THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-001824
Trial Court Case Nos. 2016-CP-04-02464 and 2016-CP-04-02468

John Cross, ... Appellant,

v.

Gregory A. Weaver, Earl E. Weaver, Terrie Fallow and Jason Seagraves, ... Respondents,

And

Steven P. Cross, ... Appellant,

v.

Gregory A. Weaver, Earl E. Weaver, Terrie Fallow and Jason Seagraves, ... Respondents.

APPELLANTS' FINAL BRIEF

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Or Stated Another Way,

IN A NEGLIGENCE ACTION, IS A COMMERCIAL LANDLORD LIABLE FOR INJURIES SUSTAINED BY A THIRD PARTY DUE TO LATENT HAZARDOUS CONDITIONS KNOWN BY THE LANDLORD AT THE TIME OF THE LEASE?

STATEMENT OF THE CASE

Steven Cross [hereinafter Steven] and John Cross [hereinafter John] each filed their respective Complaints on November 2, 2016, against Gregory A. Weaver and Earl E. Weaver [hereinafter collectively referred to as Weavers] alleging causes of action for strict liability, negligence / gross negligence and premises liability. (R. pp. 23-33). On January 23, 2017, the Weavers filed an Answer in both Complaints generally denying the allegations and offering affirmative defenses of lack of duty and comparative negligence. (R. pp. 34-41).

On September 19, 2017, both Steven and John filed Amended Complaints adding Terrie Fallow and Jason Seagraves as Defendants. (R. pp. 43-53). Both Ms. Fallow and Mr. Seagraves were personally served. Neither of them filed an Answer or otherwise made an appearance in the case. Both Ms. Fallow and Mr. Seagraves are in default [Ms. Fallow and Mr. Seagraves hereinafter collectively referred to as Tenants]. (R. pp. 58-65). By agreement, the Answers previously filed by the Weavers to the original Complaints were treated by the parties as an Answer to the Amended Complaint. (R. p. 7).

A non-jury trial was held in both cases on May 8, 2018. Following the trial, the Court took the matter under advisement, and allowed the parties to submit briefs on the legal issues involved in this case. (R. p. 163, line 2 - p. 164, line 13).

On September 4, 2018, the Court issued Its Final Order & Judgment in Steven's case. (R. pp. 7-14). On September 5, 2018, the Court issued Its Final Order & Judgment in John's case. (R. pp. 15-22).

On September 12, 2018, Motions to Reconsider, Alter and/or Amend were filed in both cases. (R. pp. 54-57). Those motions were denied by Orders issued in each case on September 27,

2018. (R. pp. 1-6). The appeals in both cases then followed. The appeals were consolidated pursuant to Rule 214, SCACR.

SEPARATE STATEMENT OF FACTS

The facts of this case are essentially not in dispute. The Weavers own real property in Anderson County that they leased to Tenants. (R. p. 125, lines 6-20). The lease was not in writing, and was a month-to-month lease. (R. p. 82, lines 8-12; p. 126, lines 23-25). The property is located on the corner of Shirly Store Road and Belton Highway in Anderson County. (R. p. 125, lines 6-20). A small building is located on the property surrounded by some land. The building was operated by the tenants as a rummage store with used items for sale. (R. p. 130, lines 1-5). According to the Weavers, the tenants sold items from this store on weekends. (R. p. 130, lines 6-8). [Property site hereinafter referred to as the rummage store].

The Weavers live about five (5) minutes from the rummage store. (R. p. 128, lines 18-21). They both drove by the rummage store at least twice every day. (R. p. 128, lines 13-16). Earl Weaver owns and operates an automobile garage and salvage yard next door to the rummage store. (R. p. 125, line 21 - p. 126, line 3).

For at least six (6) months prior to the attack in this case, the Weavers saw the Tenants' German Shepherd breed dog tethered outside the store. (R. p. 129, lines 1-11). The leash was approximately 15 yards (45 feet) in length creating a diameter of 90 feet within the dog's territory. (R. p. 92, lines 20-24). At the time of the attack, there were a number of items and debris outside the building that the dog could hide under thus making his presence unknown to individuals unfamiliar with the property. (R. p. 130, lines 19-21; pp. 167-182). Typically, the dog hid under a john boat. (R. p. 131, lines 4-7).

The Weavers both testified that they would not approach the dog or pet the dog. (R. p. 131, line 22 – p. 132, line 5; p. 145, line 22 – p. 146, line 10). There was a "Beware of Dog" sign in the back of the property. This sign is not visible to persons who approach the property from the parking area. (R. p. 131, lines 8-13; pp. 167-182). The Weavers both admit that such a sign is an indication that a dog with dangerous tendencies is present. (R. p. 132, lines 6-16; p. 146, lines 11-15).

There was at least one (1) prior attack by this dog on this property. It occurred over a month before this attack on March 17, 2016. (R. p. 82, line 3 – p. 82, line 7; p. 146, line 19 – p. 147, line 4; p. 135, lines 19-25).

Greg Weaver also testified about an attack described to him by one of the tenants, Jason Seagraves, that was not factually similar to the attack on John and Steven. (R. p. 146, line 19 – p. 147, line 4; p. 148, lines 2-24). It is unknown if Mr. Seagraves was describing the March 17th prior attack or a different prior attack.

During this six (6) month time frame, Earl Weaver had monthly conversations with Terrie Fallow, usually about payment of rent. (R. p. 131, lines 14-21). At no point did he bring up the dog or safety concerns regarding the public because of the dog. (R. p. 132, line 22 – p. 133, line 4; p. 146, lines 16-18). The Weavers did not take any affirmative steps, such as threatening to not renew the lease if the dog was not removed or kenneled, to protect unsuspecting members of the public from the dog. (R. p. 132, line 22 – p. 133, line 4; p. 146, lines 16-18). They took no action even after learning of at least one prior attack. (R. p. 146, line 23 – p. 147, line 4).

On April 19, 2016, based on a tip from a neighbor, Steven went to the rummage store to see if tools that had been previously stolen from him were there for sale. (R. p. 96, line 13 – p. 97, line 9). His eight year old daughter went with him and stayed in his Jeep. (R. p. 97, lines 12-19). He knocked on the door nearest the parking area. When no one answered, he looked around at tool

boxes laying nearby. (R. p. 98, line 13 – p. 99, line 2). He was then suddenly and viciously attacked by the dog. (R. p. 100, line 16 – p. 101, line 6).

He initially broke free from the dog. However, believing the dog was not leashed, he ran in the opposite direction from his vehicle to keep the dog away from his daughter. He was attacked again in the field area of the property. (R. p. 101, line 7 – p. 102, line 25). In the ensuing struggle, Steven attempted to pull his concealed firearm on the dog. The dog got a hold of Steven's hand and the gun was flung into a field. (R. p. 102, lines 3-12). When Steven finally got away from the dog, he called 911 and his father John. (R. p. 102, line 16 – p. 103, line 10).

John and the responding deputy, Jamie Doyle, arrived around the same time. Believing that Deputy Doyle had control of the dog and that the leash was not as long as it was, John walked to an item he believed was his son's pistol in the field. John's next recollection was waking up in the hospital. He too was attacked by the dog. (R. p. 116, line 18 – p. 117, line 20).

John suffered a subdural hematoma as well as puncture wounds and lacerations during the attack. He incurred $12,249.51 in medical bills. (R. p. 118, line 5 – p. 121, line 8; pp. 208-223).

Steven suffered a severely broken wrist and hand. He had 32 puncture wounds. (R. p. 106, line 1 – p. 107, line 1). Steven incurred $68,876.10 in medical bills. (R. p. 107, lines 2-5; pp. 183-207). He also missed 5 months of work. (R. p. 107, lines 11-16). They both testified to and described the pain associated with their respective attacks. (R. p. 108, line 11 – p. 111, line 20; p. 121, line 12 – p. 122, line 22).

This case was tried non-jury. The trial court found that John sustained actual damages in the amount of $65,000.00, and further found that Tenants were liable for punitive damages in the amount of $10,000.00. (R. pp. 15-22). The Court found that Steven sustained actual damages in

the amount of $175,000.00, and further found that Tenants were liable for punitive damages in the amount of $15,000.00. (R. pp. 7-14).

The trial court found that the Tenants were liable to John and Steven for these damages as owners of the dog. (R. pp. 7-22). The trial court found the Weavers were not liable because they had no legal duty as landlords. (R. pp. 7-22). However, the trial court further noted, "Plaintiff's argument regarding the Weaver's liability under these particular facts appears reasonable on an appellate level. However, this Court is constrained by the law as it currently stands. As this Court interprets the current law, the Weavers had no affirmative duty to act." (R. p. 13; p. 21). The case against the Weavers is an action based in negligence, John and Steven appeal the decision that the Weavers did not have a legal duty to require the tenants to remove the dangerous dog as a condition precedent to re-leasing the property each month.

ARGUMENT

Standard of Review

"In a law case tried by the judge without a jury, this court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." Town of Kingstree v. Chapman, 405 S.C. 282, 300, 747 S.E.2d 494, 503 (Ct. App. 2013). The judge's findings are equivalent to a jury's findings in a law action. Townes Assocs., Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). A reviewing court is free to decide questions of law with no particular deference to the trial court. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 569-70, 776 S.E.2d 397, 402 (Ct. App. 2015).

ISSUE(S):

IN A NEGLIGENCE ACTION, DOES A LANDLORD OF A COMMERCIAL MONTH-TO-MONTH LEASE OF A STORE HAVE A DUTY TO REQUIRE THE REMOVAL OF A DANGEROUS DOG FROM THE PROPERTY PRIOR TO RE-LEASING THE PROPERTY EACH MONTH?

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"In a negligence action, a plaintiff must show (1) the defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages." Jackson v. Swordfish Invs., LLC, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005). "Whether the law recognizes a particular duty is an issue of law to be determined by the court." Id. "The existence or non-existence of a duty is a question of law." Wright v. PRG Real Estate Mgmt., 413 S.C. 276, 280, 775 S.E.2d 399, 401 (Ct. App. 2015).

An owner of land possesses a general duty to warn others of latent hazardous conditions on his land. Blyerly v. Connor, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992). In the absence of an agreement to the contrary, a lessor surrenders possession and control of the land to the lessee. Id. *After the premises are surrendered in good condition*, the lessor typically is not responsible for hazardous conditions which thereafter develop or are created by the lessee. Id. (Emphasis added).

"A lessor of land who transfers its possession in a condition which he realizes or should realize will involve unreasonable risk of physical harm to others outside of the land, is subject to the same liability for physical harm subsequently caused to them by the condition as though he had remained in possession." RESTATEMENT (SECOND) OF TORTS § 379 (2nd 1979).

A plaintiff is not precluded from asserting a general negligence principle against a landlord. Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 443, 441 S.E.2d 317, 319 (1994). "A duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties." Id.

The only South Carolina cases regarding landlord liability in dog bite cases are in the residential context. In Mitchell v. Bazzle, 304 S.C. 402, 404 S.E.2d 910 (Ct. App. 1991), the Court of Appeals addressed a landlord's liability for injuries sustained by a tenant's guest due to an attack by the tenant's dog. The question in Mitchell was whether a landlord had a duty to terminate a tenant's month-to-month lease in order to remove the tenant's dog from the premises. Id. at 404, 404 S.E.2d at 911. The Court of Appeals held that a landlord could not be vicariously liable under the common law for the actions of a tenant's dog even where the landlord knew of the dog's dangerous propensities, could have foreseen injury, had adequate time to terminate the month-to-

month lease and did not do so. Id. at 404-405, 404 S.E.2d at 911-12; see also Gilbert v. Miller, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003); Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000); and Fair v. United States, 334 S.C. 321, 513 S.E.2d 616 (1999).

In 2011, the Supreme Court found a landlord liable for the injuries sustained by a child, a tenant's guest, injured by a dog that was kept by a tenant in common areas of an apartment complex. Clea v. Odom, 394 S.C. 175, 714 S.E.2d 542 (2011). In reversing summary judgment granted to the landlord, the Supreme Court found the Residential Landlord Tenant Act (RLTA) created a duty upon residential landlords to ensure that common areas were kept in a reasonably safe condition. Id. at 183, 714 S.E.2d at 546. In citing cases from Georgia and Alabama, the Supreme Court stated:

> We find this case is consonant with those cases from other jurisdictions where the landlord could be liable where the attack occurred in a common area. There was evidence respondent had actual knowledge of the dog's vicious propensity as it had previously attacked a child, and respondent failed to remedy the situation. Accordingly, we find the circuit court erred in finding respondent could not be liable for the attack under a common law negligence theory.
>
> Id. at 183, 714 S.E.2d at 547.

The cases involving landlord liability in the residential context all involve licensees or social guests. A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent. Sims v. Giles, 343 S.C. 708, 720, 541 S.E.2d 857, 863 (Ct. App. 2001). A licensee is a person whose presence is tolerated, a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent. Id. at 708, 541 S.E.2d at 863-64. The most common example of a licensee is the social guest. Id. "Since a licensee is there for his own benefit, he can be said to accept the

premises as they are and demand no greater safety than his host provides himself."[1] Id. at 721, 541 S.E.2d at 864.

In the commercial context, most guests are either public invitees or business visitors. An invitee is one who enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner. Id. at 716-17, 541 S.E.2d at 862. Invitees include patrons of stores. Id. at 717, 541 S.E.2d at 862. A public invitee is one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public. Id.

The owner of property owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty. Id. at 718, 541 S.E.2d at 863. The landowner has a duty to warn an invitee of latent or hidden dangers of which the landowner has knowledge or should have knowledge. Id.

This duty is an affirmative duty. Id. at 719, 541 S.E.2d at 863. In determining whether one can anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land or of the facilities is a factor of importance indicating that the harm should be anticipated. Id.

The distinction between the difference of the anticipated guests is important. In the residential context, the anticipated guests are social guests who are afforded no greater safety than a host provides himself. However, in the commercial context, the anticipated guests are store

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[1] In regards to the standard of care to a licensee: The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except: (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land. (b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover. Sims, at 720-21, 541 S.E.2d at 864 (internal citations omitted) (emphasis omitted).

patrons who are there for the owner's benefit. The public invitee is afforded a higher standard of care than the social guest.

Store owners have a duty to protect their customers from foreseeable criminal activity because they invite the public onto their premises. Cramer, 312 S.C. at 442-43, 441 S.E.2d at 318. This duty is based on the principle that "one who invites all may reasonably expect that all might not behave" and therefore bears responsibility for any injury resulting from the failure to take reasonable precautions against this possible harm. Id. at 443, 441 S.E.2d at 318 (quoting Cooke v. Allstate Mgmt. Corp., 741 F.Supp. 1205, 1213 (D.S.C. 1990).

Generally, there have been two exceptions to the traditional rule of non-liability of landlords. The exceptions are the "affirmative acts" exception and the "common areas" exception. Jackson, 365 S.C. at 613, 620 S.E.2d at 56. This case, with its unique facts, is more akin to the reasoning behind "common areas" exception.

In Jackson, the landlord, Swordfish Investors, LLC, owned a mall in Columbia. Id. 365 S.C. at 610, 620 S.E.2d at 55. The landlord rented space throughout the mall to various tenants. Id. One of the spaces at the mall was utilized as a nightclub. Id. During operation of various nightclubs at the location, numerous crimes were committed on the premises. Id. Due to this activity, the landlord had employed the use of security in the common areas, but subsequently discontinued the use. Id. 365 S.C. at 611, 620 S.E.2d at 55. After use of security in the common areas had been discontinued, an altercation occurred in the club. Id. A male patron was escorted from the club, but re-entered the club and began shooting a gun in the air and indiscriminately into the crowd. Id. An innocent patron of the club was shot multiple times, and sued the landlord arguing the landlord had a duty to provide security on the premises. Id. In affirming summary judgment at the trial level, the Supreme Court made the distinction that the criminal activity

occurred inside the leased premises and not in the common areas. Id. 365 S.C. at 613, 620 S.E.2d at 56-57. The Supreme Court further pointed out that had the criminal activity occurred in the common areas of the mall the result may very well have been different. Id. 365 S.C. at 614, 620 S.E2d at 57.

A "common area" is an area that all tenants may use though the landlord retains control over it. Black's Law Dictionary 332 (10th ed. 2014). Examples of common areas are the hallways or food courts in a mall, a parking lot or walkway at a shopping center or strip mall, or hallways and playgrounds at an apartment or condominium complex.

In this case, the lease covered a single lot and a building. (R. p. 125, lines 6- 20; pp. 167-182). There were not multiple units or tenants. The Weavers did however enter and drive their vehicles on the land surrounding the rummage store on a regular basis in order to access their neighboring auto repair and salvage yard. (R. p. 128, lines 4-12).

The key element in the cases finding landlord liability for patron injuries in common areas is control. The issue of control further forms the basis of liability of the landlord when the landlord surrenders property to a lessee in a condition which he knows or should know will involve unreasonable risk to others.

While the Weavers did not have control over a common area, they had control over whether they would re-lease the rummage store to the tenants each month. It was a month-to-month lease constituting a new lease each month. S.C. Code Ann. § 27-35-30 (1976). The tenants could be evicted with 30 days' notice. S.C. Code Ann. § 27-35-120 (1976). The Weavers could have cancelled the lease because of non-payment of rent, failure to keep the premises in good condition or failure to keep the outside of the premises free from debris. They could have cancelled the lease because of the dog.

The Weavers were aware that patrons to the rummage store would park near the location where the dog was kept, and that the tenants were only present on weekends. (R. p. 126, lines 4-11; p. 130, lines 6-8). Meanwhile the dog was on the location at all times. They were aware of at least one prior attack by the dog, and they themselves were fearful of the dog. (R. p. 131, line 22 – p. 132, line 16; p. 145, line 22 – p. 146, line 10; p. 146, lines 19-22; p. 148, lines 2-21). One of the tenants informed Greg Weaver of a prior attack on the property. (R. p. 146, lines 19-22; p. 148, lines 2-21). The Weavers indicated that due to the debris around the rummage store there were plenty of places for the dog to hide. (R. p. 130, line 16 – p. 131, line 7; pp. 167-182). Further, the dog was on a leash that was approximately 45 feet in length. (R. p. 92, lines 20-24).

Appellants contend that the cases of Shields v. Wagman, 350 Md. 666, 714 A.2d 881 (Md. 1998) and Portillo v. Aiassa, 27 Cal. App. 4th 1128, 32 Cal. Rptr.2d 755 (Ca. Ct. App. 1994) offer persuasive arguments regarding the more specific issue of whether a commercial landlord can be held liable for injuries to a store patron caused by a tenant's known dangerous dog.

In Shields, a directed verdict in favor of the landlord was reversed by the Maryland Court of Appeals. Id. at 681, 714 A.2d at 888. In that case, a landlord rented space in a strip mall to an automobile mechanic. Id. at 669-70, 714 A.2d at 882. The landlord was aware that one of his tenants kept a dog that had dangerous propensities in his shop. Id. The dog often got loose. Id. The dog owning tenant was on a month-to-month lease. Id. at 670, 714 A.2d at 882. The dog attacked a patron of the strip mall, and another tenant of the strip mall when it got loose. Id. Notably, the dog was not kept in a common area. Id.

In Portillo, the landlord re-leased a commercial property to a lessee who was open about his dangerous guard dog that he kept on the premises. Portillo, at 1132-33, 32 Cal. Rptr.2d at 756-57. A store patron was attacked by the dog. Id. In affirming the trial court's finding of liability of

the landlord and distinguishing the case from cases in the residential context, the California Court of Appeals stated, "[t]hose cases involved a family pet kept in a single family residence. In contrast here the animal was a guard dog in a liquor store which was open to the public. The risk that someone would be seriously injured was far greater in the instant case." Id. at 1137, 32 Cal. Rptr.2d at 760. "[T]here is no strong public policy in favor of guard dogs in public places. Such animals cannot be classified as 'an important part of our way of life' in the same way that pets can." Id. at 1137-38, 32 Cal. Rptr.2d at 760.

In both of the above cases, the commercial landlord re-leased the property to the tenant with knowledge that the tenant kept a dangerous dog on the property. In this case, the Weavers re-leased the property each and every month to Tenants with actual knowledge of the dangerous dog. They had actual knowledge of at least one prior bite more than 30 days before this attack. (R. p. 146, line 19 – p. 148, line 21). Yet, they continued to enter into a new lease each month with the tenants. (R. p. 146, lines 16-18; p. 132, line 22 – p. 133, line 4; p. 136, lines 3-9). They did nothing to alleviate or mitigate the risk to the public.

CONCLUSION

One of the major purposes of tort law is to encourage socially responsible behavior and deter wrongful conduct. J. Wade, et. al., Prosser, Wade and Schwartz's Cases and Materials on Torts (9th Ed.), 1 (1994).

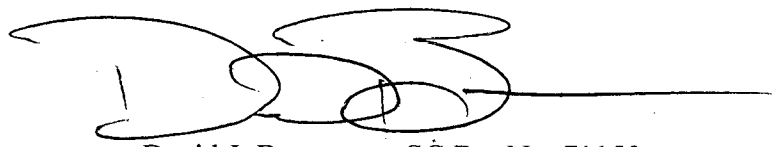
A landlord can be held liable for the dangerous condition of property at the time that the property is rented as though they are still in possession if the landlord knows or has reason to know of the dangerous condition. RESTATEMENT (SECOND) OF TORTS § 379 (2nd 1979). Appellants contend that this situation is no different than a landlord who rents property that has faulty stairs or a faulty deck railing and the landlord is aware of that condition at the time of the lease. In such

a situation, the landlord would be liable to any persons injured as a result of those known and hazardous conditions.

In this case, the Weavers re-leased the property to the tenants each and every month with knowledge of the hidden and dangerous condition, (i.e. the dog). Yet, they continued to rent the property without requiring the tenants to make reasonable assurances of keeping unsuspecting patrons safe from the dog.

Accordingly, for those reasons, Appellants request that the trial court's finding that the Weavers did not have a legal duty to rid the property of the dog prior to re-leasing the property be reversed. Appellants request that the Weavers be held jointly and severally liable in the amount of actual damages that the trial court found to exist in this matter.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.

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