

ORIGINAL

Supreme Court No. 85679-6

SUPREME COURT OF THE STATE OF WASHINGTON

In Re: THE ESTATE OF ASHLIE BUNCH:

AMY KOZEL
Petitioner,

v.

MCGRAW RES. CTR d/b/a SEATTLE CHILDREN'S HOME,
et al.
Respondents.

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PETITIONER'S SUPPLEMENTAL BRIEF
TO THE SUPREME COURT

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TABLE OF CONTENTS

I. IDENTITY OF PETITIONER..... 1

II. INTRODUCTION 1

III. SUPPLEMENTAL ARGUMENT..... 2

 A. The Court of Appeals incorrectly interpreted RCW 4.24.010 when it stripped a parent who regularly contributed to the support of her child of a cause of action for injury to, or the wrongful death of, the child. 2

 B. By making judgments with respect to the quality or the timing of the “regular contributions” the trial court invaded the province of the jury. 4

 C. The Court of Appeals’ holding frustrates the Legislature’s intent..... 7

VI. CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

<u>In re A.H.B., M.L.B., J.J.B.</u> , 791 N.W.2d 687, 689 (Iowa, 2010)	10
<u>Bingaman v. Grays Harbor Comm'ty Hosp.</u> , 103 Wn. 2d 831, 699 P.2d 1230 (1985)	6
<u>Blumenshein v. Voelker</u> , 124 Wn. App. 129, 100 P.3d 344 (2004)	3
<u>Bunch v. McGraw Residential Center</u> , 159 Wn.App. 852, 248 P.3d 565 (2011)	<i>passim</i>
<u>Lyster v. Metzger</u> , 68 Wn.2d 216, 6 412 P.2d 340 (1966).....	6
<u>Padilla-Romero v. Holder</u> , 611 F.3d 1011 (C.A.9, 2010)	9
<u>Postema v. Postema Enters., Inc.</u> , 118 Wn.App. 185, 72 P.3d 1122 (2003)	9
<u>Power v. Union Pac. R.R.</u> , 655 F.2d 1380, (9th Cir.1981)	6
<u>Wells, Waters & Gases, Inc. v. Air Prod. & Chem., Inc.</u> , 19 F.3d 157, (C.A.4, 1994)	9

STATUTES

RCW 4.24.010	<i>passim</i>
Laws of 1998, ch. 237, § 1	7

I. IDENTITY OF PETITIONER

Petitioner Amy Kozel is the movant for intervention in the underlying case and the mother of the deceased, Ashlie Bunch.

II. INTRODUCTION

Appellant Amy Kozel and Respondent Steven Bunch adopted decedent Ashlie Bunch and her younger sister in 1998. The mother and father brought up Ashlie in Florida from adoption in 1998 through 2001, when they divorced and the father moved to Washington. The mother reared both Ashlie and her younger sister as a single parent from 2001 to August 2003. In 2003, the mother became concerned that Ashlie was a physical threat to her sister. Ashlie moved to Washington to live with her father while Ashlie's younger sister remained in the home with the mother. Ashlie lived with the father until March of 2007, when she was admitted into McGraw Residential Center (hereafter "McGraw"). In January of 2008, Ashlie, then 15, took her own life while receiving inpatient treatment at McGraw.

The father brought a wrongful death action against McGraw. The mother sought to intervene in the action pursuant to CR 19 and RCW

4.24.010. The trial court denied the mother's Petition, without stating the reason. The mother appealed.

In a published opinion, the Court of Appeals, Division One, affirmed the trial court. The two judge majority held that the mother is barred from maintaining an action for the death of her daughter by RCW 4.24.010, which limits wrongful death actions and injury claims to a plaintiff who "has regularly contributed to the support of his or her minor child." The Court of Appeals concluded that Ms. Kozel's (disputed) failure to regularly contribute to Ashlie's support between August of 2003 and March of 2007 barred her participation in the wrongful death action, notwithstanding the undisputed fact that the mother regularly contributed to Ashlie's support from the time of her adoption in 1998 through August, 2003.

III. SUPPLEMENTAL ARGUMENT

- A. The Court of Appeals incorrectly interpreted RCW 4.24.010 when it stripped a parent who regularly contributed to the support of her child of a cause of action for injury to, or the wrongful death of, the child.**

The Court of Appeals erred in a published opinion when it held that RCW 4.24.010 applies only to those parents who were involved with the child "at or near the time of the death or injury of the minor child."

Bunch v. McGraw Residential Center, 159 Wn.App. 852, 865, 248 P.3d

565 (2011). RCW 4.24.010 states, 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.**

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent . . .

...

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.**

[emphases added].

The appellate court asserted that “[p]lainly, the legislature intended the necessary parent involvement to be viewed at the time of the accident, not some earlier or later time. Without the injury no claim could exist.” Bunch, 159 Wn.App. at 865 (citing, with approval, Blumenshein v. Voelker, 124 Wn.App. 129, 135, 100 P.3d 344, (Div. III, 2004).

However, the statute itself contains **no** language limiting standing to those parents who are regularly contributing to the support of the child at the time of the accident. Rather, it limits standing to each parent who “has regularly contributed” to the support of the child. The statute’s standard of what facts entitle a parent to bring a claim “for medical, hospital, medication expenses,... the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship” is broad—the statute does not require a parent to prove contributions at the time of injury or death, it merely requires that the claimant prove regular contributions to the support of the child **at some time**. The threshold inquiry, under a plain language reading of the statute, is whether or not the parent ever made regular contributions to the child’s support.

B. By making judgments with respect to the quality or the timing of the “regular contributions” the trial court invaded the province of the jury.

After the parent has established that he or she “regularly contributed” to the child, two different clauses in the statute mandate that the trier of fact, not the judge in summary proceedings, is to determine damages. Where, as in this case, the parents are not married, the trier of fact is to award each parent damages as the trier of fact finds just and equitable. If a parent-child relationship is alleged to be absent or attenuated, it is the trier of fact, not the judge, who is to weigh the

evidence and award as large or as small an amount for damages as the facts direct. Only where a parent indisputably never provided regular support is the parent stripped of standing.

The *sub silentio* reasoning employed by both the trial court and the Court of Appeals appears to be that Amy Kozel was such a negligent parent that she should not recover damages for the loss of her parent-child relationship. The focus of facts in the Opinion is on the contested (and self-serving) claims made by Steven Bunch, Ms. Kozel's ex-husband, which deny and denigrate Ms. Kozel's contact with Ashlie from 2003 to January, 2008. *See, Bunch*, 159 Wn.App. 861-863.

But, as noted by dissenting Judge Becker, the statute's language "does not foreclose recovery by a parent who has made regular contributions to a child's support in the past, and then becomes geographically or otherwise separated from the child as a result of an event like parental divorce." *Bunch*, 159 Wn.App. at 871. The existence or alleged non-existence of the parent-child relationship, the question of whether a parent has been "good" or "bad" is not the threshold inquiry. Rather, it is whether or not the parent ever regularly contributed. And, as admitted in the Opinion itself, there is no dispute that Kozel regularly contributed to the support of Ashlie from 1998 through 2003. *Bunch*, 159 Wn. App. at 860.

While Respondent argues, at page 14 of its Opposition to the Petition for Review, that the trial court did not “abuse its discretion” by denying the motion to intervene, this is a misapprehension of the issue. The discretionary issue is whether or not the facts could support a jury’s finding that support was regularly made. Where the facts, as here, establish that support was regularly provided, the trial court does not have the discretion to substitute its judgment for that of the jury regarding whether the “regular contributions” were provided close enough in time to the injury or death of the child to merit recovery by the parent.

It is up to the jury, not the judge, to consider “the circumstances of the case” and award appropriate damages. RCW 4.24.010. This function, deciding damages in difficult situations where witnesses are in disagreement, is the classic prerogative of the jury. See, e.g., Bingaman v. Grays Harbor Comm'ty Hosp., 103 Wn. 2d 831, 835, 699 P.2d 1230 (1985) (holding that “[t]he determination of the amount of damages, particularly in actions of this nature [medical malpractice], is primarily and peculiarly within the province of the jury...”); Lyster v. Metzger, 68 Wn.2d 216, 224–25, 412 P.2d 340 (1966) (issue of damages, here primarily noneconomic, is within the jury's province); Power v. Union Pac. R.R., 655 F.2d 1380, 1388 (9th Cir.1981) (under Washington law, damages for loss of companionship is to be determined by the trier of fact).

By imposing a temporal limitation on the regular contribution requirement of the statute, the trial court and the Court of Appeals incorrectly assumed the function of the jury by determining that Kozel's claim was without value. As noted by the dissenting judge:

These allegations [against McGraw], if true, reveal the anguish that must have been experienced by all of the adults who had a hand in raising Ashlie. If her death was wrongful, I see no basis in the statute for limiting the right of recovery to the father simply because he was there for Ashlie's last four years of life. Surely, the mother who lived with Ashlie and cared for her from age 4 to age 11—two of those years as a single mother—is also entitled to make a claim. Kozel's declaration states, From the date I adopted Ashlie until the date I sent her to live with Steven, I paid for Ashlie's living expenses, housed her, clothed her, fed her, and gave her all the emotional and financial support I could. I was her mother in every respect. Clerk's Papers at 57. This is sufficient to give her standing to sue.

Bunch, 159 Wn.App. at 870. Further injustice arising out of the Court of Appeals decision, as applied in this case and as applied to future cases, is discussed at pages 10 and 17-18 of the Brief of Appellant.

C. The Court of Appeals' holding frustrates the Legislature's intent.

The Legislature's comment to RCW 4.24.010 states:

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 Wn.2d 660 (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. The Court of Appeals' Opinion asserts that the statement of legislative intent "contradict[s]" the plain language of the statute and must therefore be disregarded. Bunch, 159 Wn.App. at 864. This is incorrect.

First, the Opinion suggests that the use of the word "regular" in the statute means that the support had to have occurred up to the time of the injury. Bunch, 159 Wn.App. at 866. "Regular" in this context means only at "uniform intervals" and itself carries no connotation of being "ongoing" at the time of Ashlie's death as argued by McGraw in its Opposition to Petition for Review, pp. 11-12. For example, "*Slade Gorton has regularly run for elected office in the State of Washington.*" Former Senator Gorton ran for office in 1980, 1986, 1988, 1994, and 2000. He has not run for office since 2000. Nonetheless, he has regularly run for office, even though he is not done so recently. (Further examples and analysis may be found in Kozel's Petition for Review). The statute's use of the word "regular" does not establish that the Legislature intended to cut off a parent who, in the past, has made regular contributions of support to a child.

Second, the statute states "**has regularly contributed.**" At this juncture, the undersigned pauses to confess that after reading McGraw's

Opposition at page 11, she called her high school English teacher¹ regarding the tense used in the phrase “has regularly contributed.” Ears still burning from scolding, counsel admits that the words are indeed in the present perfect tense.

Nonetheless, the correct identification of the tense does not resolve the issue. Several courts have noted the ambiguity inherent in the use of the present perfect tense because the tense “can connote either an event occurring at an indefinite past time (‘she has been to Rome’) or continuing to the present (‘she has been here for five hours’).” Padilla-Romero v. Holder, 611 F.3d 1011, 1013, (C.A.9, 2010); *see also* Wells, Waters & Gases, Inc. v. Air Prod. & Chem., Inc., 19 F.3d 157, 162, (C.A.4, 1994); Chicago Manual of Style § 5.119 (15th ed. 2003).

Thus the phrase “has regularly contributed” when given its ordinary meaning could refer to regular contributions that occur in two different temporal periods—regular contributions that occurred in the indefinite past and regular contributions that were still occurring at the time of the injury. To resolve the ambiguity, the Court must discern legislative intent. Padilla-Romero, 611 F.3d at 1013; Postema v. Postema Enters., Inc., 118 Wn.App. 185, 198 n. 30, 72 P.3d 1122 (2003).

¹ Susan Adler Kaplan, Retired, Classical High School, Providence, R.I..

The intent section clarifies that the intent is to allow any “mother or father [who] **has had** significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support” to bring an action. The comment clarifies that the statute encompasses both past completed regular support as well as support that continued at the time of the death or injury.²

The Legislature’s intent to allow more parents rather than fewer to bring an action is further buttressed by the fact that the Legislature expanded the plaintiff class to include parents who provided only, for example, emotional support. The Court of Appeals’ Opinion should be reversed, and the matter remanded for further proceedings, in deference to the intent of the Legislature to provide compensation to parents who have been devastated by the injury or death of a child to whom they provided, at any time, regular support.

IV. CONCLUSION

There is no dispute that Amy Kozel both made regular contributions to the support of her child and had significant involvement in Ashlie’s life. She should be permitted to pursue a cause of action

² *Cf.*, In re A.H.B., M.L.B., J.J.B., 791 N.W.2d 687, 689 (Iowa, 2010)(holding that a statute authorizing the termination of parental rights when “[t]he parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household” to refer to both past and present imprisonment and noting use of the present perfect tense).

against the parties who allegedly allowed that child to pass away while in their custody.

RESPECTFULLY SUBMITTED this 8th day of July, 2011.


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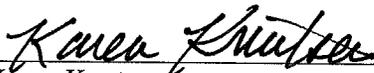
I, the undersigned, certify that on the 8 day of July, 2011, I caused a true and correct copy of this Petition for Review to be served, by US Mail, First Class postage pre-paid, to the following persons:

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