IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC05-1295
D.C. CASE NUMBER: 2D 03-134
L.T. CASE NO.: 01-5533 CA

UNITED STATES FIRE INSURANCE COMPANY, etc.

Petitioner/Defendant,

vs.

FIRST HOME BUILDERS OF FLORIDA,

Respondent/Plaintiff.

AMICUS CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES' BRIEF SUBMITTED WITH CONSENT OF ALL PARTIES ON BEHALF OF PETITIONER/DEFENDANT UNITED STATED FIRE INSURANCE CO.

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INTRODUCTION

The NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, with consent of all parties, submits this brief as amicus curiae in support of the position of Petitioner, United States Fire Insurance Company.

The NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES (NAMIC), founded in 1895, is a full-service national trade association with more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premium in the United States. NAMIC members account for 44 percent of the homeowners' market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through effective advocacy, strategic public policy and valuable member services.

Many of NAMIC's members write the type of policy involved in this case — commercial general liability including products-completed operations coverage. Historically in Florida, this type of policy has not provided coverage for an insured contractor's own defective work even when the defective work is performed by a subcontractor.

In this case, the district court departed from the long-standing Florida

authority to hold that the policy at issue here provides such coverage. The decision is a significant departure from heretofore-existing Florida law and both heavily and negatively impacts NAMIC and its members that provide this type of insurance. For these reasons, NAMIC requests that the Court consider the important legal and public policy arguments presented here in opposition to the district court's decision.

NAMIC has received the consent of all parties for this amicus brief pursuant to Fla. R. App. P. 9.370.

STATEMENT OF THE ISSUE

The issue addressed in this Amicus Brief is whether the products-completed operations hazard insurance in a general contractor's commercial general liability policy provides coverage to repair or replace the defective completed work of the general contractor or its subcontractors.

SUMMARY OF ARGUMENT

The Second District Court of Appeal has deviated from long-standing Florida precedent on CGL coverage. The law of Florida set forth in this Court's decision in *LaMarche v. Shelby Mutual Ins. Co.,* 390 So. 2d 325 (Fla. 1980) provides that a CGL policy does not cover the repair and replacement of poor workmanship by a contractor or its subcontractors.

The district courts of appeal in Florida have followed *LaMarche* until the decision of the Second District in *J.S.U.B., Inc. v. U. S. Fire Ins. Co.,* 906 So. 2d 303 (Fla. 2d DCA 2005). Florida has long stood with the majority of the jurisdictions which do not permit a contractor to pass onto its CGL insurer the cost of repairing or replacing its poor workmanship.

This Court should reverse the Second District and keep Florida in line with the jurisdictions which do not permit a contractor to profit from its own defective work or that of its subcontractors.

THE STANDARD OF REVIEW

The standard of review for this appeal on a question of law and the interpretation of an insurance policy is *de novo*. *State Farm Mut. Auto. Ins. Co. v. Reis,* 926 So.2d 415 (Fla. 1st DCA 2006).

ARGUMENT

IN FLORIDA A GENERAL CONTRACTOR'S COMMERCIAL GENERAL LIABILITY POLICY WITH PRODUCTS-COMPLETED OPERATIONS COVERAGE DOES NOT PROVIDE COVERAGE FOR THE POOR WORKMANSHIP OF THE CONTRACTOR OR ITS SUBCONTRACTORS.

A. Background

This case concerns the coverage provided to a general contractor under a comprehensive general liability ("CGL") policy that includes products-completed operations hazard ("PCOH") coverage. Until recently, Florida courts were unified in their opinions that such a policy did not provide coverage to repair or replace the negligent work performed by the general contractor or its subcontractor.

Now, however, the decision of the Second District Court of Appeal in this case, *J.S.U.B., Inc. v. U. S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005), and the decision of a federal district trial court[1], have taken a contrary view. Both hold that a CGL policy with a PCOH clause provides coverage to repair or replace the defective or deficient work of the general contractor's subcontractor. NAMIC believes that this sharp and sudden departure from settled Florida law is without

[1]The Eleventh Circuit Court of Appeals has certified that case, *Pozzi Window Co. v. Auto-Owners Ins. Co.*, 446 F.3d 1178 (11th Cir. 2006), to this Court which is pending as *Auto-Owners Ins. Co. v. Pozzi Window Co.*, Case No. SC06-779.

authority and, on that basis, submits this Amicus Brief in support of U.S. Fire's position.

B. Florida courts have consistently construed the policy language to provide no coverage for the repair and replacement of the defective work of a contractor or of its subcontractors.

U.S. Fire's policy is the standard CGL policy with PCOH coverage. The policy language is fully set forth in U.S. Fire's brief and will not be repeated here.

The general rule regarding coverage historically provided to general contractors by a CGL policy such as U.S. Fire's here was announced by this Court in *LaMarche v. Shelby Mutual Insurance Co.*, 390 So. 2d 325, 326 (Fla. 1980). There, the CGL policy stated that the insurer would pay for bodily injury or property damage for which the contractor was liable and excluded "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." *Id.*

This Court approved the decision of the intermediate appellate court that the policy provided no coverage for the contractor's own negligent work. *See Id.* Citing *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791-92 (N.J. 1979), this Court explained that rather than "coverage and payment for building flaws or deficiencies, the policy instead covers damage caused by those flaws." 390 So. 2d

at 326. This Court explained that Florida, like the majority of courts, does not allow a contractor to recover for its deficient work twice — once from the homeowner and a second time from the insurer to repair or replace the work — because to do so would violate both the intent of the parties and the boundaries between "business risks" and insurable risks. *Id.* at 326-27. This is and has been the law in Florida since 1980.

Between the time *LaMarche* was issued in 1980 and the decision of the Second District in this case, no Florida state court has departed from the concepts and public policy articulated in *LaMarche.* It is settled law in this state that general contractors' CGL policies, including those with PCOH coverage, do not cover the cost of replacing or repairing the defective materials or workmanship of the insured general contractor or its subcontractors.[2]

Even after 1986, when the standard CGL policy language was amended to include the exact exception at issue here, Florida courts continued to construe such

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[2] *See Ohio Cas. Ins. Co. v. Santos*, 465 So. 2d 826, 826 (Fla. 2d DCA 1985); *Centex Homes Corp. v. Prestressed Systems, Inc.*, 444 So. 2d 66, 67 (Fla. 3d DCA 1984); *Commercial Union Ins. Co. v. R.H. Barto Co.*, 440 So. 2d 383, 386 (Fla. 4th DCA 1983); *Keller Industries, Inc. v. Employers Mut. Liability Ins. Co. of Wisconsin*, 429 So. 2d 779, 780 (Fla. 3d DCA 1983); *Tucker Const. Co. v. Michigan Mut. Ins. Co.*, 423 So. 2d 525, 528 (Fla. 5th DCA 1982); *Old Republic Ins. Co. v. Sheridan*, 407 So. 2d 619, 620 (Fla. 4th DCA 1981); *American States Ins. Co. v. Villegas*, 394 So. 2d 222, 223 (Fla. 5th DCA 1981).

policies to exclude coverage for the defective product or workmanship of the general contractor and its subcontractors. *See, e.g.*, *Auto Owners Ins. Co. v. Tripp Const. Co.*, 737 So. 2d 600, 601(Fla. 3d DCA 1999)*; Aetna Cas. and Sur. Co. v. Deluxe Systems, Inc. of Florida*, 711 So. 2d 1293, 1296 (Fla. 4th DCA 1998); *U. S. Fire Ins. Co. v. Meridian of Palm Beach Condominium Ass'n, Inc.*, 700 So. 2d 161, 162 (Fla. 4th DCA 1997); *Lassiter Construction Co. v. American States Ins. Co.*, 699 So. 2d 768, 769 (Fla. 4th DCA 1997); *Home Owners Warranty Corp. v. Hanover Ins. Co.*, 683 So. 2d 527, 529 (Fla. 3d DCA 1996) (all explaining that policy exclusions limit coverage and that exceptions to exclusions cannot create coverage that does not otherwise exist).

As the Third District explained in *Tripp*: "Comprehensive general liability insurance policies, like the insurance policy in question here, only protect against *personal injury* or *damages to personal property* which might *result from* the defective workmanship." 737 So. 2d at 601.

In *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1262 (M.D. Fla. 2002), the Federal District Court for the Middle District of Florida recognized the precedential effect of the above decisions, particularly *LaMarche.* While noting that other states had construed the post-1986 standard CGL policy language differently, the *Travelers* court nevertheless recognized that Florida's

courts remained steadfast in holding that the policy language did not provide coverage to replace or repair the defective work of subcontractors.

C. *LaMarche* and the cases from the Florida district courts of appeal are consistent with the policy language.

The policy language confirms that the existing Florida decisions, with the exception of the decision of the Second District in this case, remain applicable and correct. The policy's Insuring Agreement provides coverage for "property damage," defined in relevant part as "physical injury to . . . property." The PCOH coverage extends that coverage to physical injury to property "arising out of" the contractor's work or work done on the contractor's behalf after the work is completed. "Property damage" is defined in one way, and "your work" is defined in another, independent way. This language did not change in 1986, and it historically and consistently has been construed not to cover the contractor's defective work or defective work done on the contractor's behalf.

As the *LaMarche* court said:

> To interpret the policy as providing coverage for construction deficiencies, as asserted by the petitioners and a minority of states, would enable a contractor to receive initial payment for the work from the homeowner, then receive subsequent payment from his insurance company to repair and correct deficiencies in his own work. We find this interpretation was not the intent of the contractor and the insurance company when

> they entered into the subject contract of insurance, and the language of the policy clearly excludes this type of coverage.

390 So. 2d at 326. As recently as 1996, the court in *Deluxe Systems*, 711 So. 2d 1296, noted that the conclusion reached by *LaMarche* was still valid in Florida as a "matter of public policy." *See also Meridian*, 700 So. 2d at 162 (emphasizing that such policies provide no coverage for defective construction).

Even if there were any doubt of the absence of insuring language in the policy, its exclusions eliminate any such doubt by clearly explaining that the policy does not apply to "property damage" to the contractor's work or work done on the contractor's behalf, even if included in the PCOH clause. This is the conclusion reached by numerous Florida courts, both before and after the 1986 revisions to the standard CGL policy. For example, in *Lassiter*, 699 So. 2d at 770, referring to exclusion j.(6), the court said: "Assuming there is 'Products-completed operations hazard' coverage in this policy, such coverage does not cover the type of contractual liability alleged against the general contractor in this case." *See also, Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 740 (Fla. 2002) (reaffirming that "policy exclusions cannot create coverage where there is no coverage in the first place"); *Meridian*, 700 So. 2d at 162 (explaining that policy exclusions cannot create coverage). On exclusion l., the court in *Hanover*, 683 So.

2d at 530, also rejected the exact argument made by the Second District.

Finally, the *Hanover* court also rejected the argument that the subcontractor exception to exclusion l. could somehow create coverage that did not exist before. *Id.* at 530. In doing so, the court relied on this Court's opinion in *LaMarche,* 390 So. 2d at 326, that "an exclusion does not provide coverage but limits coverage," and concluded that an exception to the exclusion could not, "in and of itself, create coverage." *Hanover*, 683 So. 2d at 530.

NAMIC's members have relied upon these long-standing cases for over twenty-five years.

D. The decision of the Second District is inconsistent with long-standing interpretation of CGL coverage and with the public policy of Florida.

In contrast to the consistent Florida authority, the Second District rejected the long term consistent Florida authority and the public policy of Florida on this type of coverage. To reach its conclusions, however, the court had to overlook the coverage language, overlook the exclusion language, and skip to the exception language. That is precisely the analysis that this Court has held is erroneous.

The decision of the Second District in *J.S.U.B., Inc. v. U.S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005) is incorrect. The Second District has improperly relied on out-of-state cases and ignored Florida precedent to conclude

that CGL policies now provide the coverage prohibited by *LaMarche* and its progeny. The decision reaches that result by allowing the exception to the exclusion to create coverage, explaining that the "exceptions to the exclusions would have no meaning if the policies are interpreted as providing no coverage. . . ." *Id.* at 310. No Florida authority exists for that interpretation.

While NAMIC recognizes that courts in other jurisdictions have reached the same conclusion as the Second District, that cannot and should not control this Court's decision here in the face of *LaMarche* and Florida's long and consistent interpretation of these policies.

The Court's decision in *State Farm Fire and Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1998) does not help the Respondent. First, *CTC Development Corp.*, is a duty to defend case that does not address the policy language at issue. *See Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp. 2d at 1258. Second, it was "the neighboring property owners" who sued the contractor, not the owner of the property. The contractor's actions, in violating setback requirements, damaged the neighbors' property, not the home built by the contractor. Third, this Court cited with favor to both *La Marche v. Shelby Mutual Ins. Co.*, 390 So. 2d 325 (Fla. 1980) and *Lassiter Construction Co. v. American*

States Ins. Co., 699 So. 2d 768 (Fla. 4th DCA 1997)[3]. 720 So. 2d at 1074-75.

Florida stands with the majority of states that hold that the purpose of commercial liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product. *See Tucker Const. Co. v. Michigan Mutual Ins. Co.*, 423 So. 2d 525, 528 (Fla. 5th DCA 1982); *see also, Reliance Ins. Co. v. Mogavero,* 640 F.Supp. 84 (D. Md. 1986); *Sawhorse, Inc. v. Southern Guaranty Ins. Co.,* 269 Ga.App. 493, 604 S.E.2d 541 (2004); *Nas Sur. Group v. Precision Wood Products, Inc.*, 271 F.Supp.2d 776 (M.D.N.C. 2003), and cases cited therein for some of the majority of jurisdictions which find no coverage under CGL policies with PCOH for repair and replacement of defective work. These states, along with Florida, find it eminently reasonable to construe the CGL coverage so as not to allow the contractor to be paid for shoddy workmanship, keep the money and then have the insurer pay to redo the work. Such coverage would be available under a performance bond or warranty policy but not a CGL policy which provides protection against damages, personal injury and property damage, caused by the

[3]This Court could have questioned the continued viability of these cases had it so chosen. This Court also chose not to exercise discretionary jurisdiction in *Home Owners Warranty Corp. v. Hanover Ins. Co.,* 683 So. 2d 527 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 700 (Fla. 1997).

defective work. The "products completed operations hazard" extends this coverage to the occurrence of property damage or personal injury which occurs after the completion of the work.

The "public policy" of this state has been set since *La Marche* and its progeny. The contractor has received payment for the work he has done and has kept that money. The work was poorly done and needed to be redone. The insurer should not have to pay for the repair and replacement of the shoddy work. The CGL coverage with products completed operations hazard (PCOH) does provide the insured with valuable coverage when the poor or defective work causes personal injury or damage to other property after the completion of the work.

E. Florida's interpretation of CGL coverage is consistent with that of other jurisdictions.

In *Kalchthaler v. Keller Construction Co.* 224 Wis.2d 387, 591 N.W.2d 169 (1999), water entering through leaky windows damaged drapery and wallpaper. Keller was the general contractor and a subcontractor had performed the work. Aetna, Keller's insurer, denied coverage. The issue before the court "was whether the damage to the building and its interior was covered by Keller's Aetna policy." 591 N.W.2d at 171. The issue was not the cost of repair. A Florida court would have reached the same conclusion. In *Nas Sur. Group v. Precision Wood*

Products, Inc., 271 F.Supp.2d 776, 783 (M.D.N.C. 2003), the court noted that *Kalchthaler* involved "CGL coverage where leaky windows damaged drapery and wallpaper and thus damages extended beyond the scope of contractor's original work." Thus, the damages sought in *Kalchthaler* were within the policy since this was not repair of the original work but covered damages to other property as in *Tripp, supra.*

Courts in different jurisdictions have used different theories to reach the same result when interpreting CGL coverage. *See generally*, *Reliance Ins. Co. v. Mogavero, supra*, (public policy argument that defective workmanship not occurrence and not covered under CGL policy); *Sawhorse, Inc. v. Southern Guaranty Ins. Co., supra,* (business risk borne by contractor to repair or replace defective work excluded from CGL policy); *Nas Sur. Group v. Precision Wood Products, Inc., supra*, (law of South Carolina clear that damages for repair and replacement of faulty workmanship not covered under CGL policy). In *Sawhorse*, the repair and replacement of defective work done by a subcontractor were not covered under the CGL policy with "products-completed operations hazard." The damages caused to the other portion of the building due to the defective work were covered.

In *Reliance Ins. Co. v. Povia-Ballantine Corp.,* 738 F.Supp. 523 (M.D. Ga.

1990), the court interpreted Georgia law on CGL coverage to exclude claims for property damage for the repair and replacement of that product constructed in an unworkmanlike manner and cited with approval to *LaMarche* and noted the difference between damage to the product and damage caused by the product. *See generally, Qualls v. Country Mutual Ins. Co.,* 123 Ill.App.3d 831, 462 N.E.2d 1288 (Ill. 1984)(policy with PCOH coverage does not cover cost of remedying insured's work product). The court in *Qualls* cited favorably to both *LaMarche* and *Weedo v. Stone-E-Brick,* 81 N.J. 233, 405 A.2d 788 (1979).

PCOH coverage is a valuable coverage option for NAMIC's insureds. It can offer protection for claims brought after the completion of the work. What is doesn't do is allow the contractor or sub to receive payment for shoddy work, keep the payment, and then have the insurance company pay to redo the work. To do so would turn CGL coverage into what it is not- a builder's risk policy, performance bond, or warranty coverage.

The court in *Monticello Ins. Co. v. Wil-Freds Const., Inc.,* 277 Ill.App.3d 697,709-10, 661 N.E.2d 451,459-60, 214 Ill.Dec.597, 605-06 (Ill.App. 2 Dist. 1996) provides a good analysis of the issue:

> Indeed, as numerous courts have noted, if insurance proceeds could be used to pay for the repair or replacement of poorly constructed buildings, a contractor

> could receive initial payment for its work and then receive subsequent payment from the insurance company to repair or replace it. (See, e.g., *Centex Homes Corp. v. Prestressed Systems, Inc.* (Fla.App.1984), 444 So.2d 66, 67.) This "would transform the [CGL] policy into something akin to a performance bond." (*Qualls,* 123 Ill.App.3d at 834, 78 Ill.Dec. 934, 462 N.E.2d 1288.) To hold that a CGL policy is the effective equivalent of a performance bond would cause injustice to the CGL insurer who, unlike the surety on a performance bond, has no recourse against a contractor for the use of defective materials or poor workmanship. See *Knutson Construction Co. v. St. Paul Fire & Marine Insurance Co.* (Minn.1986), 396 N.W.2d 229, 234; see also *Hartford Accident & Indemnity Co. v. Pacific Mutual Life Insurance Co.* (10th Cir.1988), 861 F.2d 250, 252-53 (CGL policy not intended to function as a performance bond); Tinker, *Comprehensive General Liability Insurance-- Perspective & Overview*, 25 Fed'n Ins.Couns.Q. 217, 224 (1975) ("[t]he CGL policy does not serve as a performance bond, nor does it serve as a warranty of goods or services").

Another court succinctly addressed the issue of allowing such coverage under a CGL policy when it stated: "To allow indemnification under the facts here would have the effect of making the insurer a sort of silent business partner subject to great economic risk in the economic venture without any prospects of sharing in the economic benefit. The expansion of the scope of the insurer's liability would be enormous without corresponding compensation." *Redevelopment Authority of Cambria County v. International Ins. Co.*, 454 Pa. Super. 374, 392-93, 685 A.2d

581, 590 (1997); *see also, Amtrol, Inc. v. Tudor Ins. Co.*, 2002 WL 31194863 (D.Mass., Sept 10, 2002).

The contractor is the one who is able to control his work and that of the subcontractors on the job. NAMIC's members, the insurers, do not. An excellent discussion of the issue is contained in C. Burke, *Construction Defects and the Insuring Agreement in the CGL Policy–There Is No Coverage for a Contractor's Failure to Do What it Promised,* Practising Law Institute, Real Estate Law and Practice Course Handbook Series, 742 PLI/Lit 73 (May 2006). As the author states: "In fact, it is the building industry's interpretation that is unreasonable because [it] has the practical effect of making the general contractor's CGL carrier the de facto insurance carrier for every subcontractor for any property damage that occurs to the project itself after it is completed. This approach seriously undermines the insurer's ability to determine with whom they will contract. This is further proof that the interpretation is unreasonable." *Id.* at 104 (footnotes omitted). This author addresses and knocks down in *seriatim* the legal fallacy behind each of the arguments advanced to support the interpretation that CGL policies with PCOH coverage will pay to repair and replace the defective work of the contractor or its subcontractors.

The "conventional" or majority view is still "that under one theory or

another, defects in one's own work are not intended to be covered by CGL policies." W. Lyman, *"Is Defective Construction Covered Under Contractors' and Subcontractors' Commercial General Liability Policies?"* 525 PLI/Real 151, 166 (April 2006).

To hold that CGL coverage does not cover poor workmanship is clear and consistent with the decisions of the Florida Supreme Court and of the district courts of appeal which have construed the economic loss rule. In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), the homeowners unsuccessfully argued that the contaminated concrete which damaged the steel reinforcing rebar was "other property." This Court noted that the "product" purchased by the homeowners was a finished product, a home, not the separate components. *See also, Jarmoc, Inc. v. Polygard, Inc.,* 668 So. 2d 300 (Fla. 4th DCA), *aff'd*, 684 So. 2d 732 (Fla. 1996); *Comptech International, Inc. v. Milam Commerce Park, Ltd.,* 711 So. 2d 1255 (Fla. 3d DCA 1998).

The effect on underwriting and the cost of offering such coverage can be monumental. If there is no coverage under a CGL policy for the repair and replacement of defective workmanship, there is no concomitant duty to defend, wherein lies the potential for the greatest expense to the insurers writing such coverage.

If this Court now determines that CGL policies in Florida will cover repair and replacement of the defect work, several things will happen. Many of NAMIC's members will no longer write such coverage in Florida. Also, those insurers which choose to offer such coverage will need to greatly increase the insurance premiums they charge to cover the increased cost of the damages of rebuilding and of the great cost of defending such claims. The net result will be a valuable loss to both the insurers, and in the long-run to the insureds.

This Court should reaffirm Florida's public policy on the interpretation of CGL policies with PCOH that do not and should not pay to repair and replace the defective work of the contractors and its subcontractors.

CONCLUSION

This Court should reverse the decision of the Second District Court of Appeal.

This Court should also reaffirm Florida's position with the majority of states that a general contractor's commercial general liability policy with products-completed operations coverage does not provide coverage for the repair and replacement of the poor workmanship of the contractor or its subcontractors.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2006 a true and correct copy of the foregoing was mailed to all parties on the attached mailing list.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared with Times New Roman 14-point font and is in compliance with Fla. R. App. P. 9.210(a)(2).

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