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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.

**BRIEF OF RESPONDENT
McGRAW RESIDENTIAL CENTER**

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I. IDENTIFICATION OF RESPONDENT

This Brief of Respondent is filed by Respondent McGraw Residential Center d/b/a Seattle Children's Home ("McGraw"), the defendant in the underlying case.

II. INTRODUCTION

The trial court correctly denied Appellant Amy Kozel's motion to intervene in a wrongful death action concerning the death of Ashlie Bunch, a minor, at a residential facility operated by Respondent McGraw on January 29, 2008.

The wrongful death action was filed by Ashlie's father, Steven Bunch. Appellant Amy Kozel ("Kozel"), who was Mr. Bunch's ex-wife and Ashlie's adoptive mother, sought to intervene to assert a claim for loss of the parent-child relationship pursuant to RCW 4.24.010. However, Appellant Kozel had not seen Ashlie in the five years preceding Ashlie's death and did not regularly contribute financial, emotional or psychological support to Ashlie in the five-years preceding her death.

After considering affidavits submitted by Steven Bunch and Appellant Kozel, the trial court determined that Kozel lacked standing to assert a claim for the loss of the parent-child relationship pursuant to RCW 4.24.010. As a result, the motion to intervene was correctly denied, and the rulings should be affirmed on appeal.

III. ISSUES PRESENTED

1. Did the trial court correctly construe and apply RCW 4.24.010 to find that Appellant Kozel did not have standing to assert a parental loss of consortium claim pursuant to RCW 4.24.010, where she did not have significant involvement in Ashlie's life or regularly contribute to her support at the time of Ashlie's death or for five years prior?

2. Did Appellant Kozel waive any right she might have had to an evidentiary hearing on the issue whether she had standing to assert a parental loss of consortium claim pursuant to RCW 4.24.010, where Kozel did not request an evidentiary hearing in the trial court and where Kozel affirmatively opposed an evidentiary hearing in the trial court?

3. Did the trial court properly exercise its discretion in declining to hold an evidentiary hearing?

4. Did the trial court properly deny Appellant Kozel's motion to intervene pursuant to Civil Rule 19, where Appellant Kozel lacked standing to assert a parental loss of consortium claim pursuant to RCW 4.24.010?

IV. COUNTERSTATEMENT OF FACTS

A. Kozel Did Not Have Significant Involvement in Ashlie's Life.

In 1998, Steven Bunch and Appellant Amy Kozel adopted Ashlie Bunch and her sister, Emily. CP 57, 68. At that time, Mr. Bunch and Kozel were married. *Id.* In 2001, Mr. Bunch and Kozel divorced. *Id.* Mr. Bunch moved to Washington State, and Ashlie and her sister Emily initially resided with Kozel in Florida. CP 57, 69. During that time, Mr. Bunch paid regular child support for both Ashlie and Emily. CP 69. In August 2003, when Ashlie was 10 years old, she went to live permanently with her father, Steven Bunch, in Washington State. CP 57, 69.

Over the next five years, Ashlie was cared for by her father, Steven Bunch, and her stepmother, Ann Marie. CP 69. Mr. Bunch was the parent providing all financial and emotional support to Ashlie, including all of her financial needs, general health care, mental health treatment, clothing, food, shelter, school supplies and after school activities. *Id.* Kozel did not contribute to Ashlie financially. *Id.* Kozel never saw Ashlie in the five years between August 2003 and Ashlie's death in 2008.

Ashlie had several inpatient mental health stays ranging from four days up to five weeks prior to going to McGraw Residential Center in May of 2007. CP 69. Each time Ashlie would enter into a facility for

treatment, Mr. Bunch would notify Kozel of her stay within 48 hours. *Id.* Kozel never attempted to contact Ashlie while in inpatient care.¹

On May 8, 2007, Ashlie was admitted to McGraw Residential Center for inpatient residential treatment. CP 69. At this point, Kozel had not seen Ashlie for four years. Mr. Bunch continued to be the only parent providing Ashlie financial and emotional support. *Id.* Ashlie remained at McGraw for the next eight months until the date of her death, January 29, 2008, while still inpatient at the facility. *Id.* Kozel never contacted Ashlie during the eight months she resided at the McGraw facility.

On February 7, 2008, Mr. Bunch held a memorial service for Ashlie. CP 71. Kozel was informed of the memorial service and chose not to attend. *Id.* Kozel also did not tell Ashlie's sister Emily about Ashlie's death until after the lawsuit was filed 15 months later. CP 71.

B. Ashlie's Father, Steven Bunch, Filed Parental Loss of Consortium Claim.

Steven Bunch, and the Estate of Ashlie Bunch filed a wrongful death action on May 7, 2009 against Respondent McGraw. CP 1. Among other things, Mr. Bunch asserted a parental loss of consortium claim pursuant to RCW 4.24.010. CP 5.

¹ Despite Kozel's apparent lack of interest, Kozel was contacted on one occasion by staff at McGraw Residential Center regarding Ashlie. CP 69-70.

Mr. Bunch served a Notice of Institution of Suit to his ex-wife, Appellant Kozel, that provided notice that if she wanted to preserve her right to bring a cause of action under the parental loss of consortium statute, at RCW 4.24.010, she was required to move to intervene in the suit as a party within sixty days of service. CP 47-48.

C. Kozel Filed Motion to Intervene in the Trial Court Action.

Thereafter, Kozel filed a Motion to Intervene in Death of a Child Action. CP 50. Kozel asserted she intended to pursue a loss of parental consortium claim under RCW 4.24.010 and argued the court should allow intervention as an “indispensable party” under Civil Rule 19. CP 50-53.

In Kozel’s declaration filed in support of the motion to intervene, Kozel admits she provided no financial support to Ashlie from the time Ashlie moved to Washington State in August 2003. CP 57. Kozel also admits she never saw Ashlie between the time Ashlie moved to Washington State in August 2003 and the time of her death in February 2008. CP 57. Kozel does not dispute that she had no contact with Ashlie during the eight months Ashlie resided at McGraw from May 2007 through the time of Ashlie’s death in February 2008.

Ashlie’s father, Steven Bunch, filed a declaration opposing Kozel’s motion to intervene in which Mr. Bunch stated that from August 2003

until Ashlie's death in 2008, he provided all of Ashlie's financial and emotional support, and that Kozel did not provide any financial support from August 2003 until the time of her death. CP 69. Mr. Bunch also averred that he provided notice of Ashlie's short inpatient stays to Kozel and that Kozel did not attempt to contact Ashlie while she was an inpatient at any residential facility; he notes that on one occasion Kozel was contacted by staff at McGraw Residential Center. CP 70. Mr. Bunch also averred that Kozel never contacted Ashlie's medical providers to check on Ashlie's status and never called or wrote to Ashlie to check on her condition after she was released from inpatient treatments. CP 70.

Mr. Bunch stated in his declaration that Kozel sent Ashlie one Christmas present over the five year period and had had one telephone conversation with Ashlie.² CP 70. He also stated that Kozel denied Ashlie telephone access to her sister, Emily. CP 70. Further, Kozel did not communicate any desire to have Ashlie move back to Florida or even to visit her in Florida, and did not ask for updates regarding Ashlie's condition. CP 71. When Mr. Bunch offered to send Kozel pictures of Ashlie, Kozel refused. CP 71. When he would call Kozel to update her

² According to Kozel's own declaration, in the five years between August 2003 and Ashlie's death in 2008, the only contact she had with Ashlie sending holiday presents and cards and speaking by telephone until Ashlie was admitted into inpatient facilities. CP 57. Mr. Bunch stated that Kozel did not send Ashlie birthday cards, presents, or holiday cards, and did not call Ashlie on birthdays or holidays. CP 70.

on Ashlie's condition, she would brush it off saying, "good luck with that." CP 71. When Kozel purchased a second home she refused to provide Ashlie or Mr. Bunch with the address. CP 71.

Finally, Kozel did not attend Ashlie's memorial service and did not tell her sister, Emily, of Ashlie's death until after the lawsuit was filed 15 months later. CP 71.

Respondent McGraw also filed a Response to the Motion to Intervene. CP 64-67. McGraw noted that Kozel lacked standing to assert a claim for the loss of the parent-child relationship under RCW 4.24.010. CP 65.

D. Kozel Opposed Holding an Evidentiary Hearing.

Both Mr. Bunch and Respondent McGraw requested an evidentiary hearing in the trial court.³

Kozel opposed an evidentiary hearing. In her reply on the motion to intervene, Kozel argued, "[t]his issue does not need to be 'clarified' as

³ In opposing Kozel's motion, Mr. Bunch requested either that the motion be denied outright, or in the alternative, that "should the court require further evidence to determine Ms. Kozel's standing, plaintiff requests an evidentiary hearing for live witness testimony as soon as possible so the Court may weigh the evidence and determine the credibility of the witnesses before determining whether intervention is appropriate." CP 73.

Respondent McGraw also opposed Kozel's motion to intervene to assert a loss of parental consortium claim, and requested that if the court deemed it appropriate, that an evidentiary hearing be held on the issue "so that there is clarification and clear understanding of the claims at issue so that the parties may meaningfully engage in mediation of all claims that can be put at issue." CP 66.

Defendant claims,” and “[t]here is no legal basis for an ‘evidentiary hearing’ to ‘determine the credibility of witnesses’ before this court grants intervention.” CP 88 (emphasis added). Kozel concluded by requesting that she be permitted to intervene “without being compelled to travel from Florida to Washington to attend an ‘evidentiary hearing’ to determine her ‘credibility.’” CP 89 (emphasis added).

E. Trial Court Denied Motion to Intervene.

On June 29, 2009, the trial court entered an order denying Kozel’s motion to intervene. CP 90-91.

On September 21, 2009, Steven Bunch and the Estate of Ashlie Bunch stipulated to dismissal of all claims alleged in the suit. CP 98-99. Appellant Kozel received her allocation of the Estate settlement proceeds pursuant to Washington’s intestate succession statute. Appellant Br. at 18.

V. ARGUMENT

A. Standard of Review.

This appeal involves both *de novo* and abuse of discretion standards. While the trial court’s statutory interpretation and conclusions under RCW 4.24.010 are reviewed *de novo*, the decisions concerning whether to hold an evidentiary hearing and whether a party is necessary

under CR 19(a) are reviewed for abuse of discretion.

1. Statutory Construction is Reviewed *De novo*.

Statutory construction is a matter of law reviewed de novo. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

2. Decision Whether to Hold an Evidentiary Hearing is Reviewed for Abuse of Discretion.

Kozel agrees the decision whether to hold an evidentiary hearing is reviewed for abuse of discretion. A trial court's decision to hold an evidentiary hearing is discretionary. CR 43(e)(1); *Pettis v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978)⁴ (District Court did not abuse its discretion in reaching decision that it lacked jurisdiction to hear the claim on the basis of the affidavits presented by the defendant, in view of the appellant's complete failure to supply anything other than conclusory allegations). *See also Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994), *review denied*, 135 Wn.2d 1010 (1998).

A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, ¶ 14, 132 P.3d 115 (2006).

⁴ Where a state rule is identical to its federal counterpart, analyses of the federal rule provides persuasive guidance as to the application of our comparable state rule. *Soter v. Cowles Publishing Co.*, 162 Wash.2d 716, 739, 174 P.3d 60 (2007).

If the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law, there may be an abuse of discretion. *Gildon v. Simon Prop. Group, Inc*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

3. Trial Court's Civil Rule 19 Ruling is Reviewed for Abuse of Discretion.

The trial court's decision on whether a party is necessary under Civil Rule 19(a) is reviewed for an abuse of discretion. *Freestone Capital Partners L.P. v. MKA Real Estate*, --- P.3d ---, 2010 WL 1645389, *11 (Wash. Ct. App., April 26, 2010).⁵

B. The Trial Court Correctly Determined That Kozel Lacked Standing to Assert Parental Consortium Under RCW 4.24.010.

The goal of statutory interpretation is to carry out the intent of the legislature and the statute's clear language. *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986); *Postema v. Postema Enters., Inc.*, 118 Wn.App. 185, 196, 72 P.3d 1122 (2003). Absent a statutory definition, the term is generally accorded its plain and ordinary meaning unless there is a contrary legislative intent. *Postema*, 118 Wn.App at 196. A court should avoid construing a statute in a

⁵ Kozel erroneously argues the standard of review is *de novo*, without citing authority.

manner which renders a provision meaningless. *Id.* When the statutory language is unclear and ambiguous, the court may review legislative history to determine the scope and purpose of the statute. *Wash. Fed'n of State Employees v. State*, 98 Wn.2d 677, 684-85, 658 P.2d 634 (1983).

In this case, the trial court's construction of RCW 4.24.010 is supported by the language of the statute, legislative intent and Washington cases construing and applying RCW 4.24.010. RCW 4.24.010 provides in relevant part:

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.

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.

* * *

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered 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, under all the circumstances of the case, may be just.

RCW 4.24.010 (emphasis added). In 1998, the legislature added an intent section to RCW 4.24.010, which reads:

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 court in *Philippides v. Bernard*, 151 Wn.2d 376, 384, 88 P.3d 939 (2004) held that the intent section “specifies that the parent of a minor child must have ‘significant involvement’ in the child’s life in order to recover.” *Id.* at 384.⁶

1. Only a Parent Who “Has Regularly Contributed to the Support” of the Child and Who “Has Had Significant Involvement” in the Child’s Life Has Standing.

The plain language of the statute is clear: not every parent may assert a loss of consortium claim for a minor child. Nor may a parent who has had only limited involvement in the child’s life assert a claim. Rather, only a parent who “has regularly contributed” to the support of the minor child and “has had significant involvement” in the child’s life has standing.

A court should avoid construing a statute in a manner which renders a provision meaningless. *Postema, supra*, 118 Wn. App at 196. Here, the threshold that a parent “has regularly contributed” and “has had significant involvement” means something and must be given effect. Had the Legislature intended that every parent could maintain a loss of

⁶ *Philippides* also noted that the intent section defines “significant involvement,” and that the definition includes, but is not limited to, emotional support. *Id.* at 384.

consortium claim, regardless of their support or involvement in the child's life, the Legislature could have so stated. The Legislature did not so state, however, but instead explicitly required that a parent meet the stated threshold in order to bring a claim under the statute.

2. A Parent's "Significant Involvement" Is Viewed With Regard to the Time of The Accident.

In *Blumenshein v. Voelker*, 124 Wn.App. 129, 100 P.3d 344 (2004), the court of appeals held that a mother did not have standing to bring an action under RCW 4.24.010, where she had not had significant involvement in the child's life prior to and at the time of the accident. In that case, the mother did not begin to have significant involvement until after the accident. *Id.* at 134. Prior to the accident, the mother had not paid child support and had not had significant contact with the child. *Id.* at 132. The court, reasoning that without the injury no claim could exist, held that the necessary parental involvement should be assessed at the time of the accident: **"Plainly, the legislature intended the necessary parent involvement to be viewed at the time of the accident, not some earlier or later time."** *Id.* at 135 (emphasis added).

Likewise, in this case, Kozel lacks standing under the statute where she did not have significant involvement for five years prior to Ashlie's death. It is undisputed Kozel provided no financial support to Ashlie

between 2003 and the time of Ashlie's death in 2008. Further, during the last eight months of Ashlie's life, when she resided at the McGraw facility, Kozel did not bother to contact Ashlie or inquire about her condition. Kozel's only evidence of involvement is her assertion that she made phone calls and sent holiday cards and presents. Even if true, this evidence does not rise to the level of "significant involvement." Kozel failed to create a record that supports her claim of "regular[]" support" or "significant involvement" in Ashlie's life.⁷

Taking into account the evidence before the trial court, Kozel's contact with Ashlie was minimal, at best, during the five years leading up to Ashlie's death. In fact, Kozel had no contact with Ashlie in the last eight months of her life when she resided at McGraw. In light of these facts, the trial court correctly determined Kozel did not have standing.

Kozel's limp response to *Blumenshein* is to argue that *Blumenshein* is not on point and was erroneously decided.⁸ Appellant Br. at 9. Kozel is wrong on both counts.

⁷ In response to Mr. Bunch's declaration, Kozel could have, but did not, submit a rebuttal declaration along with her reply brief, explaining or rebutting Mr. Bunch's mostly unrefuted testimony regarding her lack of involvement. Further, Kozel opposed an evidentiary hearing.

⁸ It is worth noting that part of Kozel's argument is that because *Blumenshein* was a Division 3 case, it should be disregarded. Such argument is inappropriately dismissive of the Division 3 analysis interpreting the language of the statute and the intent of the Washington Legislature. Even if not binding, certainly a reasoned and on point Division 3 opinion is persuasive and should be considered by this Court.

First, *Blumenshein* involves a scenario very similar to the case at hand. The parent in *Blumenshein* sought to pursue a loss of consortium claim after not having provided support and not having had any contact with the child “for quite some time” before the accident. Here, Kozel had almost no involvement and provided no support to Ashlie during the five years preceding her death, and absolutely no involvement in the last eight months.⁹

Second, *Blumenshein* was not erroneously decided. The *Blumenshein* court’s determination that the necessary parent involvement should be viewed at the time of the accident, not some earlier or later time, is supported by the language of the statute and legislative intent. The statute creates a loss of consortium claim only for a parent who “has regularly contributed to the support” of their child. Kozel would ask the court to ignore the word “regularly” and hold that a mother who contributed to the child’s support sometime in the distant past can state a consortium claim. *Blumenshein* specifically considered the Legislature’s statement of intent limiting parental consortium claims to parents with “significant involvement,” and determined that the Legislature sought to avoid the very result Kozel is seeking here, i.e., allowing an absent parent

⁹ While Kozel argues the cases are dissimilar because the mother in *Blumenshein* was apparently a drug addict, Kozel’s argument is of no moment. The relevant inquiry is whether there was significant involvement, not the reason for the lack of involvement.

who chose to have little to no involvement in their child's life to show up after the child is injured or dies and assert a loss of consortium claim. To allow Kozel to assert a claim, where her only significant involvement ended five years prior to Ashlie's death, would thwart the intent of the statute. Kozel simply has not satisfied the threshold requirement and therefore lacks standing to bring the claim under the statute.

Finally, Kozel makes the red herring argument that the phrases "has regularly contributed" or "has had significant involvement" denote a completed past tense action and do not require that parental contribution or involvement be considered at or near the time of the incident at issue. In fact, these constructions are in the present perfect tense, signifying an action which began at some point in the past but continued thereafter. This is distinguished from the past tense, which indicates a completed action. Kozel's interpretation would also require the court to ignore the word "regularly," which also indicates ongoing action. If the Legislature had intended to say that any parent who contributed to support or had significant involvement with the child at any time in the past could bring a claim, the Legislature could have so stated. The Legislature did not do so.

3. The *Postema* Case Does Not Call for a Different Result.

Appellant relies on *Postema v. Postema Enterprises, Inc.*, 118 Wn.App. 185, 72 P.3d 1122 (2003), but that case, while also good law,

addresses a separate issue and simply is inapposite here. In *Postema*, the court of appeals addressed a father's standing under the statute. In order to determine whether the father had "regularly contributed to the support" of the minor child, the court addressed whether the word "support" in the phrase "regularly contributed to the support" was intended to refer only to financial support, or rather to encompass emotional, psychological, and financial support. The *Postema* court looked at the statement of intent defining the term "support" and concluded that support encompassed emotional, psychological, and financial support. *Id.* at 198-99. In that case, where the father presented evidence that he visited his son under the parenting plan, took him on vacation, was a good parent and active father, had a close bond with the child, and apparently paid child support, he was found to have standing under the statute. *Id.* at 189. In the instant case, no party is asserting that "support" means purely financial support, and *Postema* therefore is inapposite.

Given the *Postema* and *Blumenshein* decisions and factual information regarding Kozel's lack of involvement in her daughter's life in the five years prior to her death, the court did not commit error in concluding that Kozel lacked standing under RCW 4.24.010. Kozel had not seen Ashlie in the five years preceding her death; she did not talk with Ashlie or her providers about her mental illness; she did not invite Ashlie

to visit her; and notably, she did not attend Ashlie's memorial service after her death. Kozel did not assert that she provided financial support to Ashlie once Ashlie moved to Washington, and in fact she did not. Kozel and Ashlie's relationship in the years preceding Ashlie's death lacked the indicia of "significant involvement" whether emotional, psychological, or financial.

C. The Trial Court Did Not Commit Error in Declining to Hold an Evidentiary Hearing.

Kozel's argument that the trial court should have held an evidentiary hearing is disingenuous.¹⁰ Kozel waived her right to such a hearing where she expressly opposed an evidentiary hearing in the trial court. Further, the trial court's decision not to hold an evidentiary hearing was not an abuse of discretion, where the decision was not manifestly unreasonable or based on untenable grounds or untenable reasons.

1. Kozel Waived an Evidentiary Hearing By Opposing Such a Hearing in the Trial Court.

Kozel opposed an evidentiary hearing in the trial court. Specifically, she argued in reply to her motion to intervene, that "[t]his issue does not need to be 'clarified' as Defendant claims," and "[t]here is

¹⁰ For the first time on review, Ms. Kozel asserts that the trial court abused its discretion in not holding an evidentiary hearing, claiming there were affidavits that required resolution of issues of witness credibility.

no legal basis for an ‘evidentiary hearing’ to ‘determine the credibility of witnesses’ before this court grants intervention.” CP 88 (emphasis added). Kozel requested that she not be **“compelled to travel from Florida to Washington to attend an ‘evidentiary hearing’ to determine her ‘credibility.’”** CP 89 (emphasis added).

Kozel waived any right she might have had to an evidentiary hearing. Waiver is the intentional abandonment or relinquishment of a known right. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev. Inc.*, 143 Wn.App. 345, 361, 177 P.3d 755 (2008). Intent to waive is shown by unequivocal acts or conduct that are inconsistent with any intention other than to waive. *Id.* Here, Kozel expressly requested that the trial court deny the Estate’s and Respondent McGraw’s request for an evidentiary hearing, noting that she did not want to travel from Florida for the court to determine her credibility. *See* CP 88-89. Kozel’s actions at the trial court level demonstrate an unequivocal intent to waive an evidentiary hearing on her motion to intervene.

Kozel argues a trial 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.” (Appellant Brief at 15-16). The case cited by Kozel, *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994), addressed conflicting affidavits

regarding service for a default judgment issue, but does not address the situation where the appellant failed to object to the lack of an evidentiary hearing, and in fact actively opposed such a hearing in the trial court.

An appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). “[L]itigants may not remain silent regarding a claimed error and later raise the issue on appeal.” *Leen v. Demopolis*, 62 Wn.App. 473, 479, 815 P.2d 269 (1991); *see also Postema*, 118 Wn.App. at 193 (noting that courts generally do not review claims of error that were not raised at the trial court level). In *Demopolis*, a lawyer obtained a default judgment against his former client for unpaid fees. The court rejected the client’s argument that a dispute regarding service of the complaint and summons could not be resolved on conflicting affidavits. *Demopolis*, at 479. After the client failed to timely object to the trial court deciding the service issue upon affidavits, the court concluded that he waived his argument regarding resolving the issue upon affidavits. *Id.* In this case, Kozel not only did not request an evidentiary hearing, but she actively opposed one. For the reasons already stated, this Court should not consider Kozel’s argument.

Finally, the doctrine of invited error also precludes Kozel’s argument. A party may not set up error at trial and then complain of it on

appeal. *State v. Pam*, 101 Wn.2d 507, 680 P.2d 762 (1984). “The adversary system cannot countenance such maneuvers.” *Id.*

Here, where Kozel opposed an evidentiary hearing requested by Mr. Bunch, the Estate and McGraw, CP 88-89, Kozel cannot be heard to complain that the court’s decision not to hold the hearing was error.

2. The Trial Court Did Not Abuse its Discretion in Declining to Hold an Evidentiary Hearing.

Although Kozel appears to concede the standard of review concerning a trial court’s decision not to hold an evidentiary hearing is abuse of discretion (*See* Appellate Br. at 1), she does not, and cannot, show that the decision in this case was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.

The trial court had ample evidence from which to make a determination of the issues without a hearing, in addition to the fact that Kozel expressly opposed such a hearing. The trial court had before it the declarations of Kozel and Mr. Bunch. Kozel’s declaration did not present sufficient evidence to show she “regularly” contributed to Ashlie’s support and had “significant” involvement in Ashlie’s life in the five years prior to Ashlie’s death. Conversely, Mr. Bunch’s declaration provided much greater detail concerning Kozel’s lack of involvement in, or interest in, Ashlie’s life or her medical or mental health conditions during that five

year period, during the last eight months of Ashlie's life when she resided at McGraw, and continuing after Ashlie's death, when Kozel declined to attend the memorial service. Kozel did not rebut this evidence.

Kozel argues that an evidentiary hearing is always required where there are "disputed questions of fact," in an apparent attempt to circumvent the abuse of discretion standard.¹¹ Contrary to Kozel's assertion, any purported factual disputes in this case do not concern facts which are material to the analysis. At most, Kozel claims there is a dispute as to whether she spoke with Ashlie by telephone and sent cards. However, Kozel did not submit evidence to raise a serious question as to whether there was significant involvement.¹²

In light of the declarations which were before the trial court and coupled with Kozel's opposition to any evidentiary hearing, the trial judge's decision not to hold an evidentiary hearing was neither manifestly unreasonable nor exercised on untenable grounds or for untenable reasons. There was no abuse of discretion.

¹¹ Kozel also argues that by not holding a hearing, the trial court "has run afoul of a fundamental premise of the law ..." Appellant Brief, p. 15. However, the cited excerpt is taken from a case out of context, referring to review of a class action settlement. The trial court's decision whether to hold a hearing was a matter of discretion. Particularly where Kozel objected to a hearing, the trial court did not abuse its discretion.

¹² The standard is "significant" involvement, not just involvement.

D. Trial Court Did Not Commit Error in Denying Motion to Intervene.

Finally, where the trial court correctly determined Kozel did not have standing to assert a parental loss of consortium claim, it did not commit error in denying the motion to intervene. Preliminarily, Kozel erroneously argues that the trial court's decision denying the Civil Rule 19 motion to intervene is reviewed *de novo*. Kozel cites no law in support of this standard of review, and in fact, the standard is abuse of discretion. *Freestone Capital Partners L.P. v. MKA Real Estate, supra*, *11 (Wash. Ct. App., April 26, 2010).

Civil Rule 19 concerns parties who must be joined for a just adjudication. The rule involves a two-part analysis. The first step is to determine whether the parties are needed for just adjudication. *Crosby v. County of Spokane*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999). Because as a matter of law Kozel lacked standing to bring a claim under RCW 4.24.010, her presence in the litigation was not needed for just adjudication of that claim.¹³ The trial court's ruling precluding Kozel

¹³ Kozel also mentions in her appeal brief that she received a percentage share of the monies collected by the Estate as an heir of the Estate. She did not argue to the trial court that she should be allowed to intervene as an heir to the Estate, and she is precluded from doing so on appeal. RAP 2.5(a). Further, the Estate settled with Respondent McGraw and Kozel's share was paid to her. If Kozel now thinks she did not receive an appropriate share or that the Personal Representative of the Estate did not adequately represent the Estate's interests, her claim is with the Estate and not with Respondent McGraw, and has nothing to do with her motion to intervene.

from intervening was not manifestly unreasonable or exercised for untenable reasons.

In her brief on appeal, Kozel also cites Civil Rule 24 although she did not move to intervene in the trial court under CR 24. CP 50-53, 82-89. She does not make any argument on appeal specific to CR 24. This Court should not consider arguments under CR 24 which were not raised below and where Kozel makes no argument in her opening brief. RAP 2.5(a).

If Civil Rule 24 is considered, it does not change the result. Generally, four requirements must be met before intervention as of right may be granted: timely application for intervention, the applicant claims an interest which is subject of action, the applicant is so situated that disposition will impair or impede applicant's ability to protect interest, and the applicant's interest is not adequately represented by existing parties. *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994). Here, Kozel has no interest in the action where, as a matter of law, she has no standing under RCW 4.24.010. Therefore, even under the *de novo* review argued by Kozel, there would be no basis for allowing intervention where Kozel does not meet the threshold test for standing under RCW 4.24.010. The trial court correctly denied the motion and should be affirmed.

E. Remedy Sought By Kozel Should Be Denied.

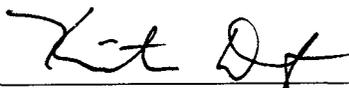
While the premise of Kozel's appeal is that an evidentiary hearing should have been held to determine her standing (notwithstanding her waiver of the same), she requests in her conclusion that this Court either allow her "to intervene as a matter of right and set aside the settlement agreement" or "to bring her own action against defendants McGraw Center for her losses under RCW 4.24.010." However, where Kozel failed to make a threshold showing of standing under the statute, the remedy requested should be denied.

V. CONCLUSION

The trial court correctly determined that Kozel, an absent parent who had not seen her daughter for five years and who did not have "significant involvement" in her daughter's life, lacked standing to assert a claim under RCW 4.24.010. As such, the trial court correctly denied Kozel's motion to intervene. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of June, 2010.

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