

APPELLATE COURT CASE NUMBER A-09-2223
 STATE OF MINNESOTA
 IN COURT OF APPEALS

M/V Joseph L. Block;
 Indiana Harbor Steamship Co., LLC
 A foreign corporation; and
 Central Marine Logistics, Inc.,
 A foreign corporation;
 Arcelormittal USA Inc.,
 a foreign corporation; and
 Arcelormittal Minorca Mine, Inc.,
 a foreign corporation;

Appellants,

vs.

Daniel L. Willis,

Respondent/Plaintiff

and

Duluth, Missabe and Iron Range
 Railway Company, d/b/a Canadian
 National Railway(CN), a foreign
 Corporation,

Respondent/Defendant.

REPLY BRIEF OF APPELLANTS TO RESPONSE BRIEF OF PLAINTIFF DANIEL WILLIS

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Corrections to The Plaintiff's Statement of Facts

- At page three of his brief plaintiff misstates the employment relationship. Under the time-charter contract (Ex. 64, Section 8(b) and 8(c)), the time charter ArcelorMittal USA Inc. is the crew's employer "for the sole purpose of protecting seniority arrangements pension rights and other benefits" of crewmembers. For all other purposes, crewmembers are "subject in all ways to the direction and control" of Indiana Harbor (vessel owner) and Central Marine Logistics, (vessel manager/employer of the crew). Contrary to plaintiff's assertion, Indiana Harbor and Central Marine are not consultants and are not paid a "consulting fee." They are paid a management fee to operate and crew the vessel, which is the standard time charter arrangement.

- Contrary to plaintiff's statement, brief page 4, ArcelorMittal USA Inc., Indiana Harbor, Central Marine, and ArcelorMittal Minorca Mine do not have "shared management." There is no factual support for this statement.

- Contrary to plaintiff's statement, brief at 5, the DM&IR is not an "agent" employed by the vessel defendants. Plaintiff's citation to the record does not support such an assertion. DM&IR Dock was an independent contracting party with Minorca Mine under the Rail Transportation Contract (Ex. 65). DM&IR Dock had no contractual relation with ArcelorMittal USA, Inc., or Indiana Harbor, or Central Marine, and no agency relation with any of the four.

- At page 8, plaintiff states that the crew was "shorthanded." Under the union contract, the crew was two men short. Under Coast Guard regulations, the crew was complete, and had extra men. (R.1330) Whether any of this was causal was an issue at trial.

• Like DM&IR dock, plaintiff emphasizes, brief at 10, 17 hours of plaintiff wearing a leg immobilizer on his bus ride home, but ignores 10 more days after plaintiff got home that he wore the immobilizer continuously. (R. 721-731). The ten days of immobilization led to deep vein thrombosis and plaintiff's hospitalization.

1. **Spoliation**

Nowhere does plaintiff address the central issue: no spoliation instruction is proper where appellants did not **exclusively** possess or control the dock. Make no mistake - the law requires exclusive control and possession in order to find spoliation. *Wajda v. Kingsbury*, 652 N.W.2d 856 (Minn. App. 2002). Plaintiff would have this court rewrite the standard. The dock used the improper instruction to argue that the vessel defendants had hidden the evidence: "So I think - and that's part of the instruction that the judge gave you. If one party prevents another party from getting evidence in some fashion, whether by negligence or whether directly, you're allowed to infer that that the evidence would not have been favorable to that party." (R. 2024).

The spoliation instruction was improper and unfairly prejudicial to appellants, as argued in our principal brief, pp. 7-16.

Minnesota law requires that the item spoiled must be critical to the proof of the case. The dock's assertion that it could not defend itself is not worthy under the law. Photographic, demonstrative or testimonial evidence about a lost item in question cannot suffice in order to find spoliation. Certain items must be critical to the proof of a case because they are needed for testing to actually prove up a defect or other pieces of the liability puzzle, like a defective car brake. For instance, a sidewalk hole is not such an item of evidence since there are many other

ways to establish liability in such a case. *Dardeen v. Kuehling*, 344 Ill. App. 3d 832, 801 N.E.2d 960 (2003). *Dardeen* is on point here, the dock spillage, like a sidewalk hole, is capable of proof through other means and one does not direct testing of it to establish liability.

There has never been an instance of a non-premises owner being liable for spoliation upon another's premises. Appellants argued at the charging conference that the present case is akin to slip and fall cases in grocery stores. (R. 1979-80) For instance, the squashed grape requires notice to the store owner which in part is based upon the condition of the grape immediately after a fall. If the dock's position is viable, a slip and fall claimant in a grocery store could be charged with a potential spoliation claim if the grape was not preserved, although they did not have exclusive possession of the premises. Here, Appellants were merely invitees permitted to dock and unload cargo and by no stretch of the imagination ever exercised exclusive control and possession of dock No. 6 under the law to properly impose spoliation upon them.

In reality the rule permitting an unfavorable inference to be drawn is bottomed on the belief that, if the evidence had been produced, it would have been unfavorable to the one having control over it. It is a dangerous inference, which is why the law requires **exclusive** control and possession. *Kmetz v. Johnson*, 261 Minn. 395, 403, 113 N.W.2d 96, 101 (1962). The wrongful application of this inference to the vessel defendants was unfairly prejudicial and requires a new trial.

II. The Apportionment of Fault

The plaintiff's discussion of apportionment glaringly leaves out any discussion of the unfairly prejudicial effect of the spoliation instruction, which is the principal reasonable explanation for why a dock

whose own rules require it to inspect and clean the dock between vessels, but did not do so and a plaintiff who ignored orders, ignored what he saw in front of him, and couldn't tell his story the same way twice and apportioned only 7.5% of the fault for this accident.

III. Appellants' Contribution Claim Against the Dock is Governed by Maritime Law, not Minnesota State law.

Contrary to plaintiff's implication, brief at 18, this issue was properly preserved for appeal. (R. 1943-45)

Minnesota state law regarding contribution governs only plaintiff's negligence claim against the dock. At no point does plaintiff ever discuss the legal principles governing the maritime nature of the tort contribution claim made by appellants against the dock. The principal claims asserted against appellants by plaintiff (Jones Act negligence, unseaworthiness, and maintenance and cure) are all undisputedly maritime. Where the principal claims are maritime, the tort contribution claim based on them is also maritime, as set forth in appellants' principal brief at pp. 21-22. The court's incorrect charge allowed the dock to argue (successfully when combined with the erroneous spoliation instruction) that the law required the vessel defendants to be aware of open and obvious conditions (R. 2027), and that if the condition is open and obvious the dock is not liable. This wrong standard was unfairly prejudicial to the vessel defendants, and requires a new trial. Nowhere does plaintiff discuss this prejudice to appellants.

IV. Respondent Admits that the Evidence Did Not Support the Award of Past Lost Wages

In footnote 136, p.21 of his brief, respondent concedes that Dr. ██████ testified the loss was \$267,000.00 and the jury awarded a higher amount of \$281,268.00 (R. 2159) Despite this concession,

respondent argued that the evidence was within the range to award such past lost wages. In actuality the jury awarded \$281,468.00 for past lost earnings pursuant to the special interrogatory number 11 (R. 2159). It was conceded by Dr. [REDACTED] on cross-examination that the bonus he calculated was too high. (R. 1050) Taking the plaintiff's financial expert's concessions, the proper total lost wages as calculated in their brief constituted \$255,445.44 (R. 1027) The jury has exceeded what it properly awarded by \$26,022.56. Respondent failed to present any contrary record but counters by submitting that we should have objected to the erroneous testimony given by Dr. [REDACTED] The fact that Dr. [REDACTED] calculation of past wage losses was not objected to, but instead successfully cross-examined to gain concessions provides the rational basis for the award and it should be corrected and overturned to correct a manifest injustice.

V. Appellants are Entitled to a New trial on Damages

Respondent's sole defense to this issue is that Dr. [REDACTED] testified in the range of the jury's award and solely because of that fact it should be upheld. However, based upon a desire to punish this defendant for spoliation or to make it the *de facto* insurer of the accident, this is an erroneous finding by the jury. Substantial counter evidence through cross-examination of plaintiff and his sporadic work history, causes one to question the damages awarded for future lost earning capacity which either resulted from speculation or worse, punishing appellants based on spoliation of the evidence. Plaintiff's future earning capacity based on a temporary job he worked for 93 days and his 20 year history of never holding a job more than two years is in utter disregard of the evidence. (R.644-46,653) The jury either speculated or

punished appellants. There is a lack of competent evidence to support their award. Respondent did not distinguish the precedential cases, *Hammarlund v. James*, 2004 WL 1964871, 1964874 (Minn. App. 2004) and *Fifer v. Nelson*, 295 Minn. 313, 204 N.W.2d 422 (1973) in his brief in any manner. Respondent failed to cite any case law that would support his submission as to the appropriateness of the verdict.

In order to properly consider future medical expenses it was necessary that medical evidence be adduced that in fact plaintiff would require nursing or home care as opposed to a health care consultant who is not competent to provide the medical basis. Dr. [REDACTED] respondent's treating doctor, never provided such testimony which formed the basis of Ms. [REDACTED] cost estimates and which constituted 80% of her future costs (R. 869-870). There was absolutely no supporting evidence as to when plaintiff would ever require nursing or home care (R. 851-856). Further, respondent glosses over this lack of competent medical evidence and failed to address it in any meaningful way in his response. The verdict on these substantial damage awards for future medical costs and future earning capacity are unsustainable under the law.

VI. a. The Maritime Warranty of Workmanlike Performance

Appellants have to wonder why plaintiff chimes in on the WWLP, which is an issue that does not affect or apply to him. Be that as it may appellants agree that, if the ship's actions prevented DM&IR from cleaning the surface of the dock" (Plaintiff's brief at 24), that the WWLP does not apply. The difficulty is that neither the court Order nor plaintiff explains what facts support such a conclusion. There are none, and the WWLP applies.

It was dock policy to wash down the dock surface, known as the "fender," after every vessel, so that the fender was clean and safe for vessel personnel to work on. The dock's Book of Rules Item 19 at Page 30 (Ex. 115C) requires this, and requires the dock to notify incoming vessels about unusual conditions. Once a vessel finishes unloading, it is the foreman's responsibility to inspect the fender area to see if it needs to be cleaned. The dock knew spillage occurred with nearly all limestone unloads. It had equipment that could be used to clean the dock even while a vessel was approaching. It had the ability to tell approaching vessels to wait. The dock had more than one hour between the M/V Callaway and the M/V Block to do at least a partial cleaning. Under no view of the facts did the ship prevent the dock from doing so.

Plaintiff also argues, brief at 24, that the WWLP is "outmoded." This will come as a great surprise to the most recent federal circuit court continuing to apply the WWLP in our context, see *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003), discussed at pages 32-33 of appellants' principal brief and at page 7-8 of appellant's reply brief to the DM&IR dock. *Vierling* discusses at length the policy issues underlying its correct decision to apply the WWLP. 339 F.3d at 1316-1320.

The WWLP is a long established marine contract warranty unique to the maritime law, which applies even in the absence of a contract, and does not depend on the absence of comparative fault. It places responsibility on dock owners who fail to keep their docks safe for seamen who come there. It clearly applies here, and should be applied to require the dock to indemnify appellants.

VI. b. Unitary Enterprise

Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 78 S.Ct. 758 (1958) is the source for the "unitary enterprise" doctrine. *Sinkler* requires a contract in which the Jones Act employer delegates to someone not the employer an "operational duty" of the employer, the breach of which "operational duty" injures plaintiff. How are those elements satisfied here? They are not. There is no contract in which ArcelorMittal USA or Central Marine (jointly the Jones Act employers) delegate any duty to anyone, the breach of which injured plaintiff. These elements are set forth in *Sinkler* for a reason. It will not do to wave one's hands, mutter "expansive scope" and be done, with no look at the legal elements. This is exactly what plaintiff - and the dock - would have this court do here.

Plaintiff's citation to *Klump*, a Michigan trial court decision does not help him. While *Klump* finds a *Sinkler* agency, it does so without discussing the *Sinkler* agency elements, without discussing traditional agency elements, and without citations to any authority to support its extension of *Sinkler* to an imaginary contract with speculated terms. *Klump* also is not on point here because, like *Sinkler*, *Klump* uses the imaginary contract to impute the negligence of a related entity (the dock) to the Jones Act employer (the ship). Here the two related entities are the Jones Act co-employer ArcelorMittal USA and Minorca Mine. Even if one accepts the faulty *Klump* analysis, it can only apply here to impute negligence of Minorca Mine to ArcelorMittal USA. There is no negligence of Minorca Mine to impute to ArcelorMittal USA. There has never been the first allegation that Minorca Mine was negligent in any way. And finally here there is no evidence of common control over ArcelorMittal USA and

Minorca Mine, or that either controlled the other. Indeed Minorca Mine took its orders from ArcelorMittal Mining Europe. (R.191)

It is important to keep in mind what the case law does and does not say when considering what plaintiff is asking this court to do. The *Sinkler-Hopson* - unitary enterprise theory of agency has been used sparingly to find a principal and agent relationship between **two** entities. *Sinkler* found that two entities - the railroad and a separate switching company - were a "unitary enterprise". It did this to avoid the unfair result of leaving the injured railroad worker with his only recourse against a switching company that was not his employer. The "unitary enterprise" construct saw to it that the railroad that employed him remained liable for its employee's on-the-job injury. Here, plaintiff is asking this court to affirm its use to find such a relationship among **four entities** - Minorca Mine, ArcelorMittal USA, Central Marine and Indiana Harbor. This is prejudicial error.

In this case, with no analysis, not two, but **four separate entities** have been held to be a "unitary enterprise". This despite the fact that the alleged negligent acts were committed by Central Marine's own employees, not by some other entity to whom "operational duties" of Central Marine were delegated. There is no precedent for such a holding. Where "operational duties" of plaintiff's employer are not delegated, *Sinkler* does not apply. Yet plaintiff encourages this court to go where no court (save the trial court) has ever gone before, and find not two but **four companies** to be a "unitary enterprise."

There is no case law holding that the existence of a time charter establishes an agency under traditional agency principles, or a "unitary enterprise" under *Sinkler*, which after all is a way to find an

agency in Jones Act cases where traditional principles fail. Nor has any court held that the corporate relation of parent - subsidiary alone does so. *Sinkler* required the existence of a written contract from the Jones Act employer/principal delegating "operational activities" of the employer to another entity before applying "unitary enterprise" to find an agency existed. Here there is no such contract. Absent such proof there can be no "unitary enterprise."

The trial court's decision that the four appellants ArcelorMittal USA, Central Marine, Indiana Harbor and Minorca Mine were a "unitary enterprise" was prejudicial error.

VI. c *There is No Principal - Agent Relation Between Minorca Mine and the Remaining Three Appellants Under Traditional Agency Principles.*

Without analyzing any facts or applying the elements of any agency legal theory plaintiff argues that there is an agency. How? In support plaintiff points to the trial court's decision (brief at 27) that all four appellants are agents of each other because they **"are engaged in furthering the operational activities of each other."** "Operational activities" is the language of *Sinkler*, and the prejudicial error of declaring all four appellants a "unitary enterprise" has already been discussed. The Court's decision lends no support to a finding of agency of all four appellants under any traditional agency principle. If just saying "agency" makes it so, any two companies doing business with each other become each other's agents - which is clearly not the law.

Plaintiff ignores the black letter law that no one can become the agent of another without the consent of the principal. *Nerlund v. Schiavone*, 250 Minn. 160, 165, 84 N.W.2d 61, 65 (1957). Plaintiff also ignores that apparent authority requires (1) that the principal (Minorca)

hold the agent out as having authority, (2) that the party dealing with the agent must have actual knowledge that the agent is held out by the principal as having authority, and (3) that the proof of the agent's apparent authority must be found in the conduct of the principal, *Foley v. Allard*, 427 N.W. 2d 647, 652 (Minn. 1988), and the several other agency principles discussed at appellants' principal brief, p. 37-39.

How are any of these theories satisfied in this case? They aren't. Shouldn't the plaintiff (or for that matter the dock) have to point to what negligent acts the purported agent committed and to how the purported principal authorized those acts? Lumping together all four appellants as one big defendant is no more justified under traditional principles than it was under *Sinkler*. It permeated the trial and was prejudicial error.

Appellants are entitled to a new trial.

VII. Appellant ArcelorMittal Minorca Mine is Entitled to Judgment as a Matter of Law.

Plaintiff's argument is that Minorca Mine is properly included in his judgment because Minorca was part of a "unitary enterprise" under *Sinkler*. This is wrong on two levels.

First, Minorca cannot be part of a unitary enterprise, see discussion supra, Section VI-b of this brief and pp. 34-36 of our principal brief.

Second, plaintiff does not dispute that no claim was made by anyone that Minorca was directly liable to plaintiff on any theory. Since that is so, how can any judgment in favor of plaintiff and against Minorca be entered? It can't.

Minorca is entitled to reversal of the judgment against it.

VIII. Appellants Paid Supplemental Wage Payments That are Subject to Set Off Under the Collateral Source Statute

Appellants paid \$200,339.37 in excess of what was contractually required to be paid to respondent during his term of disability. The trial court failed to properly set off these payments although there were many discussions during trial that it would be addressed after the verdict. (R.43,45,47; 1894) Respondent attempts to treat the appellants in the same light as insurance company and contends that the party making the payments as tortfeasor is not allowed set off either under the common law or pursuant to the set off statute. Respondent cites to *Smith v. American States Insurance Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), rev. den. (Minn., February 18, 1999) as persuasive in denying set off under the common law collateral source rule and that plaintiff may enjoy a double benefit or recovery. However, the facts of *Smith, supra*, are very different from the facts here, because the district court had ruled that respondent was not barred from recovery of special damages even though the damages had been paid by another. The court in *Smith* held that based on its particular fact situation the collateral source statute does apply "because the statute expressly does not apply to payments not yet received, whether due to an insured's denial of coverage or discontinuation of payments based on an insured's failure to show continued entitlement to those benefits. *Id* at 786. Minn. Stat. §548.36 is limited to payments made up to the date of the verdict. Appellants here are not seeking any payments made after the date of the verdict so the case is not applicable to the present case.

A newly decided case after this appeal was filed is cited by respondent, but factually is so different as to not be applicable to the case at hand. Respondent cites *Do v. American Family Mutual Insurance*

Company for the proposition that a tortfeasor may not receive set off. 799 N.W.2d 853 (Minn.2010) The case is limited to its facts. The issue examined required the court in *Do* to determine the applicability of Minnesota's collateral source statute to an insurance company subject to payments under the Minnesota no fault statute. More particularly the court answered the question of whether the statute requires a deduction of a settlement payment made by the tortfeasor's automobile insurer from the plaintiff's subsequent judgment against his own automobile insurer for no fault benefits. The court examined various provisions of the No Fault Act as well as the collateral source statute. The court found that a claim for no fault benefits is separate and distinct from a tort claim against the tortfeasor and the tortfeasor's insurance. Additionally, the No Fault Act provides statutory off sets designed to avoid duplicate recovery. Minn. Stat. §65b.42(5) (Minnesota No Fault Act). The facts of the case are different from the facts here. Here, appellants are the direct parties making the payments in advance to the plaintiff and thus it falls squarely within the collateral source benefits statute. Appellants are not a third party insurance company making payments under a no fault scheme. Respondent's reference to *Do* is completely inapplicable to the facts at hand here and thus appellants should be afforded their collateral set off under *Stanislowski v. Upper River Service, Inc.*, 6 F.3d 537 (8 Cir. 1993). In *Stanislowski*, the Eighth District Court of Appeals squarely decided an issue with parties in the same posture as they were here. It is the controlling law, not a no fault scheme versus collateral source set off statute involved in an automobile insurance claim. Respondent's reliance at footnote 188, brief p.31, that the prior payments must be from a source solely independent of the tortfeasor is actually

from a concurrence to the *Do* opinion that again limits it to application in which it is a **tortfeasor's liability insurance**. *Id* at 14.

Respondents did not counter *Stanislawski v. Upper River Service, Inc.*, 6 F.3d 537 (8 Cir. 1993) in any manner. Respondent cites to the case for the general proposition of what maintenance and cure constitutes. In this instance, replacement wage benefits were paid to plaintiff far in excess of the binding union contract rate (Ex.48, page 12, ¶40) for maintenance and cure which is \$8.00 per day and the only amount that shipowner was obligated to pay under its collective bargaining agreement with respondent's union. It has been agreed by the parties through this trial that set off would be not presented to the jury so as to confuse them, but would be applied after the return of the verdict. (R. 43,45,47; 1894) At no time did the trial court indicate that it did not consider appellants' set off anything other than wages or that it was strictly maintenance and cure not subject to set off. In that instance, appellants certainly would have submitted the advance payments to the jury so that they would achieve appropriate credit. Appellants did not have to pay these additional amounts but did so in good faith and sought set off as they properly should under the collateral source statute and under the common law. *Stanislawski, supra*, permitted a credit for payments that constituted supplemental wage payments at the time of the payment. Appellants were only obligated to pay the union contract rate for maintenance of eight dollars per day and for cure any reasonable medical bills. They voluntarily paid in excess of the union contract rate, and are entitled to a set off for their good faith efforts. It is of no moment whether Mr. [REDACTED] referred to such payments as maintenance or not, it is the character of what was paid as a voluntary payment above and

beyond what was required by the union contract as a maintenance and cure benefit. That is what is recompensible in *Stanislowski* and should likewise be recompensed in this action for appellants benefit in their good faith advancement of these amounts to respondent.

Despite the protests of respondent, there was no change of the characterization of payments although the terminology perhaps could have been neater. Appellants did not argue that such payments were inadmissible as prejudicial admission of fault or that they were able to advance their affirmative defenses unfairly. Respondent claims that it left him hamstrung in his mitigation defense because he could not explain his failure to return to employment because the payments would have ceased. FN 205. Respondent through his artful twists should not be allowed to avoid this fact and thus this court should overturn the trial court's decision on and off set against past lost wages, \$200,339.37.

IX. The Trial Court is wrong in its Application of the Rate of Post Judgment Interest

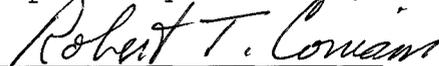
Respondent was unable to distinguish or detract from appellants citation as to what constituted "finally entered" under the law and in this instance the rate of four percent predates the effective date of the statute amendment. The respondent's citation to *Erikson v. Nelson* is distinguishable on the basis that the court made findings that in effect plaintiff abandoned his right to purchase under the agreement and denied plaintiff any relief. 275 Minn. 561 (1966). The conclusions of law provided for dismissal of the action with prejudice and a stay of 30 days was granted to allow the judgment to be entered accordingly. In that case under those facts, the dismissal in *Erikson* required the entry of judgment to become a final determination of the court. Thus, it is distinguishable from this case where a verdict was entered and an order was placed upon

the record by the clerk making it final. The final judgment was entered in this case prior to August 1, 2009, and to do otherwise would allow parties to file post judgment motions in order to gain a higher post judgment interest rate, which would allow gamesmanship to enter into post-verdict pleading practice. The legislature certainly did not endorse nor contemplate such an action when it amended the statute. The appropriate action in this case is to apply the four percent interest rate.

Conclusion

The trial court during the argument on appellants JMOL certainly recognized the errors committed during this two week trial. The court asked counsel for appellants how long a retrial on apportionment of liability would take and that if he agreed with reapportionment "would it not be the best solution to have a new trial on liability as to the dock and the boat." (Proceedings of August 11, 2009, R.19,59) For the foregoing reasons, appellants should prevail on their appeal, and this case should be remanded to the trial court for further proceedings.

Respectfully submitted,



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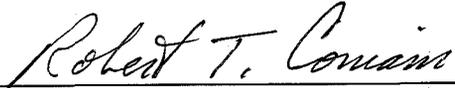
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CERTIFICATE OF SERVICE

A true copy of the foregoing Reply Brief Appellants to
Response Brief of Daniel Willis has been served on all parties this
10 day of May, 2010 by ordinary mail.



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Certificate of Compliance

Pursuant to Rule 132.01 subd. 3, the undersigned hereby certifies, as counsel for Appellants that this brief complies with the type-volume limitation as there are 4,610 number of words of proportional space type in this brief.

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