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SUPREME COURT NO. 85679-6

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SUPREME COURT
STATE OF WASHINGTON

In Re: THE ESTATE OF ASHLIE BUNCH:

AMY KOZEL,
Petitioner

v.

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

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

**MCGRAW RESIDENTIAL CENTER'S
OPPOSITION TO PETITION FOR REVIEW**

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ORIGINAL

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I. IDENTIFICATION OF RESPONDENT

Respondent McGraw Residential Center d/b/a Seattle Children's Home ("McGraw"), the defendant in the underlying case, opposes the Petition for Review.

II. INTRODUCTION

The wrongful death action regarding Ashlie Bunch, a minor, was filed by Ashlie's father, Steven Bunch. Petitioner Amy Kozel ("Kozel") sought to intervene in the case to assert a claim for loss of the parent-child relationship pursuant to RCW 4.24.010. The statute allows a parent to sue for the death of a minor child, provided the parent "has regularly contributed to the support of his or her minor child." RCW 4.24.010. Ashlie was 15 at the time of her death. During the last five years of her life, Kozel did not see Ashlie or contribute to her support in any way.

The trial court correctly denied Kozel's motion to intervene, as Kozel did not have standing under the statute to assert a parental loss of consortium claim. The Court of Appeals affirmed, holding there was a temporal element to the construction of the statute, such that a parent who had not regularly contributed to the child's emotional, psychological or financial support during the last five years of the child's life, did not have standing under the statute.

In her Petition, Kozel concedes she did not regularly contribute to Ashlie's emotional, psychological or financial support during the last five years of Ashlie's life. She asks this Court to reinterpret the statute to provide that a parent who has at any time in the distant past contributed to their minor child's support has standing to assert a claim under the statute.

Kozel's proposed interpretation of the statute is wrong and would require the Court to ignore the plain language of the statute. Kozel has not shown any basis for Supreme Court review pursuant to RAP 13.4(b). Her petition should be denied.

III. ISSUE PRESENTED

Can a parent who did not regularly contribute to her minor child's support during the last five years of the child's life assert a loss of consortium claim with respect to the child's death under RCW 4.24.010?

IV. COUNTERSTATEMENT OF FACTS

A. Kozel Did Not Regularly Contribute to Ashlie's Support.

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.

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 filed a wrongful death action on May 7, 2009 against Respondent McGraw, asserting parental loss of consortium pursuant to RCW 4.24.010. CP 1, 5. Mr. Bunch served a Notice of Institution of Suit to his ex-wife, Petitioner Kozel. CP 47-48. Pursuant to the statute, she had sixty days to move to intervene in the suit.

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

Kozel moved to intervene, asserting she intended to pursue a loss of parental consortium claim under RCW 4.24.010 and arguing she was an "indispensable party" under Civil Rule 19. CP 50-53.

In her declaration filed in support of the motion, Kozel admitted she provided no financial support to Ashlie from the time Ashlie moved to Washington State in August 2003. CP 57. Kozel also admitted 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 did not,

and 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. 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 provided notice of Ashlie's short inpatient stays to Kozel and Kozel did not attempt to contact Ashlie while she was an inpatient at any residential facility. 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 over the five year period Kozel sent Ashlie one Christmas present, had one telephone conversation with Ashlie and did not send birthday cards or presents. CP 70. Kozel denied Ashlie telephone access to her sister, Emily. CP 70. 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 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. After Ashlie died, Kozel did not attend the memorial service and did not tell Ashlie's sister, Emily, of Ashlie's death until after the lawsuit was filed 15 months later. CP 71.

Respondent McGraw also responded to the motion to intervene, noting that Kozel lacked standing to assert a claim for the loss of the parent-child relationship under RCW 4.24.010. CP 65.

Both Mr. Bunch and Respondent McGraw requested an evidentiary hearing in the trial court. Kozel objected to an evidentiary hearing, arguing, "[t]his issue does not need to be 'clarified' as 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 requested 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).

D. Trial Court Denied Motion to Intervene and Court of Appeals Affirmed.

On June 29, 2009, the trial court entered an order denying Kozel's motion to intervene. CP 90-91.¹ The Court of Appeals affirmed on February 7, 2011. *Estate of Bunch v. McGraw Residential Ctr.*, 159 Wash.App. 852, 248 P.3d 565 (2011).

V. ARGUMENT

A. This Court Should Deny Review as Kozel Has Not Shown a Basis for Review under RAP 13.4(b).

Kozel argues the matter is one of "substantial public importance" and that the decision is in conflict with the Division 3 decision in *Blumenshein v. Voelker*, 124 Wn.App. 129, 100 P.3d 344 (2004). Kozel mistakenly cites RAP 13.4(b)(1) (conflict with a decision of the Supreme Court) but her argument indicates her petition is brought under 13.4(b)(2) and 13.4(b)(4) which respectively provide for review if either:

- 2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals;
- 4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Kozel has not shown that either of the above criteria are met to warrant review by this Supreme Court.

¹ 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.

B. There is No Issue of Substantial Public Interest that Requires Review by This Court.

In relying on RAP 13.4(b)(4), Kozel argues this Court should grant the petition because the matter is one of “substantial public importance.” However, RAP 13.4(b)(4) requires more: that the matter “involves an issue of substantial public interest *that should be determined by the Supreme Court.*” (emphasis added). While one can always argue that interpretation of a statute might be of substantial public interest, this case does not require this Court’s review. The Court of Appeals correctly analyzed and ruled on the meaning of “regularly contributed to the support” of a minor child.

Kozel makes several unfounded assertions in her Petition. For example, she argues that prior to this case, “no published appellate opinion has suggested that ‘significant involvement’ is measured ‘at or near the time of the death or injury to that child.’” (*Petition*, p.4). In fact, Division 3 of the Court of Appeals did so hold in *Blumenshein, supra*: “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.

Kozel also argues that the Court of Appeals held that the parent’s support, in order to qualify as regular, “must occur in the temporal period

immediately preceding the death or injury.” (*Petition*, p.5; emphasis added). This is not true. What the Court of Appeals held was:

RCW 4.24.010 creates a statutory cause of action for either or both parents that did not exist at common law. Without the death of Ashlie, no claim for destruction of any parent-child relationship between her and either parent would exist. Thus, it is reasonable to strictly construe this statute, which is in derogation of the common law, to limit its application to a time at or near the time of the death or injury of the minor child.

Bunch v. McGraw Residential Ctr, supra, 159 Wash.App. at 572.

1. The Temporal Limitation on When the Parent Regularly Contributed to the Child’s Support is Consistent with the Statute’s Language and Intent.

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 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).

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).² Support under the statute encompasses emotional, psychological, and financial support. *Postema v. Postema Enterprises, Inc.*, 118 Wn.App. 185, 198-99, 72 P.3d 1122 (2003).

According to the plain language of the statute, not every parent may assert a loss of consortium claim for a minor child. Only a parent who “has regularly contributed” to the support of the minor child has

² In 1998, the legislature made the following statement of intent:

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.

standing. The threshold that a parent “has regularly contributed” must be given effect.

Kozel argues that the statute was only intended to preclude claims by “deadbeat dads” who “never” contributed to their child’s support. (*Petition*, p.11). But the Legislature did not say that all parents may bring a claim except those who never contributed to the child’s support. Nor did the Legislature say that any parent who contributed to support at any time could bring a claim. The only reasonable way to interpret when the contribution of support must have occurred is in relation to the time of the injury to the minor.

Kozel also makes the red herring argument that the phrases “has regularly contributed” or “has had significant involvement” (in the statement of legislative intent) 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. (*Petition*, pp.5-6). 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. Indeed, the use of the word “has” imposes a temporal element and, with the word “regularly” indicates ongoing action. In other words, the action (support) must begin prior to the injury and be ongoing at the time of the

injury. Kozel's interpretation would require the court to ignore the plain language of the statute.

Further, if Kozel's argument were accepted, then any parent who supported their child for the first two years of a child's life but thereafter abandoned the child and had no contact, for whatever reason, could assert a claim for loss of consortium after the child is injured at age sixteen. For that matter, if there were no temporal limitation, then any mother who gave birth and immediately abandoned her child could appear after the child is injured at any age and assert a claim, on a theory that carrying the child was providing "support." These scenarios clearly are not what the Legislature intended and are not based on any reasonable construction of the statute.

2. Statute Provides Threshold Which Parents Must Meet to Bring Claim.

Kozel argues it is up to the jury to consider the extent of parental involvement. (*Petition*, p.9). Kozel's argument seems to confuse the issue of whether a statutory threshold is met with a trier of fact's determination of damages. Kozel cites the case *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971), but that case simply held the trial court "cannot substitute **its views of damages** for those of the jury." *Id.* (emphasis added). However, the trial court's function in making a

threshold determination is distinct from a jury determination regarding the extent of damages.

Kozel's motion to intervene was brought under Civil Rule 19, which addresses whether parties must be joined for a just adjudication. *Crosby v. County of Spokane*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999). The trial court had discretion, on the record before it, to determine whether the CR 19 motion should have been granted. *See, e.g., Freestone Capital Partners L.P. v. MKA Real Estate, supra*, 155 Wash.App. 643, 230 P.3d 625 (2010).

Here, the trial court had before it the declarations of Kozel and Mr. Bunch. Kozel's declaration did not show she "regularly" contributed to Ashlie's support or 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 support of, involvement in, or interest in, Ashlie's life or her medical or mental health conditions during that five year period, including the last eight months of Ashlie's life when Ashlie resided at McGraw and Kozel had no contact with Ashlie at all. Kozel's lack of involvement continued after Ashlie's death, when Kozel declined to attend the memorial service. Mr. Bunch's declaration was un rebutted; Kozel declined to submit any evidence in response and declined an opportunity for an evidentiary hearing.

On the record before it, the trial court soundly exercised its discretion in denying the CR 19 motion. Kozel had not provided any regular support to Ashlie in the last five years of Ashlie's life. As such, Kozel lacked standing to bring a claim.

3. Kozel's Argument That the Court of Appeals Opinion Fails to Provide Meaningful Guidance is Unsupported.

Kozel also argues the Court of Appeals decision provides no "meaningful guidance" on how trial courts should rule in the future. Implicit in this argument is Kozel's apparent position that the trial court cannot make discretionary rulings determining the rights of the parties. Kozel is incorrect. Trial courts are regularly entrusted with making sound discretionary rulings which are not reversed absent an abuse of discretion. Here, based on the record in the trial court, there was no abuse of discretion in denying her motion to intervene.

C. There is No Conflict with the Division 3 *Blumenshein* Holding.

Finally, Kozel argues the Court of Appeals decision in this case is in conflict with *Blumenshein v. Voelker*, 124 Wn.App. 129, 100 P.3d 344 (2004). Her argument is baseless. In fact, in an effort to have the appellate court not consider *Blumenshein*, Kozel argued to the Court of Appeals that *Blumenshein* was not on point and was erroneously decided.

(See Appellant Brief, p 9). Kozel was wrong on both counts.

In *Blumenshein* the court of appeals held that a mother did not have standing to bring an action under RCW 4.24.010. *Id.* at 134. In that case, prior to the child's injury, the mother had "rarely contributed to the support of the child." *Id.* at 132. Moreover, she had not had significant contact with the child for quite some time prior to the accident. *Id.* 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. *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 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.

The Court of Appeals in this case agreed with and cited with approval the holding in *Blumenshein*. See *Bunch v. McGraw Residential Ctr, supra*, 159 Wash.App. at 571-572. There is no conflict with *Blumenshein* and Kozel has shown no basis for review by this Court.

VI. CONCLUSION

The Court of Appeals correctly construed RCW 4.24.010, consistent with the Division 3 holding in *Blumenshein*, to have a temporal element. In order to have standing to assert parental loss of consortium claim, the parent must have “regularly contributed” to the child’s financial, emotional or psychological support at or near the time of the injury at issue. There is no need for further review of the Court of Appeals’ straightforward analysis. Kozel’s petition should be denied.

RESPECTFULLY SUBMITTED this 18th day of April, 2011.

ANDREWS SKINNER, P.S.

By s/ Kristen Dorrity
KRISTEN DORRITY, WSBA #23674
Attorneys for Respondent McGraw
Residential Center d/b/a Seattle
Children’s Home

DECLARATION OF SERVICE

I, SALLY GANNETT, hereby declare as follows:

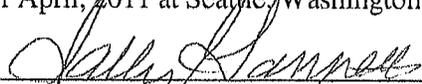
1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 18th day of April, 2011, I caused a copy of the attached **Respondent McGraw Residential Center's Opposition to Petition for Review** to be served upon the following in the manner noted:

<p><u>Attorneys for appellant Amy Kozel:</u></p> <p>Jeffrey L. Herman Herman Law Firm LLC 10303 Meridian Avenue N., Suite 300 Seattle, WA 98133-9483 Fax: 206-524-2401 Email: jefflawyer@aol.com <i><u>Via Legal Messenger</u></i></p>	<p><u>Attorneys for Plaintiff:</u></p> <p>Lawrence M. Kahn Lawrence Kahn Law Group, P.S. 1621 114th Ave. SE, Ste. 123 Bellevue, WA 98004-6905 Fax: 425-453-5685 Email: lkahn@trialsmiths.com <i><u>Via Legal Messenger</u></i></p>
<p><u>Attorneys for appellant Amy Kozel:</u></p> <p>Elena Luisa Garella 927 North Northlake Way, Suite 301 Seattle, WA 98103 Fax: 206-632-7118 Email: law@garella.com <i><u>Via Legal Messenger</u></i></p>	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of April, 2011 at Seattle, Washington.



SALLY GANNETT

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Petitioner

v.

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

DECLARATION OF SERVICE

PAMELA M. ANDREWS, WSBA #14248
KRISTEN DORRITY, WSBA #23674
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Attorney for Respondent McGraw Residential Center
d/b/a Seattle Children's Home

DECLARATION OF SERVICE

I, SALLY GANNETT, hereby declare as follows:

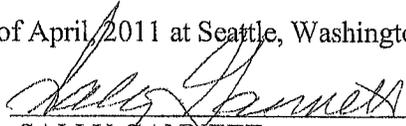
1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

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<p><u>Attorneys for appellant Amy Kozel:</u></p> <p>Elena Luisa Garella 927 North Northlake Way, Suite 301 Seattle, WA 98103 Fax: 206-632-7118 Email: law@garella.com <u>Via Legal Messenger</u></p>	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of April, 2011 at Seattle, Washington.



SALLY GANNETT

OFFICE RECEPTIONIST, CLERK

To: Sally Gannett
Cc: Kristen Dorrity
Subject: RE: In Re: The Estate of Ashlie Bunch: Amy Kozel, Petitioner v. McGraw Residential Center, et al., Repsondents, Supreme Court No. 85679-6

Rec. 4-18-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sally Gannett [<mailto:Sally.Gannett@johnsonandrews.com>]
Sent: Monday, April 18, 2011 12:06 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kristen Dorrity
Subject: In Re: The Estate of Ashlie Bunch: Amy Kozel, Petitioner v. McGraw Residential Center, et al., Repsondents, Supreme Court No. 85679-6
Importance: High

Case name: In Re: The Estate of Ashlie Bunch: Amy Kozel, Petitioner v. McGraw Residential Center, et al.

Case number: Supreme Court No. 85679-6

Name, phone number, bar number and email address of the person filing the document: Kristen Dorrity, WSBA #23674, telephone number: (206) 223-9248; email address: Kristen.Dorrity@Andrews-Skinner.com.

Documents submitted for filing with the Court: McGraw Residential Center's Opposition to Petition for Review and Declaration of Service.

Very truly yours,

Sally Gannett
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Please note our new firm name, address and email.