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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001659-MR

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 01-CI-00622

LINDA KAYE SAMONS,
ADMINISTRATRIX OF THE ESTATE
OF KENNETH R. CRUM — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: The issue presented in this appeal is whether an insurance company providing insurance to the driver of an uninsured motor vehicle that he did not own is required to pay basic reparation benefits to a pedestrian who was hit and injured by the vehicle. The Floyd Circuit Court held that Kentucky Farm

Bureau Mutual Insurance Company (Kentucky Farm Bureau) was responsible for the payment of basic reparation benefits under these circumstances. After thoroughly reviewing this issue, we find the circuit court's ruling to be in error. Hence, we reverse.

On August 25, 2001, twenty-eight-year-old Kenneth R. Crum was riding a horse on Route 3381 in Floyd County, Kentucky. Originally from that area, Crum lived in North Carolina, and was in Kentucky visiting his family. While he was riding the horse, Crum was hit by a motor vehicle driven by Raymond K. Ousley. Crum suffered severe injuries to his left leg and heel, and was hospitalized. Crum did not have any personal automobile insurance.

Ousley, the driver, grew up and lived in that area of Floyd County. At the time of the accident, Ousley was test driving an older model car owned by Rhonda Ward. Ward's fiancé, John Reed, was a passenger in the car. Ward did not carry insurance on the car, but Ousley had indicated to them that he was covered by two insurance policies. The record reflects that these two policies were issued by Kentucky Farm Bureau, and the one at issue in this case was policy number 4248070 naming Ousley as the insured and a 1989 Mercury Grand Marquis as the insured vehicle. Among other coverages, the policy provided $10,000.00 in coverage for personal injury protection (PIP).

On November 5, 2001, Crum filed suit against Ousley seeking damages for negligence due to the injuries he incurred in the motor vehicle accident, including past and future medical expenses as well as pain and suffering.

Eleven months later, Crum moved to join Kentucky Farm Bureau as a defendant and file an amended complaint. The circuit court granted his motion, and the amended complaint was filed October 22, 2002. In the amended complaint, Crum alleged claims against Kentucky Farm Bureau regarding Crum's ability to collect basic reparation benefits, or no-fault PIP benefits, including whether the company acted in bad faith or violated provisions of the Kentucky Unfair Claims Settlement Practices Act (UCSPA) for its failure to pay basic reparation benefits to him. In its answer, Kentucky Farm Bureau stated that Crum's claims against it were barred by the Motor Vehicle Reparations Act (MVRA) as well as by the terms of the policy. On Kentucky Farm Bureau's motion, the circuit court bifurcated the tort claim from the coverage issue and the bad faith claim. Also on Kentucky Farm Bureau's motion, the circuit court entered a summary judgment on the amount of liability coverage available, limiting it to $25,000.00 from a single policy, rather than permitting stacking of the two policies.

Crum settled his claims against Ousley for the sum of $25,000.00, and his complaint against Ousley was dismissed by agreed order entered July 18, 2003. Unfortunately, Crum passed away on November 20, 2005, at his home in North Carolina. The record does not reflect that his death was related to the injuries he received in the 2001 motor vehicle accident. The probate court in North Carolina appointed Crum's sister, Linda Kay Samons,[1] as his administratrix on June 15, 2006. On behalf of the estate, Samons moved the circuit court to revive the suit

[1] The notice of appeal incorrectly spells her last name as "Sammons."

pursuant to Kentucky Revised Statutes (KRS) 395.278, which the court granted in November 2006.[2]

Beginning in 2003, Kentucky Farm Bureau and Crum have litigated in multiple motions and court appearances concerning whether Kentucky Farm Bureau was responsible for the payment of basic reparation benefits to Crum due to his status as a pedestrian.[3] Kentucky Farm Bureau has consistently argued that it was not responsible for two reasons: 1) Because Kentucky Farm Bureau did not provide any security covering the vehicle which struck Crum and because Crum himself was not covered by a policy, he had to recover basic reparation benefits from the Assigned Claims Plan by operation of KRS 304.39-050 and KRS 304.30-160, which he did; and 2) Ousley's policy excluded coverage from Crum because Crum was not an insured under the terms of the policy and was not struck by Ousley's covered automobile.

Just as consistently, Crum has argued that pursuant to the stated purpose of the MVRA in KRS 304-39.100(1), all contracts of liability insurance covering motor vehicles are deemed to provide basic reparation benefits, regardless of any exclusion in the policy. He has also argued that Ousley's policy stated that it would cover the payment of basic reparation benefits for any covered vehicle.

[2] For ease of understanding, we shall continue to refer to the plaintiff/appellee as Crum.

[3] There appears to be some confusion as to what Crum is actually claiming on this issue. Kentucky Farm Bureau has described Crum's claims on this issue as two-fold: 1) to recover basic reparation benefits and 2) for bad faith in its handling of Crum's request for basic reparation benefits. Pursuant to his reply brief, however, Crum specifically states that he is not making a claim to recover basic reparation benefits, but rather is seeking damages for bad faith due to damages and injuries he incurred because of Kentucky Farm Bureau's allegedly reckless conduct in the handling of his claim for these basic reparation benefits.

Finally, he has argued that the doctrine of reasonable expectations invalidates the exclusion in Ousley's policy because it was not plain or conspicuous.

On July 15, 2010, the circuit court entered an order and declaration as to coverage, finding in favor of Crum that Kentucky Farm Bureau was required to pay basic reparation benefits with regard to the subject motor vehicle accident.[4] The circuit court found that the policy issued to Ousley, which promised to cover him for the ownership, maintenance, or use of any auto, specifically insured a pedestrian struck by any motor vehicle pursuant to the MVRA. It also found that the policy exclusion was invalid both because it violated the mandated policy of compulsory insurance under the MVRA and because it violated the doctrine of reasonable expectations. The circuit court then denied Kentucky Farm Bureau's motion to alter, amend, or vacate the order, except to the extent that it made the prior order final and appealable. This appeal now follows.

On appeal, Kentucky Farm Bureau continues to argue that the circuit court erred in granting summary judgment in favor of Crum based both on the procedure set forth in the MVRA in KRS 304.39-050 and on the policy exclusion. It further argues that Crum lacks standing to seek basic reparation benefits because Crum had already received those benefits from the Assigned Claims Plan. In his

[4] We note that the record contains an order addressing the same issue signed by Judge Caudill on September 30, 2009, prior to the time he left the bench. That order ruled in favor of Crum as well, stating that Ousley's policy was deemed to provide basic reparation benefits to Crum and that the policy exclusion did not clearly or conspicuously manifest Kentucky Farm Bureau's intent to exclude basic reparation benefits for pedestrians injured in such a situation. However, the order was not entered or mailed to counsel until August 26, 2010, after Judge Harris had assumed the bench. While neither party has raised the propriety of or even mentioned this ruling, we assume that it is has no legal effect based upon the timing of its entry.

brief, Crum continues to argue that Ousley's policy was deemed to provide basic reparation benefits in this situation and that the exclusion violated the MVRA and the doctrine of reasonable expectations. Crum also argues that Kentucky Farm Bureau's standing argument is not properly before this court because it was not first raised below and because he was not actually seeking those benefits. Rather, he asserts that any issue regarding the payment of basic reparation benefits went solely to whether Kentucky Farm Bureau acted in bad faith.

In addition, Crum has pointed out that Kentucky Farm Bureau failed to include a copy of the July 15, 2010, order in the appendix of its brief pursuant to Kentucky Rules of Civil Procedure (CR) 75.12(4)(c)(vii) or to address all of the court's factual findings and legal conclusions. While it perhaps would have been more proper to have included the first order in the appendix, Kentucky Farm Bureau complied with the Civil Rules by attaching the August 27, 2010, order to its brief. Kentucky Farm Bureau has adequately addressed the circuit court's rulings in its brief.

Our standard of review in this case is problematic because Kentucky Farm Bureau views this case as one arising from the ruling on a summary judgment. While Crum contends that the applicable standard of review is for a declaratory judgment action, meaning that the circuit court's findings of fact must be reviewed for abuse of discretion. We presume that the findings of fact to which Crum refers arose from the entry of the order containing the declaration of coverage. We recognize that the standard of review on an appeal from a

declaratory judgment is whether the judgment was clearly erroneous. *See* CR 52.01; *Uninsured Employers' Fund v. Bradley*, 244 S.W.3d 741, 744 (Ky. App. 2007). However, we agree with Kentucky Farm Bureau that the ruling in this case is more akin to a ruling on a motion for summary judgment. Both parties had been seeking summary judgment on the issue of coverage since 2003, and Crum did not file a separate action seeking a declaratory judgment pursuant to KRS Chapter 418. And, even in declaratory actions, the summary judgment procedure may be utilized. *See* CR 56.01; *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky. App. 2010) ("In cases where a summary judgment has been granted in a declaratory judgment action and no bench trial held, the standard of review for summary judgments is utilized.").

Accordingly, we shall review this case using the standard of review for summary judgment:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, "an appellate court need not defer to the trial court's decision and will review the issue de novo." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Ladd, 323 S.W.3d at 776. Despite any argument to the contrary, there does not appear to be any genuine issues of material fact on the coverage question that remain disputed. Rather, the circuit court's "findings" are legal conclusions based

on its interpretation of the MVRA and the specific policy provisions. Therefore, we shall review the decision of the circuit court on a *de novo* basis to determine whether summary judgment was properly entered in favor of Crum as a matter of law.

By way of background, Kentucky's legislature enacted the MVRA in 1974, when it "established for the first time a system of compulsory insurance for the owners and operators of motor vehicles in Kentucky." *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865, 865 (Ky. 1981). The act requires the owners and operators of motor vehicles to "provide minimum security covering payment of no-fault BRB [basic reparation benefits] and payment of tort liability for personal injuries and property damages." *Id*. at 865-66.

In *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975), the Supreme Court of Kentucky upheld the validity of the MVRA. The Court described the provisions creating compulsory insurance:

> Except for governmental agencies, every owner of an automobile registered in Kentucky or operated by him in Kentucky must carry or provide insurance covering the payment of (a) tort liabilities for personal injuries (minimum $10,000 per person, $20,000 per accident) and property damage (minimum $5,000) and (b) no-fault 'basic reparation benefits' (hereinafter called BRB). An owner or registrant who operates or permits his vehicle to be operated in this state without the required tort liability coverage commits a misdemeanor punishable by fine of not less than $50 nor more than $500.

Id. at 772 (footnotes omitted). The Court then described the benefits and liabilities imposed by the act:

> Regardless of fault, every person suffering economic loss from a personal injury arising out of the maintenance or use of an automobile is entitled to BRB unless he has exercised the option to reject limitation of his tort rights. On the other side of the ledger, every person who registers, operates, maintains or uses an automobile on the public roadways of Kentucky is deemed, as a condition thereof, to have accepted certain limitations upon his tort rights unless he has filed with the Department of Insurance a written rejection. This is the heart of the no-fault plan.

Id. at 772-73 (footnotes omitted).

The MVRA provides for the recovery of basic reparation benefits in KRS 304.39-030(1): "If the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits, unless he has rejected the limitation upon his tort rights as provided in KRS 304.39-060(4)." The legislature defined "basic reparation benefits" as "benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle." KRS 304.39-020(2).

Kentucky Farm Bureau's primary argument is that it did not provide the security for the automobile in the incident and is therefore not responsible for the payment of basic reparation benefits.

The *Fann* Court addressed the responsibility for basic reparation benefits, explaining:

> BRB is paid by the insurer of the vehicle occupied by the injured person, or, if he was a pedestrian, by the insurer of the vehicle by which he was struck, or, if neither vehicle had such coverage, by the issuer of any policy under which the injured person is entitled to BRB. KRS 304.39-050. If there is no applicable BRB coverage, payment is made through an 'assigned claims plan.' KRS 304.39-160.

Fann, 534 S.W.2d at 786 n.8.

In addition, Kentucky Farm Bureau brings our attention to KRS 304.30-050, in which the legislature set up the priority for the payment of basic reparation benefits. That statute provides:

> (1) The basic reparation insurance applicable to bodily injury to which this subtitle applies is the security covering the vehicle occupied by the injured person at the time of the accident or, if the injured person is a pedestrian, the security covering the vehicle which struck such pedestrian. . . . A pedestrian, as used herein, means any person who is not making "use of a motor vehicle" at the time his injury occurs.
>
> (2) If there is no security covering the vehicle, any contract of basic reparation insurance under which the injured person is a basic reparation insured shall apply.

"Security" is defined as "any continuing undertaking complying with this subtitle, for payment of tort liabilities, basic reparation benefits, and all other obligations imposed by this subtitle." KRS 304.39-020(17). "Security covering the vehicle" is in turn defined as "the insurance or other security so provided. The vehicle for which the security is so provided is the 'secured vehicle.'" KRS 304.39-080(1).

Kentucky Farm Bureau argues that because the automobile that hit Crum was not secured by a policy of insurance and because Crum was not a basic

reparation insured under any other insurance contract, Crum's avenue of relief was through KRS 304.39-160, the Assigned Claims Plan. This statute provides that a person who is entitled to basic reparation benefits may obtain such benefits through the plan if "(a) [b]asic reparation insurance is not applicable to the injury for a reason other than those specified in the provisions on converted vehicles and intentional injuries[.]"

In support of its argument, Kentucky Farm Bureau cites to *State Automobile Mutual Insurance Co. v. Outlaw*, 575 S.W.2d 489 (Ky. Ap. 1978), in which this Court described the proper procedure to follow:

> The plaintiff-appellee, Anna B. Outlaw, was a pedestrian who suffered serious injuries when struck by an automobile driven by Jerry L. Taylor and owned by Allen L. Taylor. Therefore, Outlaw was entitled to basic reparation benefits under the Kentucky Motor Vehicle Reparations Act (MVRA). KRS 304.39-030(1). However, the Taylor automobile was uninsured, and Outlaw was not a "basic reparation insured" within the meaning of KRS 304.39-020(3). There being no policy of basic reparation insurance applicable to her injury, Outlaw filed a claim with the Kentucky Assigned Claims Bureau. KRS 304.39-160(1)(a). Outlaw's claim was then assigned to the defendant-appellant, State Automobile Mutual Insurance Company, which had the same obligations as though it had issued a policy of basic reparation insurance applicable to her injury. KRS 304.39-170(2).

Outlaw, 575 S.W.2d at 490.

Kentucky Farm Bureau also cites to our opinion of *Rees v. U.S. Fidelity & Guaranty Co.*, 715 S.W.2d 904 (Ky. App. 1986). In *Rees*, this Court addressed the validity of an escape clause in a dealership's garage policy with United States

Fidelity and Guaranty Company (USF & G), which specifically excluded its customers from the status of an insured unless there was no other available insurance. The Court held that while the escape clause addressed tort liability, it did not speak to basic reparation benefits:

> The legislative policy as announced in KRS 304.39-050(1) is that the basic reparation insurance applicable to bodily injury "is the security covering the vehicle occupied by the injured person at the time of the accident." The "security covering the vehicle" in the present case is the policy written by USF & G, see KRS 304.39-080, which is, therefore, primarily liable for the payment of basic reparation benefits to the injured passenger. *We have been referred to nothing in the MVRA which permits shifting the liability for the payment of basic reparation benefits as is the case with respect to the payment of tort liabilities*.

Rees, 715 S.W.2d at 906 (emphasis added).

Crum, in turn, relies upon the legislature's pronouncement in KRS 304.39-100(1) that "[a]n insurance contract which purports to provide coverage for basic reparation benefits . . . has the legal effect of including all coverages required by this subtitle." In subsection (2) of that statute, the legislature required an insurer authorized to transact business in the Commonwealth to file a form with the insurance commissioner stating that "in any contract of liability insurance for injury, wherever issued, covering the ownership, maintenance or use of a motor vehicle other than motorcycles while the vehicle is in this Commonwealth shall be deemed to provide the basic reparation benefits coverage and minimum security for tort liabilities required by this subtitle[.]"

Crum further relies on *Commonwealth Fire & Casualty Insurance Co. v. Manis*, 549 S.W.2d 303, 305 (Ky. App. 1977), for its statement that "[i]t is true the vehicle was not insured by its owner but the insurance coverage of the operator provided the minimum coverage required by KRS 304.39-020." Therefore, Crum contends that Ousley's policy for his own automobile obtained from Kentucky Farm Bureau provided the security for Reed's otherwise uninsured vehicle, leading to the conclusion that Kentucky Farm Bureau was responsible for the payment of basic reparation benefits.

We have thoroughly reviewed the statutes and caselaw cited by the parties, and we must agree with Kentucky Farm Bureau that under this unusual factual situation, Ousley's policy of insurance did not act as the "security covering the vehicle" for purposes of the payment of basic reparation benefits to Crum. Specifically, *Rees* provides that the security covering the vehicle was responsible for the payment of basic reparation benefits. In addition, we have recently stated, "BRB follows the vehicle, not the person." *Stewart v. ELCO Administrative Services, Inc.*, 313 S.W.3d 117, 123 (Ky. App. 2010). We have also sought guidance from a treatise addressing the payment of basic reparation benefits:

> If the vehicle which the injured person was driving or in which he was a passenger is covered by a no-fault policy, the insurer of the vehicle is responsible for BRB payments. This is true even if the policy has an escape clause (see § 12:4, Escape clauses providing no liability if there is other insurance) purporting to shift liability to another insurer. That insurer is also responsible if the vehicle strikes a pedestrian. If a pedestrian is struck by

> two cars in the same accident, he may pursue either or both, regardless of which may have caused his injuries.
>
> *If the vehicle is not covered, but the injured driver, passenger or pedestrian, is a "basic reparations insured," he may recover under his policy, even though the vehicle involved in the accident is not mentioned in the policy*. There is coverage in this situation even if the insured vehicle is not in Kentucky at the time of the accident.

Robert D. Monfort, *Ky. Motor Veh. Ins. Law* § 11:7 (2010-2011 ed.) (footnotes omitted, emphasis added).

We agree with Kentucky Farm Bureau's argument that while the policy provided Ousley with liability coverage as a "basic reparations insured," the policy did not provide security for Reed's vehicle itself or for Crum as a basic reparations insured. Because no security covered the vehicle Ousley was driving for purposes of basic reparation benefits and such liability may not be shifted, Kentucky Farm Bureau cannot be held liable for the payment of these benefits to Crum. Furthermore, the MVRA provides for a situation such as this where a pedestrian is struck and injured by an automobile that is not covered by insurance. Therefore, Crum properly sought payment of basic reparation benefits due to him from the Assigned Claim Plan by operation of KRS 304.39-050 and 304.39-160.

We also agree with Kentucky Farm Bureau that Ousley's policy properly excludes coverage to a person in Crum's situation. We find no merit in Crum's argument that this exclusion violates the MVRA or the doctrine of reasonable expectations.

Part B/1 sets forth the policy specifications for the payment of basic reparation benefits. It states that Kentucky Farm Bureau "will pay, in accordance with the Kentucky Motor Vehicle Reparations Act, personal injury protection benefits to or for an **'insured'** who sustains **'bodily injury**.' The **'bodily injury'** must be caused by an accident arising out of the operation, maintenance or use of a **'motor vehicle'** as a vehicle." The definitions section defines an "insured" as:

> 1. The **"named insured"** or any **"family member"** while:
>
> a. **"Occupying"**; or
>
> b. A **"pedestrian"** struck by;
>
> any "motor vehicle."
>
> 2. Any other person while:
>
> a. **"Occupying"**; or
>
> b. A **"pedestrian"** struck by;
>
> "your covered auto."

"Your covered auto" is defined as a motor vehicle:

> a. To which the bodily injury liability coverage of this policy applies and for which a specific premium is charged; and
>
> b. For which the **"named insured"** is required by the Kentucky Motor Vehicle Reparations Act to maintain security.

Kentucky Farm Bureau's interpretation of the policy is that for Crum to be covered under the policy, he had to meet the definition of an "insured." Because he was a pedestrian who was neither the named insured nor a family member, Crum would have had to be struck by Ousley's covered automobile, which in this case was the Mercury because Ousley paid a specific premium for coverage of that

vehicle. However, Crum was not hit by the Mercury, but by another automobile owned by another person. This exclusion is in line with the MVRA in that the legislature created a specific procedure in KRS 304.39-050 and 304.39-160 to address this situation. This exclusion does not render Ousley uninsured, but merely means that the vehicle he was driving at the time of the accident was not covered by the terms of his policy.

Crum also contends that the exclusion is invalid because it violated the doctrine of reasonable expectations since it was not conspicuously and unequivocally located in the "Exclusions" section of the policy, but rather was in the "Definitions" section. He argues that the phrase "specific premium" is also ambiguous. The circuit court found that the exclusion violated the doctrine for these same reasons. We disagree.

Both Crum and the circuit court cited to *Simon v. Continental Insurance Co.*, 724 S.W.2d 210 (Ky. 1986), to support this position. *Simon* addressed a situation where the insured and the insurance company differed on how much underinsurance coverage was available in the policy. The Supreme Court looked to whether the policy was ambiguous, explaining that the insured is entitled to all of the coverage he could reasonably expect:

> An essential tool in deciding whether an insurance policy is ambiguous, and consequently should be interpreted in favor of the insured, is the so-called "doctrine of reasonable expectations." This is a principle abstracted from numerous cases and first elaborated by Prof. Robert Keeton in his *Basic Text of Insurance Law*, § 6.3(a), at 351 (1971). *See Ohio Cas. Ins. Co. v. Stanfield*, Ky., 581

> S.W.2d 555, 558 (1979). The nature of the doctrine of reasonable expectations is summarized in R.H. Long's *The Law of Liability Insurance*, § 5.10B, which states, in pertinent part:
>
> > "The gist of the doctrine is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation.
> >
> > ....
> >
> > The doctrine of reasonable expectations is used in conjunction with the principle that ambiguities should be resolved against the drafter in order to circumvent the technical, legalistic and complex contract terms which limit benefits to the insured."

Simon, 724 S.W.2d at 212-13.

We agree with Kentucky Farm Bureau that the doctrine of reasonable expectations plays no role in this case. Crum, who was not a party to the policy, could not have any expectation related to coverage under Ousley's policy. The doctrine would only be applicable to Ousley as the person who contracted for the policy with Kentucky Farm Bureau, and because Ousley was covered as an insured, his reasonable expectations never came into play. We further agree with Kentucky Farm Bureau that the language of the policy is neither ambiguous nor inconspicuous. Rather, the language is straightforward and clear upon a reading of the provisions in the policy.

Accordingly, we must hold that the circuit court erred as a matter of law in declaring that Kentucky Farm Bureau was required to pay basic reparation benefits to Crum with regard to the motor vehicle accident and in denying Kentucky Farm Bureau's motion to alter, amend, or vacate that ruling.

Based upon our holding, we need not address Kentucky Farm Bureau's argument that Crum lacks standing to make a claim for basic reparation benefits.

For the foregoing reasons, the orders of the Floyd Circuit Court are reversed, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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