

038475

038475 ORIGINAL

Court of Appeals No. 63847-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

In re: THE ESTATE OF ASHLIE BUNCH;

AMY KOZEL,

*Appellant,*

*v.*

McGRAW RESIDENTIAL CENTER d/b/a SEATTLE  
CHILDREN'S HOME and THE ESTATE OF ASHLIE BUNCH,

*Respondents.*

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
JAN 17 11:03 AM '06

BRIEF OF APPELLANT

ELENA LUISA GARELLA

Attorney at Law  
927 N. Northlake Way, Ste 301  
Seattle, Washington 98103  
ph: (206) 675-0675 fax: (206) 632-7118  
law@garella.com

**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERROR .....1

    A. Assignments of Error .....1

    B. Issues Relating to Assignment of Error.....1

II. STATEMENT OF THE CASE .....2

III. ARGUMENT.....6

    A. Kozel is entitled to seek damages under RCW 4.24.010 because she regularly contributed to the support of her minor child, Ashlie .. .....7

    B. The trial court abused its discretion when it denied Kozel's Motion to Intervene without conducting an evidentiary hearing on contested matters of fact. .... .....14

    C. Kozel should have been joined in the action under both CR 19 and CR 24. .... .....16

IV. CONCLUSION.....19

**TABLE OF AUTHORITIES**

**CASES**

Autera v. Robinson, 419 F.2d 1197, 1202 (D.C.Cir.1969) .....16

Beal v. City of Seattle, 134 Wash.2d 769, 777, 954 P.2d 237 (1998)..... 17, fn. 1

Benoy v. Simons, 66 Wn.App. 56, 60, 831 P.2d 167 (Div. 3, 1992).....17

Blumenshein v. Voelker, 124 Wn.App. 129, 100 P.3d 344  
(Div. III, 2004) .....9, 10, 12

Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th  
Cir.1983), cert. den'd, 464 U.S. 849, 104 S.Ct. 156, 78 L.Ed.2d 144  
(1983). .....17

Philippides v. Bernard, 151 Wash.2d 376,389, 88 P.3d 939 (2004).....7

Pickett v. Holland America Line-Westours, Inc., 145 Wn.2d 178, 35 P.3d  
351 (2001).....15

Postema v. Postema, 118 Wn.App. 185, 72 P.3d 1122 (2003), rev. den'd 151  
Wn.2d 1011 (2004) .....12, 13

Woodruff v. Spence, 76 Wn.App. 207, 883 P.2d 936 (Div. 3, 1994).....16

**STATUTES AND RULES**

CR 19.....16, 17, 18

CR 24.....8, 16

RCW 4.20.046.....17

RCW 4.20.060.....17

RCW 4.24.010 ..... *throughout*

RCW 11.04.015 .....13

**TREATISES**

Comment, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI31.06.01 (5th ed.).....18

## **I. ASSIGNMENTS OF ERROR**

### **A. Assignment of Error**

The trial court erred in denying Appellant Kozel's motion to intervene in a lawsuit seeking damages relating to the death of her daughter. See Order at CP 90-92.

### **B. Issues Relating to Assignment of Error**

1. Whether the trial court erred as a matter of law when it denied a mother's Motion to Intervene in Death of a Child Action apparently based on the conclusion that the mother had not been "significantly involved" with the child, notwithstanding uncontested evidence that the mother had custody of the decedent for five years and continued to provide emotional support for the following five years while the child was in her father's custody until the child's death.

2. Whether the trial court abused its discretion when it failed to hold an evidentiary hearing in order to determine whether or not the mother "regularly contributed to the support of his or her minor child" where there was (a) uncontested evidence that the mother raised the decedent for five years, providing both emotional

and financial support, and (b) disputed evidence offered by the parents in declarations as to the nature and extent of the mother's involvement in the child's life for the five years preceding the child's death, thus extinguishing the mother's claims under RCW 4.24.010 without a hearing on a material issue of fact.

3. Whether the trial court erred as a matter of law by failing to allow the mother to join the Estate's action against the tortfeasor at fault for her child's death pursuant to CR 19 where the mother was both a necessary party by virtue of the facts that she was a parent who had regularly contributed to the support of her minor child and a beneficiary of the child's estate.

## **II. STATEMENT OF THE CASE**

Appellant Amy Kozel appeals the trial court's denial of her motion to intervene in a wrongful death lawsuit brought by her ex-husband, Respondent Steven Bunch, relating to the death of their child, 15 year old Ashlie Bunch.

During their marriage, in 1998, Kozel and Bunch adopted decedent Ashlie and Ashlie's younger sister, Emily. At that time the couple lived in Florida. Kozel and Bunch divorced in 2001 and

Bunch moved to Washington State. Ashlie remained in Florida with her mother and sister until 2003. In August of 2003, Ashlie moved alone to Washington where she commenced living with her father. CP 57 (Kozel Declaration), CP 68-69 (Bunch Declaration).

According to the Complaint in this case, Ashlie was involuntarily committed to Kitsap Mental Health Hospital in March of 2007 because of serious emotional difficulties. Later, she was transferred to the McGraw Residential Center (a d/b/a of Seattle Children's' Home, here, "McGraw Center") in May of 2007. She admitted to suicidal thoughts and the McGraw Center identified her as a high risk for suicide. Unfortunately, however, the Center failed to monitor her adequately and Ashlie committed suicide on January 29, 2008. The Center attempted to hide the failure to check on the patient by falsifying records. CP 1-2, 5-8 (Complaint).

Bunch obtained appointment as the Personal Representative of the Estate of Ashlie Bunch. CP 2, ¶2.1 (Complaint). On May 7, 2009, Bunch filed a Complaint against McGraw Center and various McGraw Center employees. CP 1 -46. Bunch asserted claims of

outrage, medical malpractice, negligent hiring, training and supervision, and wrongful death of a child. CP 9-12. Pursuant to RCW 4.24.010, Bunch issued a Notice to Amy Kozel of Institution of Suit. CP 47-48 (Notice). The Notice advised Appellant of the time limits of her right to join as a party to the suit in order to recover damages for the death of their child.

On June 8, 2009, well within the 60 days allowed by RCW 4.24.010, Appellant filed a Motion to Intervene in Death of a Child Action. CP 50-53 (Motion to Intervene). The Estate, through Bunch, objected to the Motion to Intervene, asserting that Kozel lacked standing under RCW 4.24.010 due to an alleged failure to regularly contribute to the support of the minor child. CP 73-81 (Bunch Opposition), CP 68-72 (Bunch Declaration). Defendant McGraw Residential Center also questioned Kozel's standing to assert her claim for loss of the parent-child relationship. CP 65 (McGraw Center Response).

However, in the Declaration in Support of the Motion to Intervene, Kozel testified to facts indicating that she was significantly involved in her daughter's life. CP 56-58 (Kozel

Declaration). She swore that she raised Ashlie (and Emily) with Bunch during their marriage from 1998 until May of 2001. CP 57. Furthermore, she stated that she had custody of Ashlie for over two years after Bunch left Florida for the State of Washington. CP 57. During those two years, Kozel provided for Ashlie's financial and emotional support. CP 57, CP 68-69. Unfortunately, Ashlie had behavioral problems that threatened the safety of her younger sister, Emily. CP 57.

According to both Kozel and Bunch, Ashlie moved in with her father in August 2003, while Emily stayed with Kozel. CP 57, CP 69. Kozel testified that during the five years after Ashlie moved, the two spoke by phone at least once a week and Kozel sent her presents. CP 57. Appellant also presented legal argument regarding the appropriate interpretation of RCW 4.24.010. CP 82-89. Bunch contested the facts alleged by Kozel. CP 6872 (Bunch Declaration). He claimed, *inter alia*, that from the time Ashlie moved in with him in 2003 that her mother, Kozel, "did not have a relationship of any kind with Ashlie." CP 69.

Notwithstanding the conflicting facts presented to the Court, the Superior Court issued an Order denying Kozel's Motion to Intervene in Death of a Child Action on June 29, 2009. CP 90-92 (Order). No evidentiary hearing was held. No findings of fact or conclusions of law were entered. The Court relied entirely on the record, which has been transmitted in pertinent part to this Court. CP 90-91 (Order); Statement of Arrangements.

Appeal was timely filed on July 13, 2009. CP 93-97 (Notice of Appeal). On September 21, 2009, having settled the matter, McGraw Residential Center and Bunch stipulated to dismissal of the cause, and the matter was dismissed. CP 98-100 (Stip. and Order of Dismissal).

### **III. ARGUMENT**

As noted above, the trial court denied Amy Kozel's Motion to Intervene in Death of Child Action (CP 50-53). The effectively terminated the possibility that Kozel could be a party or that Kozel could pursue a wrongful death action under RCW 4.24.010. The trial court apparently rejected Kozel's contentions that (1) RCW 4.24.010 intended to provide a civil cause of action for wrongful

death to any parent who "has had significant involvement in the child's life," [CP 83-85] and (2) that Kozel was a necessary party under Civil Rule 19. [CP 87-88]. The trial court further erred by presuming that Kozel did not regularly contribute to the support of Ashlie despite a conflicting record. If, as a matter of law, a mother who had raised a child for five years can be cut-off from a wrongful death action in motions practice, the trial court at least should have held an evidentiary hearing to determine whether or not Kozel regularly contributed to Ashlie's support. CP 66.

**A. Kozel is entitled to seek damages under RCW 4.24.010 because she regularly contributed to the support of her minor child, Ashlie.**

RCW 4.24.010 provides that the parents of a minor child may recover damages for their own financial and emotional losses when a child is injured or dies due to the tortious conduct of another. The statute exists in derogation of common law, which did not recognize the emotional injury sustained by parents. Philippides v. Bernard, 151 Wash.2d 376,389, 88 P.3d 939 (2004). However, the legislature limited the relief to only those parents who were involved in the child's life:

4.24.010. Action for injury or death of child

**A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child. . . (Emphasis added)**

The legislature also added an intent section to RCW 4.24.010 in 1998. That section reads in full:

**It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in Guard v. Jackson, 132 Wash.2d 660, 940 P.2d 642 (1997). The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support.**

Laws of 1998, ch. 237, § 1 (emphasis added). The statute reads "**who has regularly contributed**" and the intent section states "**has had significant involvement in the child's life.**" As can be readily discerned from the use of the past tense in both texts, the Legislature recognized a cause of action for a parent whom, at any time, provided for her child.

Ashlie's father, Bunch, urged the trial court to deny Ashlie's mother the right to intervene (CR 24) because he alleged that Kozel

did not provide for Ashlie at the time of her death. CP 77. Bunch relied on a Division III case, Blumenshein v. Voelker, 124 Wn.App. 129, 100 P.3d 344 (Div. III, 2004). Blumenshein holds that the Legislature intended that the necessary parental involvement be measured at the time of the injury, not at some earlier or later time. Id., 124 Wn.App. at 135.

Blumenshein has not been adopted by Division One, and appellant respectfully contends that its holding is erroneous. In Blumenshein, defendant Voelker, driving a vehicle, struck and injured 5 year-old Felicia, who was riding a bicycle. Id. 124 Wn.App. at 131. At the time of the accident, Felicia's mother, plaintiff Blumenshein, was living at a homeless shelter and Felicia and her brother were living with their father. Due to a history of drug addiction, instability, and incarceration, Ms. Blumenshein had not had significant contact with her children for a unspecified period prior to the accident. 124 Wn.App at 132. She had not been contributing to their material support, and was absent. At some point, the children were placed in foster care based on parental neglect. Id. 124 Wn.App at 132. Division III held that because the

mother did not have significant involvement in Felicia's life until one and a half years after the accident and did not have contact for "quite some time" before the accident, she lacked standing to bring suit under RCW 4.24.010. 124 Wn.App at 132, 135.

Notably, Blumenshein does not consider the argument that the legislative intent section of the statute allows standing to any parent who "**has had** significant involvement in the child's life." The result is not only contrary to the mandate of the Legislature as expressed in the intent section, it invites inequitable results. For example, imagine a situation in which a mother raises and supports a daughter for the first ten years of the child's life. The mother then suffers catastrophic injuries in an accident that preclude her involvement with the child, and the child moves in with her father. The child is killed in an accident a year or two later. Under the Blumenshein analysis, the mother would be precluded from any recovery under RCW 4.24.010, an inequitable result.

The unjust consequences invited by Blumenshein's holding are easily avoided. The statute itself provides the remedy for the

situation in which a parent's involvement with the child has been attenuated. It states:

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other **damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.** (Emphasis added).

RCW 4.24.010. In other words, where support of the child has been unequal between the parents, it is the trier of fact's duty to apportion the damages. By reading both the statute and the legislative intent section, it is apparent that the legislature recognized that one parent may have a greater claim than the other.

In case at bar, Kozel and Bunch adopted two sisters. The mother had raised the girls jointly with the father for three years, and had sole custody for two years after the parents divorced. One daughter (Ashlie) unfortunately had behavioral difficulties that required her to live away from her sister. The mother sent Ashlie to live with her father, while retaining custody of the younger sister. CP 57, CP 68-69. The contact and support provided by the mother for Ashlie in the subsequent five years is a matter of factual dispute. But irrespective of those facts, it is undisputed that Kozel

"had significant involvement" in Ashlie's life for at least the first five years following her adoption. Bunch is free to argue to the jury that because Kozel's support was attenuated or absent in the five years prior to the accident, she should receive a lesser portion of any award under RCW 4.24.010.

In addition, Blumenshein's holding is contrary to the logic expressed in the Division One case of Postema v. Postema, 118 Wn.App. 185, 72 P.3d 1122 (2003), *rev. den'd* 151 Wn.2d 1011 (2004). Postema involved a father's claim for the death of his three year-old son in a motor vehicle accident. On a special verdict form, the jury found that the father had not "regularly contributed" to the child's support because the father's child support payments had been sporadic. The jury instruction defined "Support" as "providing for the child's material well being. This may include payment of money or contributing to housing, food, clothing or healthcare services of the child incurred after his birth." *Id.*, 118 Wn.App at 191.

This Court determined that the Postema Instruction's definition of support was erroneous. It relied on the intent section

to rule that RCW 4.24.010 provides a cause of action for parents who provide emotional, psychological, financial or other support to the child, not just material support. *Id.*, 118 Wn.App at 198-99. Postema was remanded for new trial. *Id.*, 118 Wn.App at 199.

As in Postema, this Court should consider the statement of legislative intent which provides for recovery for any parent who "has had significant involvement in the child's life." It is undisputed that Amy Kozel had significant involvement in Ashlie's life for at least five years. CP 57, CP 68-69. There is no need for the trial court to apply a high threshold test of parental involvement—the jury will consider the differing contributions of the parents and resolve the matter. The jury allocates the damages "for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as ... may be just to each of her parents" as directed by the RCW 4.24.010. In addition, the jury determines the damages sustained by Ashlie herself, providing a share to the Estate which will be divided between the parents pursuant to the law of intestate succession. RCW 11.04.015.

**B. The trial court abused its discretion when it denied Kozel's Motion to Intervene without conducting an evidentiary hearing on contested matters of fact.**

As noted in the Statement of the Case, above, the parties submitted conflicting declarations to the trial court regarding Kozel's involvement in the life of Ashlie. While both parties agreed that Kozel took care of Ashlie with Bunch for the first three years after adoption, and had custody of Ashlie for the second two years (CP 57, CP 68-69) the parties disputed the nature and amount of the mother's involvement for the five years prior to Ashlie's death. Kozel testified that she spoke by phone to her daughter at least once a week, and sent her presents. CP 57. Unsurprisingly, Bunch minimized the amount of Kozel's contact, conclusorily alleging that Kozel "did not have a relationship of any kind with Ashlie." CP 69. While Bunch claims that he provided all financial support for Ashlie (CP 69), the record is silent as to whether or not he provided financial support for her sister Emily, leaving open the possibility that the parents elected to not exchange child support checks. If there were such an arrangement, it is hardly fair to conclude that the mother did not provide financial support for Ashlie.

Despite the factual disputes, the trial court failed to conduct an evidentiary hearing. Where there are disputed questions of fact, it is inappropriate for the trial court to deny a motion for intervention in a procedure akin to summary judgment. Because of the operation of RCW 4.24.010, the trial court's Order (CP 90-92) in fact acts as a final judgment, extinguishing Kozel's right to recover damages for the loss of her daughter's life. Under RCW 4.24.010, the "[f]ailure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit."

By dismissing Kozel's Motion to Intervene without a hearing, the trial court has run afoul of a fundamental premise of the law, that is:

[N]either the trial court nor [an appellate] court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.

Pickett v. Holland America Line-Westours, Inc., 145 Wn.2d 178, 35 P.3d 351 (2001). A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact

whose resolution requires a determination of witness credibility. See Autera v. Robinson, 419 F.2d 1197, 1202 (D.C.Cir.1969), Woodruff v. Spence, 76 Wn.App. 207, 883 P.2d 936 (Div. 3, 1994). Therefore, even if this Court disagrees with the statutory interpretation of RCW 4.24.010 urged by Appellant at pages 7-13 of this brief, the matter must be remanded for hearing on whether or not Kozel was involved in Ashlie's life so that her standing may be determined.

**C. Kozel should have been joined in the action under both CR 19 and CR 24.**

Under Civil Rule 19, a trial court must determine which parties are “necessary” for a just adjudication. As alternative grounds to intervention under CR 24 (Intervention), Kozel argued that under CR 19, Kozel must be joined in the action because:

(1) in [her] absence complete relief cannot be accorded among those already parties, or (2) [she] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [her] absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a), CP 88. The “complete relief” clause of Rule 19(a) addresses the interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same cause of action. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir.1983), cert. den’d, 464 U.S. 849, 104 S.Ct. 156, 78 L.Ed.2d 144 (1983).<sup>1</sup>

At this juncture it must be recalled that Bunch pursued damages on both his own behalf (RCW 4.24.010, the child injury and death statute) and on behalf of Ashlie’s Estate (RCW 4.20.060, the general survival statute). While 4.24.010 provides for losses to the parents, RCW 4.20.046 compensates the Estate for losses suffered by the child.. The actions on behalf of Ashlie herself may only be brought by her personal representative, Bunch. RCW 4.20.060, Benoy v. Simons, 66 Wn.App. 56, 60, 831 P.2d 167 (Div. 3, 1992). As a practical matter, the two claims usually are brought together, in the same action. *See*, Comment, 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI31.06.01 (5th ed.).

---

<sup>1</sup> The analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive. *See* Beal v. City of Seattle, 134 Wash.2d 769, 777, 954 P.2d 237 (1998).

Kozel is entitled to a 50% share of Ashlie's Estate pursuant to the law of intestate succession. RCW 11.04.015(2)(b). In the instant case, after the trial court denied Kozel her right to participate in the action, the Estate settled Ashlie's and Bunch's claims for a lump sum of \$575,000. \$20,000 of the \$575,000 was attributed later to Ashlie's claims against the defendants. The Estate then tendered \$4,819.94 to Kozel as her share of the Estate's settlement as a beneficiary after deducting attorneys' fees and costs. CP \_\_.<sup>2</sup>

By denying the motion to intervene, and by refusing to join Kozel in the action, the trial court thwarted the purposes listed by CR 19. The disposition of the action in Kozel's absence impaired and impeded her ability to protect her interest. Defendant McGraw Center is now vulnerable to a second action relating to the same negligent acts alleged by the father. McGraw Center is exposed to the multiplicity of lawsuits that the Civil Rules seek to avoid.

---

<sup>2</sup> Counsel is amending the statement of arrangements to provide for the transmission of the Declaration of Jeffrey L. Herman, Kozel's trial court attorney, setting forth these facts.

#### IV. CONCLUSION

The trial court's rulings are erroneous as a matter of law. The failure to conduct a hearing on disputed and material issues of fact was an abuse of discretion. For the reasons set forth above, the Order Denying Amy Kozel's Motion to Intervene in Death of a Child Action must be reversed.

On remand, the trial court should be directed to set aside the dismissal of the action and (1) allow Amy Kozel to intervene as a matter of right and set aside the settlement agreement that was forged in the absence of an indispensable party, or, in the alternative, (2) allow Amy Kozel to bring her own action against defendants McGraw Center for her losses under RCW 4.24.010.

RESPECTFULLY SUBMITTED this 15th day of March, 2010,

By: Elena Luisa Garella  
Elena Luisa Garella  
WSBA No. 23577  
Appellate Attorney for Amy Kozel  
(in association with Jeffrey L. Herman,  
WSBA No. 24432)

LAW OFFICE ELENA LUISA GARELLA  
927 N. Northlake Way, Suite 301

LAW OFFICE ELENA LUISA GARELLA  
927 N. Northlake Way, Suite 301  
Seattle, Washington 98103  
(206) 675-0675  
law@garella.com