccessible loft. An injury resulted when someone removed the desk that had been supporting the ladder, causing the ladder to slip. *Id.* at 638-39. The court stated that while the university was under no duty to upgrade the design, the maintenance practices provided an unreasonable risk. *Id.* at 645.

However, in *Padilla,* decided apparently three years after *Walton,* the court clarified that the waiver of immunity for a dangerous condition does not exist when an injury results from the government's use of a facility in an unsafe manner. In *Padilla,* an elementary school used a closet as a timeout room for a disabled child who was in a stroller. The Padilla's theory of recovery only amounted to a claim that "the School District should have upgraded the design of the closet if it wished to use it as a 'time out' room for students exhibiting disruptive behavior." *Id.*

In *Padilla,* the court held that the fact that the school district used the closet in what was arguably an unsafe matter did not fall

within a waived area of immunity for a dangerous condition of a public building. *Id.* at 1183. In *Burnett v. State Dep't Nat. Res.,* 350 P.3d 853, 856 (Colo. App. 2013), the court stated that "[i]n *Padilla*, the supreme court further clarified that waiver only exists when there is a defect in the structure itself, not when an injury is a result of the negligent use of a public facility." Similarly, citing *Padilla,* a Tenth Circuit district court held that a claim that a school used a gymnasium in an unsafe manner without upgrading the facility did not fall within a waived area of immunity. *Dorsey v. Pueblo Sch. Dist.,* 140 F. Supp. 3d 1102, 1111-12 (D. Colo. 2015).

The Cruzes argue that a facility's use coupled with design creates a liability situation. *Opening Br.,* p. 16. Ultimately, what the Cruzes are claiming is that the State was negligent in allowing pedestrians to use the same ramp used by venders. However, negligence in and of itself does not fall within a waived area of immunity. As the court stated in *Padilla,* "only alleging that the government was negligent in its use of the facility… lacked sufficient jurisdictional facts to support an immunity waiver under the provision of the CGIA waiving immunity for a dangerous condition of a public facility." *Id.* 25 P.3d at 1183.

Additionally, the record does not reflect any prior injuries on the ramp. *CF,* p. 66, ¶ 15.

Nevertheless, the Cruzes argue that the trial court erred by not analyzing what they characterize as the "ramp's change in use." *Opening Br.,* pp. 4, 21. Not so. The trial court considered the Cruzes' argument but found that they had not provided any authority for the proposition that "purportedly changing the use of a physical condition of a public building can result in an obligation to upgrade the physical condition for new use." *CF,* p. 289, ¶ 44.

Moreover, the case law demonstrates the contrary to be true. As discussed above, in *Padilla,* the Supreme Court held that "only alleging that the government was negligent in its use of the facility" is insufficient to support an immunity waiver for a dangerous condition of a public facility. *Id.* 25 P.3d at 1183. As the district court found, the Cruzes' claims only attack design and fail to establish a connection between the physical conditions of the ramp (high slope, no handrails, no steps, lack of traction) "to a construction or maintenance activity of the [State]." *CF,* p. 290, ¶ 49.

Additionally, in *Medina,* the court held that design need not be updated because of a change in use. *Id.* 35 P.3d at 457-58. The claim in *Medina* involved a rock fall on a highway. The Cruzes argue that *Medina* is distinguishable from the case at bar because in *Medina*, the change in use related to an increase in traffic flow. *Opening Br.,* p. 19. But again, the Cruzes' argument is at odds with *Padilla* where the court held that a claim based on using a closet as a "time out" room did not fall within a waived area of immunity. *Id.* 25 P.3d at 1183.

B. The Cruzes' claims do not arise from construction or maintenance.

The Cruzes argue that the CGIA should be interpreted within the context of the employment law concept of "efficient service." *Opening Br.,* p. 18. In support of that proposition, the Cruzes rely on *Swieckowski v. City of Fort Collins,* 934 P.2d 1380 (Colo. 1997) and *Medina*, arguing that pursuant to those cases, the State is liable because it changed the use of the ramp by permitting pedestrian use. *Opening Br.,* pp. 18-20.

However, neither case supports that proposition. In *Swieckowski,* the court held that the plaintiff could not sustain a claim for inadequate maintenance under the CGIA because the roadway at issue remained

unchanged and the claim arose from allegations of inadequate design. *Id.* 934 P.2d at 1386. In *Medina,* the court defined "maintenance" as keeping "a road in 'the same general state of being, repair, or efficiency as initially constructed' whereas 'design' means 'to conceive or plan out in the mind.'" *Id.* 35 P.3d at 456. Using a facility in an alleged unsafe manner does not fall within a waived area of immunity. *Padilla,* 25 P.3d at 1183.

The Cruzes characterize their claims as involving maintenance and urge the Court to interpret the CGIA as providing a waived area of immunity for a facility's "change in use." *Opening Br.,* pp. 17-21. But a court's primary duty is to ascertain and give effect to the legislature's intent and not substitute its judgment for the General Assembly's. *See State v. Mandatory Poster Agency, Inc.,* 260 P.3d 9, 14 (Colo. App. 2009) (interpreting the Colorado Consumer Protection Act); *see also St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.,* 325 P.3d 1014, 1019 (Colo. 2014) (interpreting the CGIA).

The language of the CGIA does not lend itself to such an interpretation. In fact, the CGIA's definition of a "dangerous condition" specifically excludes a claim based on "inadequate" design. § 24-10-103

(1.3). C.R.S. Similarly, the definition of "maintenance" excludes a claim based on an alleged failure to "upgrade, modernize, modify, or improve the design or construction of a facility." § 24-10-103 (2.5), C.R.S.

Moreover, the Supreme Court rejected the Cruzes' proposed interpretation in *Padilla*, holding that the government's use of a building in an unsafe manner does not fall within a waived area of immunity for purposes of the CGIA. *Id.* 25 P.3d at 1183.

Here, the district court did not find any facts related to the ramp's construction or maintenance. *CF,* p. 288, ¶ 39. Therefore, the district court correctly determined that the Cruzes' claim is about inadequate design, not maintenance or construction. *CF,* at p. 287, ¶ 34; p. 288, ¶ 36. Accordingly, the district court was correct in finding that the Cruzes' claim did not fall within a waived area of immunity within the CGIA. *Id.* p. 288, ¶¶ 42-44; p. 289, ¶ 49.

On a related point, the Cruzes argue that their claim is akin to turning a stop sign around. *Opening Br.,* p. 20. But the ramp itself never changed. The Cruzes' claim is that the State created a dangerous condition by allowing fairgoers to use the ramp without upgrading its design.

Nor does an alleged failure to warn fall within a waived area of immunity. In *Medina,* the Colorado Supreme Court held that the alleged failure to warn of the danger of falling rocks on a highway, closing the highway, or suggesting alternative routes, did not fall within a waived area of immunity under the CGIA. Similarly, in *Szymanski,* 776 P.2d at 1125, the court held that the failure to warn motorists of the dangers of an intersection did not fall within a waived area of immunity. Therefore, the district court was correct in determining that the Cruzes' claims did not fall within a waived area of immunity.

Lastly, the Cruzes argue that the waiver of immunity for a dangerous condition of a public facility as used in § 24-10-106(1)(e) (dangerous condition of a public facility located in any park or recreation area), is broader than that for a dangerous condition of a public building. *Opening Br.,* pp. 20-21. However, for that waiver of immunity to apply the Cruzes must still connect the State's alleged negligence to "construction" or "maintenance." Instead the nature of the Cruzes' claims arise from "design" or a "change in use." Neither claim falls within a waived area of immunity under either the plain language of the CGIA or case law interpreting the Act.

CONCLUSION

For the reasons stated herein, the district court's dismissal of the Cruzes' complaint should be affirmed.

Respectfully submitted this 11th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of April, 2019, the foregoing ANSWER BRIEF was served upon all parties herein by e-filing through the Colorado Courts E-Filing/CCES that will provide notice and a copy of this document to the following:

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