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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002112-MR

STEVEN H. KEENEY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 06-CI-001717

BRENDA C. OSBORNE;
CAROLINA CASUALTY INSURANCE
COMPANY; AND MONITOR LIABILITY
MANAGERS, INC. — APPELLEES

AND NO. 2007-CA-002177-MR

CAROLINA CASUALTY INSURANCE
COMPANY; AND MONITOR LIABILITY
MANAGERS, INC. — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 06-CI-001717

STEVEN H. KEENEY;[1]
AND BRENDA C. OSBORNE — CROSS-APPELLEES

[1] The notice of appeal incorrectly listed Steven H. Keeney as appellant instead of cross-appellee.

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Steven H. Keeney ("Keeney") appeals from both the August 30, 2007 judgment, in an action for legal malpractice which was entered by the Jefferson Circuit Court in favor of Brenda C. Osborne ("Osborne"), and also the October 10, 2007 opinion and order denying Keeney's various posttrial motions. The judgment was based on a jury verdict against Keeney that awarded Osborne compensatory and punitive damages of more than $5.1 million. The claim for negligent representation arose out of an October 22, 2002 incident in which a small airplane crashed into Osborne's home. Osborne retained Keeney to represent her in an action against the airplane pilot; however, the underlying action was dismissed on statute-of-limitations grounds.

Following the entry of the judgment, Carolina Casualty Insurance Company and Monitor Liability Mangers, Inc. (hereinafter "Carolina"), which were Keeney's professional liability insurer and policy administrator, appealed both the judgment and also the October 10 order which granted Osborne leave to file a second amended complaint against them.

For the following reasons, we affirm in part, vacate in part, and remand.

BACKGROUND

Osborne is a high school English teacher in Pineville, Kentucky. On October 22, 2002, Osborne was sitting in her living room when a small plane hit the roof of her two-story home, causing a fire with resulting damages including loss to real and personal property. While she suffered no physical injury from the impact of the airplane, she did go into a state of shock, her blood pressure rose, and she experienced tachycardia. Osborne was transferred to the local hospital and treated for these conditions. Prior to the airplane accident, Osborne had suffered for more than a decade from anxiety, depression, hypertension, insomnia, and diabetes.

Initially, Osborne retained a Pineville attorney to represent her in claims against airplane pilot Clifford Quesenberry ("Quesenberry"). Six months later, without any suit having been filed against Quesenberry or having received any recovery from her homeowner's insurance, Osborne dismissed this attorney and hired Louisville attorney, Keeney, to represent her in obtaining reimbursement from her homeowner's insurance and in the civil case. She signed an engagement letter/contract with Keeney that set forth the terms of the representation. Within two weeks, Keeney arranged for a meeting with the insurance adjuster and secured checks totaling $151,390.52. Eventually, Osborne received in excess of $234,000.00 from her homeowner's insurance coverage.

The original complaint in the underlying action (hereinafter "the airplane case") was filed on October 22, 2004, in Bell Circuit Court and on

November 10, 2004, removed to the United States District Court of the Eastern District of Kentucky. Besides the allegations of pilot negligence, the airplane case complaint stated that Osborne's damages had not become fixed and final until October 20, 2004, thus tolling the statute of limitations, and that Osborne had been incapacitated since the crash and, thus, requested that the case be held in abeyance. Ultimately, the District Court entered an order on November 8, 2005, granting Quesenberry's summary judgment motion on the grounds that Osborne's case was barred by the statute of limitations. Additionally, the District Court stated that Keeney's failure to cooperate in discovery and comply with court orders warranted independent dismissal of Osborne's complaint. Costs were assessed against Osborne.

Osborne filed this action against Keeney on February 24, 2006. In her June 4, 2007 amended complaint, Osborne alleged legal malpractice, fraud, and breach of contract. She contended that Keeney was grossly negligent in his representation and, hence, she was deprived of compensation from the airplane crash from which she incurred mental anguish, loss of enjoyment of life, lost wages, lost income, and expenses including legal fees. Osborne requested compensatory and punitive damages, plus interest. On May 30, 2007, Osborne amended her complaint to add claims that Keeney had either negligently or intentionally destroyed her file; had received unreasonable and unconscionable compensation for services rendered on her behalf; and had acted fraudulently with

regards to the contract for legal services, negotiation of insurance settlement checks, and in the performance of his legal obligations.

Under a legal malpractice policy issued by Carolina, the company and its administrator hired and paid independent counsel for Keeney's defense. The policy contains a $1 million limit of liability and provides for Keeney's defense at trial. Further, the policy states that Keeney's coverage is reduced by the amount of attorney fees and costs incurred by his counsel.

A jury trial was held. The jury determined that, as a result of Keeney's failure to pursue the airplane case, he was found to have acted with both ordinary and gross negligence in his representation of Osborne's claims in the airplane case. Further, he breached his contract to represent Osborne's interests in the airplane case, committed various acts of fraud during his representation of Osborne, and caused Osborne to suffer losses associated with the airplane case. The jury awarded Osborne approximately $5,000,000 in damages. The damages awarded to Osborne were as follows:

$ 54,924.04	Property damage from the airplane crash
500,000.00	Mental pain and suffering; physical pain and suffering
750,000.00	Punitive damages from the airplane crash
53,025.39	Legal fees paid to Keeney
250,000.00	Emotional distress caused by Keeney
$ 3,500,000.00	Punitive damages against Keeney

On August 30, 2007, judgment was entered for Osborne.

Following the verdict against him on September 10, 2007, Keeney filed various posttrial motions, which included judgment not withstanding the

verdict under Kentucky Rules of Civil Procedure (CR) 50.02; to alter, amend, or vacate the judgment, or for a new trial under CR 59.05; and, for relief from the judgment under CR 60.02. On September 18, 2007, the nineteenth day after entry of the judgment, Osborne objected to Keeney's motions and also filed a motion to amend her complaint to add Carolina as a defendant, and to add claims against Carolina under Kentucky Revised Statutes (KRS) 304.12-230, the Unfair Claims Settlement Practices Act; KRS 367.170; and Kentucky common law for bad faith conduct in refusing to settle the case. The proposed amended complaint also incorporated by reference all of the allegations made in the original complaint.

Then, Keeney filed additional motions and objections to the motion for leave to amend the complaint. Keeney argued that the amended complaint adding additional parties and claims would delay his appeal while Osborne argued her bad faith claims against third parties. On October 10, 2007, the court granted Osborne leave to file the second amended complaint and denied Keeney's various motions.

On October 19, 2007, Keeney filed a notice of appeal and named Carolina as an appellee. Carolina filed a notice of cross-appeal on October 29, 2007. Then, on December 8, 2007, Osborne filed a motion to dismiss Carolina's appeal on the grounds that Carolina is not a proper party to this appeal because it was not a party at the trial. Furthermore, Osborne argued that Carolina could not appeal the trial court's order permitting Osborne to file her postjudgment amended complaint because the order was interlocutory. Subsequently, on December 20,

2007, Carolina filed a response to Osborne's motion to dismiss and set forth its legal basis for participating in Keeney's appeal, and claimed that Carolina should be allowed to appeal to protect its interests in the outcome of the appeal.

On March 18, 2008, we entered an order on Osborne's motion to dismiss Carolina's cross-appeal and on appellees'/cross-appellants' (Carolina's) motions in the alternative for leave to intervene and for leave to file a reply to Osborne's response and response to the motions. After we considered the motions, we ordered that the motion for leave to file a reply be granted. And, we denied the motions to dismiss the cross-appeal and to intervene in the direct appeal. We will now address the issues in this appeal.

STANDARD OF REVIEW

Before reviewing the case, it is important to attend to the appellate court standard of review for evidence in cases where a jury verdict has been rendered. This standard is set forth in *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459 (Ky. 1990). The Court stated:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the

> evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Id. at 461-62 (citations omitted). Now, we address the issues in the case.

ISSUES

Initially, Keeney contends that Osborne did not prove, and the jury was not required to find, any liability in the airplane case. Further, Keeney argues that Osborne was impermissibly allowed to recover over $5 million in damages, including damages in the airplane case without any evidentiary support, emotional distress damages where there had been no physical impact or inappropriate touching, and punitive damages for the negligence of the airplane pilot. Osborne was also awarded damages in the legal malpractice case for emotional distress caused by Keeney and punitive damages. Finally, Keeney asserts that the total damages exceeded her pretrial itemization by $2.8 million and are contrary to the requisites of civil procedure law. Accordingly, Keeney asserts that the jury verdict must be vacated and the judgment reversed.

Carolina appeals in this case and seeks to be named a party on appeal or, alternatively, to intervene in the appeal in the event that Keeney settles or otherwise does not prosecute the appeal. Moreover, Carolina appeals the Jefferson Circuit Court's order granting Osborne's motion for leave to amend her complaint and add a new cause of action (bad faith) and a new party (Carolina).

First, we will consider Keeney's arguments and then Carolina's contentions. The issues will be discussed sequentially.

1. Elements of legal malpractice.

A plaintiff in a legal malpractice case has the burden of proving: "1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and 3) that the attorney's negligence was the proximate cause of damage to the client." *Stephens v. Denison*, 64 S.W.3d 297, 298-99 (Ky. App. 2001). With regard to the first element, it is undisputed that Keeney and Osborne had an attorney/client relationship. Assessing the second element, Keeney failed to meet the requisite statute of limitations for Osborne's airplane case and, thus, did not exercise the ordinary care of an attorney. While in legal malpractice cases expert testimony is required to establish the malpractice, we note the rule in this Commonwealth that expert testimony is not essential in malpractice cases where the negligence is sufficiently apparent that a layman using his own general knowledge would have no difficulty recognizing it. *Id.* Clearly, Keeney's failure to commence Osborne's original suit before the statute of limitations expired constitutes an obvious breach of duty and one for which expert testimony is not required.

The third element necessary to prove legal malpractice, that the attorney's negligence was the proximate cause of damage to the client, is the most challenging to establish and the one at issue here. In other words, even though Keeney's failure to file the case before the statute of limitations had tolled was the

proximate cause of the airplane case being dismissed, in order to prevail in a legal malpractice action, Osborne must prove not only that Keeney's negligence caused the harm but also that she would have fared successfully in the underlying claim. That is, but for Keeney's negligence, Osborne would have been more likely successful. *Marrs v. Kelly*, 95 S.W.3d 856 (Ky. 2003). Thus, for Osborne to fulfill her burden, a "suit within a suit" is necessary. *Id*.; Restatement (Third) of the Law Governing Lawyers § 53 (2000).

In order to establish that the attorney's breach of duty caused the injury, Osborne must prove she would have been successful in pursuing or defending against the original lawsuit but for the defendant's negligence. Moreover, it is at this point that Osborne has to establish the specific damages proximately caused by the defendant's breach of duty. Thus, our focus on review will be whether Keeney's failure to file Osborne's complaint in the airplane case was the proximate cause of her damages and, but for this failure, Osborne would have been successful in the airplane case.

On appeal, Keeney argues that Osborne should have been required to prove the underlying "case within a case" ("suit within a suit") in this legal malpractice action. He maintains that Osborne has not established the negligence of the pilot in the airplane case and, therefore, the judgment should be reversed because Osborne failed to prove any liability in the underlying negligence case. In fact, Keeney says that Osborne did not call any witnesses who could testify firsthand about the negligence of the airplane pilot but only offered the testimony

of two attorneys which, according to Keeney, did nothing to establish the pilot's negligence because neither attorney had investigated the underlying case. In response, Osborne contends that Quesenberry's negligence speaks for itself and it was, therefore, unnecessary to have a separate finding of negligence before proving Keeney's liability for failing to timely file Osborne's complaint.

As noted above, in legal negligence cases, as in all negligence action, proximate cause of the damages is an element of the legal action. But Keeney provides no support for his position that every legal malpractice action requires a complete and separate trial on the underlying action. It is important to remember that in a legal malpractice action, the negligence at issue is the attorney's actions in handling the underlying case and that the negligence of the actor in the underlying case is ancillary. The facts, here, are that an airplane landed on Osborne's home causing damages. Following this event, she hired Keeney to represent her in an action against the airplane pilot. Subsequently, he missed the statute of limitations in filing the action and the case was dismissed. Hence, in the present case, Osborne was completely precluded from bringing any suit or recovering any damages from Quesenberry. Furthermore, evidence was introduced that Keeney not only failed to file the airplane case within the one-year statute of limitations but also that he received reminders from third parties that the statute of limitations was approaching. And, once Osborne's airplane case was dismissed, Keeney failed to inform her that the case had been dismissed and costs awarded against her. Even

more significant, Osborne did not learn of the case's dismissal until after such time she would have been able to move for reconsideration or file an appeal.

Significantly, the facts in each legal malpractice case to demonstrate the negligence of the original actor will necessitate different degrees and types of support. Moreover, as Osborne maintains in her brief, evidence of Quesenberry's negligence was introduced to the jury. The passage below was taken from Osborne's brief, and is based on the National Transportation Safety Board (NTSB) factual investigation and Keeney's original lawsuit, which was dismissed on statute-of-limitation grounds:

> On October 22, 2002 prior to his departure from the Bell County Airport, Quesenberry experienced difficulty in getting his plane started. In an attempt to start his plane, he sprayed fuel from a squirt bottle into the air intake of the left engine. The engine started but backfired and caught fire. After extinguishing the fire, Quesenberry restarted the engine after again squirting fuel from his squirt bottle into the left engine air intake. In spite of the known dangerous condition of his plane, he took off. Shortly after takeoff his engine quit and he crashed into the home owned and occupied by Ms. Osborne destroying the home and engulfing it in flames. Weather was not a factor. (Footnotes omitted).

These facts were never disputed. In addition, Osborne provided testimony from the attorney that represented Quesenberry in the airplane case, Brian Sullivan, and an aviation expert witness, Steve Hixson ("Hixson"), supporting this version of the events. Keeney maintains that the information from the NTSB's report, which supported the pilot's negligence, was prohibited by law. Yet, in Aviation § 6A:10 the following discussion of the use of NTSB reports is found:

> Federal statutory and regulatory law governs the use of the work product, including final reports, resulting from the investigations by the NTSB. [FN1] While the federal statute on its face seems to prohibit the use of any "part of the report" released by the NTSB Board, [FN2] most courts have found that the factual portions of a NTSB investigative report are admissible. [FN3] Further, the NTSB itself has affirmed it does not object to the use of the factual reports in private civil litigation. [FN4] However the use and release of any cockpit voice recordings and transcripts are more restrictively controlled and will require intervention in federal court for access to any recording. [FN5]
>
> [FN1] 49 U.S.C. § 1154; 49 C.F.R. § 835; See also Ch 28, supra.
>
> [FN2] 49 U.S.C. § 1154 (b)
>
> [FN3] *See e.g., In re Air Crash at Charlotte, North Carolina,* 982 F. Supp. 1071 (D.S.C. 1996), but also see, *In re Air Crash at Sioux City, Iowa on July 19, 1989,* 780 F. Supp. 1207 (N.D. Ill. 1991).
>
> [FN4] 49 C.F.R. § 835.2
>
> [FN5] 49 U.S.C. § 1154 (a)

1 Aviation Tort and Reg. Law § 6A:10. Surely, given the fact that Keeney filed the original airplane case, it is somewhat disingenuous for him to suggest that the pilot was not negligent. Besides, the purpose of the NTSB report was not to establish the pilot's negligence, but the purpose of its introduction was to bolster the fact that Keeney did not properly investigate the accident. Furthermore, Hixon, the expert witness, relied on the report. Clearly, information and evidence not otherwise admissible can be relied upon by expert witnesses. Kentucky Rules of Evidence (KRE) 703(a).

Thus, in the airplane case, evidence was presented that Osborne had a viable claim against Quesenberry and that she lost the opportunity to maintain this case in her own name and prosecute her own interests. While it is true that Osborne must demonstrate that, but for Keeney's negligence, she would have prevailed in the underlying case, we believe she presented adequate evidence to establish the liability of the airplane pilot, particularly in light of the circumstances of a legal malpractice action and its "case within a case" structure. We would be remiss not to mention that Keeney's own actions following the dismissal of the airplane case created issues in establishing the pilot's negligence, most obviously when he allowed the insurance company in the original case to discard the airplane wreckage. This factor alone precluded Osborne's ability to have the wreckage inspected.

Keeney also argues that the trial court erred by not instructing the jury to specifically find liability on the part of the pilot in the airplane case. The function of instructions is to tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who has the burden of proof on that issue. *See Webster v. Com.*, 508 S.W.2d 33 (Ky. 1974), *cert. denied*, *Webster v. Kentucky*, 419 U.S. 1070, 95 S.Ct. 657, 42 L.Ed.2d 666 (1974). In Kentucky, it is well recognized that there should not be an abundance of detail but the jury instructions should provide only the "bare bones" of the question for the jury. *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431 (Ky. App. 1992). The instructions tendered in this complicated and somewhat

convoluted case presented the issues in a clear and concise manner using suggestions from both sides. Bolstering the efficacy of the jury instructions in this case is the fact that they are based on instructions in *Daugherty v. Runner*, 581 S.W.2d 12, 18 (Ky. App. 1978), which were expressly approved in *Equitania Ins. Co. v. Slone & Garrett, P.S.C.* 191 S.W.3d 552 (Ky. 2006).

Therefore, we find that Osborne raised a viable claim of legal negligence against Keeney and that Osborne introduced evidence of the airplane pilot's action, allowing the jury to find both that Keeney breached his duty to exercise reasonable care and skill in his legal representation of Osborne and that Osborne, but for his negligence, would have prevailed in the airplane case. We will not substitute our opinion regarding Keeney or Quesenberry's negligence for that of the jury. *See Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985).

2. Damages

Now that we have determined that Osborne sufficiently established that the pilot in the airplane case was negligent, we turn to Osborne's damages. Quesenberry's negligence is predicated on the existence of cognizable damages or injury. And, as stated in *Marrs v. Kelly*, an element of a claim for legal malpractice is that the client has suffered an injury proximately caused by the attorney's negligent conduct. *Marrs,* 95 S.W.3d at 860. Thus, in the instant case, the same damages from the airplane case are now asserted by Osborne against Keeney. Osborne alleges that she was injured by Keeney's acts and omissions,

which rendered her case against Quesenberry without a remedy when the claims were deemed time-barred. Osborne's injury is the lost opportunity to pursue these otherwise viable claims.

Notwithstanding the viability of Osborne's claims for damages, these damage claims must still be established under the requisite Kentucky law. When it has been shown that wrongful conduct has been committed by an attorney against a client, the plaintiff must still introduce credible evidence about the damages and the calculation of the damages. Next, with this standard in mind, we will review the jury's award of damages in the airplane case, which included compensatory, mental and physical pain and suffering, and punitive damages for the plane crash.

a. Airplane case – personal property damages

The jury in its verdict rendered $54,924.04 in compensatory damages for personal property. This award was based on Osborne's personal property that the homeowner's insurance policy had not paid her in the settlement with them. Osborne's loss of personal property inventory, which she prepared for the insurance company, totaled $141,023.65, for which the insurance company paid $83,127.36 for personal property. Obviously, a deficit exists between the insurance company payment and the inventory. The amount of the deficit is $57,896.29.

Keeney makes two arguments against the validity of the award for the personal property damages. First, he explains that the measure of damages for loss of personal property is the fair market value. Keeney alleges that Osborne relied

upon an improper measure of damage to support her claim for loss of personal property, that is, evidence of replacement cost rather than the fair market value of the damaged property. The law in Kentucky is "that the proper measure of damages for injury to personal property is the difference in the fair market value of the property before and after the accident." *McCarty v. Hall*, 697 S.W.2d 955, 956 (Ky. App. 1985). Expert testimony, however, is not required to establish fair market value. *Id*. While it is accurate to say that Osborne's list on the value of her destroyed property does not delineate between the fair-market or replacement-cost value of the items, her Plaintiff's Exhibit 16 is a meticulous and extensive list of her personal property. In it she gives prices based on prices in stores, internet sites, or suggestions of friends or family. Even though disputing the values of the items, Keeney provides no evidence that the items were improperly valued or based only on the fair market value. Many items are small household items in which the fair-market value versus the replacement-cost value is somewhat meaningless. For instance, the inventory contains items such as jeans, Christmas ornaments, household cleaners, and towels. We find guidance for this issue in *Columbia Gas of Kentucky, Inc. v. Maynard*, 532 S.W.2d 3, 6 (Ky. 1976), wherein the Court stated:

> However, this court has recognized that market value is not a fair basis of compensation for the loss of "household goods and wearing apparel," the proper measure being "the actual value in money . . . to the owner for the purpose for which they were intended and used . . . excluding sentimental or fanciful value which

> for any reason he (the owner) might place upon them." *Davis v. Rhodes*, 206 Ky. 340, 266 S.W. 1091 (1925).
>
> Under this rule of damages we think that the owner's estimate of what the items were worth to him, unless so obviously preposterous as to be devoid of probative value, is enough to support an award by a properly instructed jury.

Second, Keeney complains that there was no competent proof on the items previously paid for under the homeowner's policy and appears to be suggesting that Osborne was paid twice for some items. But Keeney's allegation that no competent proof was given regarding which items had previously been paid for under the homeowner's policy is merely an allegation. He never establishes that Osborne was paid twice for any item. We find nothing unreasonable about the method used to determine the value of the items not reimbursed under the homeowner's policy. The inventory total was initially reduced by an insurance reimbursement. In this action, Osborne asked only for a value based on the remaining inventory. And in fact, the jury did not award the full amount asked by Osborne. Hence, in the case at hand we find nothing to indicate that the jury incorrectly decided the value of the uninsured lost personal property or unfairly determined the value of the remaining inventory. Needless to say, it is the province of the jury to determine the amount of damages.

> The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty

> of the trial court and this Court not to disturb the jury's assessment of damages.

Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711, 725 (Ky. App. 1992). And, we find no reason to substitute our opinion for the judgment of the jury.

b. Airplane case – damages for emotional and physical distress

The verdict included $500,000 denominated as "pain and suffering both mental and physical" related to the airplane crash. The basis for this award was testimony by Osborne and her medical providers. The distress consisted of emotional distress and physical manifestations of stress reacting with her diabetes, blood pressure, and depression. Osborne, however, consistently testified that she had not been physically touched by anything after the crash or physically injured by the crash.

Kentucky courts apply the "impact rule" in determining whether a plaintiff may recover for negligent infliction of emotional distress. To recover damages in such an action, the plaintiff must suffer a physical impact or injury. The Kentucky Supreme Court recently reaffirmed our adherence to the impact rule in *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 928 (Ky. 2007), when it cited *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980) (quoting *Morgan v. Hightower's Adm'r*, 291 Ky. 58, 59-60, 163 S.W.2d 21, 22 (1942)):

> It is well established in this jurisdiction that "an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury."

But Osborne suggests that *Deutsch* supports the finding of emotional distress for her because the airplane's landing on her house was a substantial factor in her emotional distress. She alleges that the *Deutsch* case supports the notion that, even though she was not physically touched in the airplane crash, because the Court had "no difficulty" in finding the physical contact necessary to support that plaintiff's claim for mental pain and suffering when her body was negligently subjected to x-ray diagnostic tests in *Deutsch*, this holding applies to her case because the primary cause of her emotional distress was the crash. *Deutsch,* 597 S.W.2d at 145. Significantly, it is our understanding it was not that the Court found no contact but rather that the x-rays were sufficient for contact.

> We find no difficulty in concluding that the physical contact necessary to support the claim for mental suffering occurred when, through Dr. Shein's negligence, Mrs. Deutsch's person was bombarded by x-rays.

Id. at 146.

In *Deutsch*, recovery was permitted to a pregnant plaintiff who had been negligently exposed to x-rays by her doctor and chose to undergo an abortion rather than risk an abnormal birth, although there was no proof that the x-rays were actually harmful. The Court found that the negligence indirectly caused harm to the plaintiff and supported her cause of action. *Capital Holding v. Bailey,* 873 S.W.2d 187 (Ky. 1994), addressed *Deutsch* in its analysis and noted that *Deutsch's* significance was the determination that an injury supported a claim regardless of whether that injury was a direct or indirect consequence of the negligent activity.

But the case does not stand for the proposition that damages for fear in the absence of injury may be awarded. In *Deutsch*, "[t]he abortion and loss of the baby were substantial injury." *Capital Holding* at 193.

Therefore, under Kentucky jurisprudence, in order to recover for emotional distress Osborne must have suffered some type of physical impact in the airplane crash in order to recover damages for emotional suffering. As she herself testified, nothing touched her and she was not physically injured. Thus, since nothing touched her, she cannot recover. *Hetrick v. Willis*, 439 S.W.2d 942, 943 (Ky. 1969). Similarly, she cannot, as a matter of law, recover for emotional distress, mental anguish, or any psychological stress. *Morgan*, 163 S.W.2d at 22.

Regardless of Osborne's strenuous suggestion that Kentucky has adhered to the "no impact" principle while other jurisdictions in negligence cases have rejected the physical impact or injury requirement, it remains Kentucky law. The trial court should not have allowed the jury to consider Osborne's claim for suffering, whether mental or physical, without any impact from the plane. Thus, we hold that emotional distress and physical suffering damages in this case conflict with the impact rule as it currently stands and vacate the $500,000 damage award for these damages.

c. Airplane case – "punitive damages"

The question presented in this case is whether a plaintiff in a legal malpractice case may recover punitive damages allegedly lost in the underlying suit as a result of attorney malpractice. Keeney argues that the recovery of lost

punitive damages is not permitted in a legal malpractice action and violates Kentucky's express purpose for punitive damages. According to Keeney, KRS 411.184 provides that the purpose of punitive damages is to punish a tortfeasor and not to compensate the victim. In pertinent part, the statute says:

> "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

KRS 411.184(1)(f).

While Osborne, after noting that there are no Kentucky cases specifically on point, contends that to refuse to allow plaintiffs to recover lost punitive damages in legal malpractice cases is the same as rewarding a negligent attorney for his or her wrongdoing. Moreover, in light of the nature of a legal malpractice action, "case within a case," we observe that not allowing a plaintiff to recover lost punitive damages ignores the purpose of compensatory damages. "The object of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." *Kentucky Cent. Ins. Co. v. Schneider*, 15 S.W.3d 373, 374 (Ky. 2000). Therefore, using this rationale, to allow an award for lost punitive damages in the underlying action which, but for the attorney's negligence, the plaintiff would receive, becomes a compensatory function in a legal malpractice case.

Only a few jurisdictions have addressed this issue and they are split as to whether or not a plaintiff in a legal malpractice action may recover "lost

punitive damages" against an attorney defendant. And, as the parties to this action have shown, it is certainly a question on which reasonable minds can disagree. The dispute exists between the construct of whether to consider lost punitive damages to be compensatory in the legal malpractice setting, or whether punitive damages may only be assessed against the original tortfeasor as a deterrent for the underlying bad action.

As noted by Keeney, punitive damages are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future. Conversely, as Osborne suggests, the issue is not based primarily on the purpose of punitive damages but instead relies on the purpose of compensatory damages, that is, to give the client what she lost because of the lawyer's negligence. In essence, because the loss of the punitive damages is a result of the lawyer's negligence, "the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer." *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 101 (D.D.C. 2002), quoting Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements***,** 26 Hofstra L. Rev. 641, 653 (1998).

Recovery of lost punitive damages has only been addressed once in Kentucky in an unpublished federal district court action, *McMurtry v. Wiseman*, 2006 WL 2375579 (W.D.Ky. 2006). Both parties discuss this case in their briefs.

Keeney notes that this case held that lost punitive damages were not recoverable in a legal malpractice case. He cites the following from the case:

> Punitive, or exemplary, damages are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future . . . Allowing Tri-G to recover its lost punitive damages from Burke would not advance that policy in any way. To the contrary, by holding the firm liable for the intentional or willful and wanton misconduct of a third party, it tears the concept of punitive damages from its doctrinal moorings.

Id. at 1. Thus, Keeney contends, using this case as support to allow the recovery of lost punitive damages would be extremely deleterious to the concept of punitive damages. In fact, while *McMurtry* is the only Kentucky case to address the issue of lost punitive damages directly, as an unreported slip opinion, it is not controlling. Further, in *McMurtry,* the issue was whether lost punitive damages should be recovered against an attorney who had committed mere negligence. Notwithstanding *McMurtry,* in Kentucky, we have specific statutory direction regarding legal malpractice damages in KRS 411.165, which states in pertinent part:

> If any attorney employed to attend to professional business neglects to attend to the business, after being paid anything for his services, or attends to the business negligently, he shall be liable to the client for all damages and costs sustained by reason thereof.

KRS 411.165(1). This statute was not addressed in *McMurtry* and, although enacted in 1976, it has not been discussed in any Kentucky case.

But, in the case at hand, we do not need to decide whether lost punitive damages may be awarded in a legal malpractice action because there was no evidence provided demonstrating the requisite level of conduct on the part of the pilot for an award of punitive damages. Our decision rests on the statutory language in KRS 411.184(2), which requires that an award of punitive damage must be established by clear and convincing evidence that, here, the defendant [Quesenberry] from whom such damages are sought, acted toward Osborne with conduct allowing for the imposition of punitive damages.

Here, the jury decided the negligence of the pilot based on several factors, including information from Keeney's initial representation of Osborne; the airplane crash itself; and the testimony of two attorneys – Sullivan, who represented Quesenberry in the original action, and Hixon, an attorney and aviation expert witness. In actions founded on negligence, the causal connection between the defendant's negligence and the plaintiff's injury must be established by a preponderance of the evidence. 65A C.J.S. *Negligence* § 812 (2009). We believe that the jury's findings in this case were not erroneous. But, notwithstanding that negligence was established, Osborne must prove by clear and convincing evidence that Quesenberry acted in such a manner as to warrant an award of punitive damages. We find that no clear and convincing evidence was proffered by Osborne regarding the necessary elements for an award of punitive damages against the airplane pilot, and vacate the award of lost punitive damages in the amount of $750,000.

d. Legal malpractice case – Osborne's emotional distress damages

As discussed above, Kentucky courts apply the "impact rule" in determining whether a plaintiff may recover for negligent infliction of emotional distress. To recover damages in such an action, the plaintiff must suffer a physical impact or injury. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d at 928. Osborne testified that Keeney never touched her and never made any inappropriate contact. Likewise, we are not persuaded by Osborne's reference to *Sanders, Inc. v. Chesmotel Lodge*, Inc., 300 S.W.2d 239 (Ky. 1957), that mental anguish is an element of damage for which monetary damages can be recovered in an action for fraud. A fuller reading of the case states:

> The fundamental rule in assessing damages for fraud is that the victim of fraud is entitled to compensation for every wrong which was the natural and proximate result of the fraud. 24 Am.Jur., Fraud and Deceit, Section 226, page 54. In Restatement of the Law of Torts, Volume 3, Section 549, page 108, the rule is stated as follows:
>
> "The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages * * * is the pecuniary loss which results from the falsity of the matter misrepresented, including
>
> a) the difference between the value of the thing bought, sold or exchanged and its purchase price or the value of the thing exchanged for it, and

> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the truth of the representation."

Sanders, 300 S.W.2d at 241. Clearly, this case does not support the proposition that Osborne can receive damages for emotional distress based on Keeney's fraud, nor does she cite any other support for such a proposition. Consequently, under Kentucky jurisprudence, Osborne may not recover $250,000 for emotional distress and this portion of the jury award is vacated.

e. Legal malpractice case – damages from fraud

Citing the Kentucky case, *Long v. Howard*, 260 Ky. 323, 75 S.W.2d 742, 743 (Ky. 1934), which states that "fraud without damage gives no rise to a [legal] cause of action[,]" Keeney maintains that because Osborne suffered no damages, the fraud verdict must be vacated. This contention is simply erroneous. Osborne had damages for the loss of claim against Quesenberry for personal property. Moreover, Osborne presented evidence that Keeney made fraudulent promises that he would recover substantial sums of money from Quesenberry in order to receive large payments of legal fees and costs. The jury awarded Osborne $53,025.39 in legal fees and costs based on Keeney's fraudulent conduct. Therefore, Keeney's argument that the jury's determination that he committed fraud must be vacated because Osborne did not suffer any damages is erroneous.

f. Legal malpractice case – punitive damages

Keeney argues that the jury's award of $3.5 million in punitive damages against Keeney should be vacated. Keeney bases this claim on the following theories: (1) punitive damages are not recoverable unless damages are available in connection with an underlying tort; (2) punitive damages are not recoverable in a breach of contract claim; (3) punitive damages are not available when the tortfeasor's conduct does not rise to the level required by KRS 411.184. We agree that punitive damages are not permitted for a breach of contract claim unless the breach was accompanied by a separate tortious act. KRS 411.184(4); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 486 (Ky. App. 1978). But we disagree with Keeney's contention that Osborne was not entitled to an instruction on punitive damages for Keeney's alleged malpractice. Moreover, Keeney's contention that punitive damages cannot be awarded is based on the false conclusion that Osborne did not sustain any damages as a result of his fraudulent conduct.

It is accurate that to sustain a claim for punitive damages, more than mere negligence on the part of an attorney is necessary. Punitive damages have been awarded in cases where attorneys have failed to provide adequate representation in a willful, wanton, fraudulent or malicious manner. In short, to recover punitive damages in a legal malpractice case, it must be proven that "the attorney acted with 'fraud, ill will, recklessness, wantonness, oppressiveness, (or) willful disregard of the (client's) rights'" (citation omitted). *Hendry v. Pelland*, 73 F.3d 397, 400, 315 U.S. App. D.C. 297, 300, 64 USLW 2543 (D.C. Cir.1996). A

determination of whether punitive damages are available is also governed by KRS 411.184 and KRS 411.186, the punitive damage statutes. *See Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998). In this case, fraudulent acts by an attorney established a claim for punitive damages. *Id*. at 20. Additionally, in *Bierman*, we upheld a judgment for punitive damages based upon fraudulent concealment of legal malpractice because the concealment exacerbated the damages suffered by the client, thus establishing "a claim for punitive damages clearly independent from his acts of negligence." *Id*. at 20.

Additionally, in cases alleging gross negligence and requesting punitive damages, "[a] party plaintiff is entitled to have (her) theory of the case submitted to the jury if there is *any evidence to sustain it*." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996) (quoting *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 250 (Ky. 1995). If there was any evidence to support Osborne's theory that Keeney had acted with gross negligence in permitting the statute of limitations to expire in her airplane case, Osborne had the right to an instruction on punitive damages. *Shortridge*, 929 S.W.2d 194.

In the present case, the jury heard evidence that Keeney filed the complaint in the airplane case a year after the statute of limitations had expired and further failed to diligently prosecute that action. His failure to diligently prosecute the action was commented on by the U.S. District Court in its order as an independent justification for dismissal of that action notwithstanding his failure to meet the statute-of-limitations deadline. Moreover, Osborne paid Keeney

$53,025.39 in legal fees, as determined by the jury, based on his promises that he would recover substantial money from Quesenberry from her homeowner's insurance proceeds prior to any suit being filed. Keeney's failure to respond to Quesenberry's insurer about the damaged aircraft allowed it to be destroyed. Keeney endorsed a check made out to Mr. and Mrs. Osborne from the homeowner's insurance and deposited it in his personal checking account without informing them. When Osborne confronted him several months later, he said he was retaining the majority of the check for unpaid hourly fees and expenses in addition to his normal 20 percent contingency fee. Testimony was further elicited that Keeney neglected to inform Osborne that the case had been dismissed for approximately two months afterwards, which eliminated any possibility that Osborne would have had to request reconsideration of the dismissal order or appeal the court's decision. The authenticity of Keeney's proffered contract was disputed.

In contrast, Keeney testified that he had informed Osborne that the statute of limitations had already run in the airplane case before they filed their complaint. He further testified that he had consistently advised Osborne that she might not be able to recover for all her claims against Quesenberry. He also testified that he did not file the complaint within the statute-of-limitations period due to concerns he had, based on conversations with Osborne's physician, that Osborne's health would be adversely affected by filing suit at that time. In other words, Keeney disputed much of Osborne's testimony, but the trier of fact heard the evidence and ascertained that Keeney's behavior reached the level required for

an award of punitive damages. We, again, will not substitute our opinion for that of the jury.

g. Osborne's damages exceeded her pretrial itemization

Keeney argues that Kentucky law limits Osborne's monetary damage recovery to the damages specified by her in pretrial discovery. Citing CR 8.01(2) for support, he claims that damages are limited to the itemization of damages provided in discovery or, if the court permits supplementation, the supplementation may not cause prejudice to the defendant. He maintains that during pretrial discovery, Osborne itemized her damages as follows: $1 million for the airplane crash claim; $58,000 for legal fees and expenses; $500,000 for mental anguish; and $1 million for punitive damages and, thus, is limited to that amount of damages.

Osborne counters that this assertion is in error because the $1 million itemization refers specifically to the airplane case and was a response to Keeney's demand that damages for the underlying case be designated by Osborne. Osborne further argues that the total amount of the jury's award for the airplane case was well within the $1 million itemization that had been claimed for damages in the airplane case. Furthermore, Osborne maintains that Keeney's argument that the legal malpractice punitive damages award is limited to $1 million is without merit because Keeney was well aware that Osborne was requesting that no limitation be placed on the punitive damage award.

Besides these factors, Osborne also asserts that it is questionable whether CR 8.01(2) even applies to punitive damages since the rule implicates

unliquidated damages, which Osborne states are compensatory damages not punitive damages. A jury determines compensatory damages based upon evidence produced at the trial establishing a monetary amount for damages experienced by the plaintiff on the basis of the defendant's negligence. In contrast, Osborne argues that punitive damages are intended to punish the defendant for his "bad" conduct and prevent such conduct in the future.

It is important to review CR 8.01(2), which reads as follows:

> In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories . . . .

And *Black's Law Dictionary,* 419 (8th ed. 2004), defines unliquidated damages as "[d]amages that cannot be determined by a fixed formula and must be established by a judge or jury." In response to Osborne's suggestion that CR 8.01 does not apply to unliquidated damages, we note that in Kentucky, we have two unreported opinions, *Pickett v. Shields*, 2005 WL 3246838 (Ky. App. 2005), and *Village Campground, Inc. v. Liberty Bank*, 2008 WL 4998478 (Ky. App. 2008), wherein our Court has declared that punitive damages seem to fit within that definition for unliquidated damages and, therefore, are subject to CR 8.01(2).

We conclude, based on the plain meaning of CR 8.01(2) and caselaw, that Osborne's claim for unliquidated damages is effectively limited to $1 million because that is the last amount she disclosed in her trial memorandum and she did not make a motion to amend this amount. Indeed, in *Fratzke v. Murphy*, 12 S.W.3d 269, 273 (Ky. 1999), application of the CR 8.01(2) was held mandatory and not discretionary. The Court explained the purpose of CR 8.01(2) by noting that in that case, additional amounts of unliquidated damages could not be recovered because "the purpose of the rule is to allow a party to discover the *amount* an opposing party is seeking for unliquidated damage claims." *Id. See also LaFleur v. Shoney's, Inc.,* 83 S.W.3d 474 (Ky. 2002).

CR 8.01(2) restricts a plaintiff's recovery to the amount of damages provided during discovery or any court-permitted supplementation if no prejudice results to the defendant. Here, the last amount of damages specified by Osborne was in her trial memorandum and she asked for $1 million in punitive damages for Keeney's legal malpractice. Thus, we hold that punitive damages herein are limited to $1 million rather than the $3.5 million punitive damages awarded.

CAROLINA CASUALTY APPEAL

Next, we will address the issues presented by Carolina. First, a brief synopsis of the facts will be given. Carolina issued Keeney's legal malpractice insurance policy. Under the provisions of the policy, the company and its administrator hired and paid independent counsel for Keeney's defense. As previously mentioned the policy contains a $1 million limit of liability and allows

for payment for Keeney's defense at trial. The policy also provides that Keeney's coverage is reduced by the amount of attorney fees and costs incurred by his defense counsel.

The procedural history of motions and cross-motions is elucidated above under the "Background" section. In essence, two issues must be addressed. First, we must consider the legal viability of Osborne's motion to amend her complaint nineteen days following the entry of the judgment. Then, we are required to ascertain whether Carolina's motion to intervene on appeal is valid.

1. Osborne's Motion to Amend the Complaint

The longstanding rule in Kentucky is that a party may not move, pursuant to CR 15.01, to amend or supplement a complaint after a judgment becomes final under CR 58 without first moving to alter, amend, or vacate the final judgment under CR 59.05 As the Kentucky Court of Appeals has already stated in *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 93 (Ky. 1956), "[u]nder CR 59.05, a motion to alter or amend a judgment must be served not later than 10 days after entry of the judgment." CR 15.01 supplies the authority to permit the amended complaints to be filed. But the amendment of a complaint afforded by CR 15.01 applies only to an amendment offered during the pendency of the action. *James* at 94. The Court went on to say "[c]ertainly it was not intended to apply in situations where, by the lapse of a period of 10 days after judgment, the court has lost control of the judgment." *Id*.

In this case, the trial court entered a judgment on August 30, 2007, that disposed of every issue presented in Osborne's complaint. The judgment concluded with the statement "[t]here being no just cause for delay, this judgment is final and appealable." Nothing in Osborne's motion for leave to amend the complaint or the trial court's October 10, 2007 order granting the motion made any mention of CR 59.05. Consequently, the CR 15 amendment and the order granting permission to file an amended complaint are invalid without an order of postjudgment relief vacating the original judgment.

Moreover, even without the trial court's acting to vacate the original judgment and permit an amendment to the complaint, Osborne moved to amend her complaint on September 18, 2007, which was outside the time limits of CR 59. That is, Osborne moved to amend or supplement her complaint nineteen days after the trial court's entry of judgment. A motion to alter, amend, or vacate a complaint under CR 59.05 must be made no later than ten days after the judgment is entered. Therefore, the trial court on September 18, 2007, no longer had any jurisdiction over the case.

Additionally, the fact that Keeney's motion for judgment notwithstanding the verdict under CR 50.02, and motion to alter, amend, or vacate under CR 59.05, were timely made does not change the timeline for Osborne. Keeney served his motions on September 10, 2007, which was the final day to file posttrial motions. Although Osborne's motions were served within ten days of Keeney's posttrial motions, Osborne's motion was not made within the ten days of

entry of the judgment on August 30, 2007. Under Kentucky law, one party's motion for postjudgment relief under CR 50 or 59 does not toll the ten-day limitation period for another party to file a CR 59 motion on different grounds. *Johnson v. Smith*, 885 S.W.2d 944, 947 (Ky. 1994).

The timeline regarding this issue allows only one conclusion – the trial court lacked jurisdiction to rule on Osborne's motion when it granted the motion to amend the complaint. We review questions as to the circuit court's jurisdiction *de novo*. *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007). Therefore, the order is invalid. We vacate the order permitting the amendment of Osborne's complaint after the entry of the August 30, 2007 judgment.

2. Carolina's motion to intervene in the direct appeal

By granting Carolina's motion to dismiss the trial court's grant allowing Osborne to amend her complaint nineteen days after the entry of the judgment, Carolina's motion to intervene directly in the appeal is rendered moot.

CONCLUSION

After considering the arguments of the parties, we affirm in part and vacate in part the Jefferson Circuit Court August 30, 2007 judgment, and October 10, 2007 opinion and order. First, we hold that Osborne raised a viable claim of legal negligence against Keeney. Second, we determine that, with regard to damages, the jury had sufficient evidence to establish damages for personal property plus evidentiary support for the award for punitive damages in the

malpractice case. But, we do not reach the issue of lost punitive damages in the airplane case because clear and convincing evidence was not provided to demonstrate the requisite actions on the pilot's part warranting punitive damages. With regard to the damages for emotional distress for both the underlying case and the case itself, we find that Kentucky law does not allow an award of these damages without physical impact and, thus, vacate the award for those damages. We uphold the jury award of $53,025.39 in legal fees and costs to Keeney based on sufficient evidence on the record for the jury to believe Keeney's conduct was fraudulent. Likewise, Keeney's argument that his fraud damages must be vacated because Osborne did not suffer any damages is erroneous. Finally, regarding the itemization of damages pretrial, we believe, based on the requisites of CR 8.01(2), that Osborne is limited to punitive damages in the amount of $1 million against Keeney, based on her last itemization of such damages in her trial memorandum.

Additionally, we find that the trial court did not have jurisdiction to allow Osborne to amend her complaint nineteen days following the entry of the judgment and, thus, this order must be vacated. The vacation of the order allowing her to amend her complaint renders moot any reason for Carolina to intervene directly in the appeal.

In summary, for the foregoing reasons we affirm in part, vacate in part, and remand to the Jefferson Circuit Court for further action in accordance with this opinion.

MOORE, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING. I agree with the majority's well written and scholarly opinion with one exception. I cannot agree with the conclusion that there was insufficient evidence of gross negligence on the part of the pilot. In addition to starting the engine by squirting aviation gasoline into the air intake, the pilot ignored the fact that his engine had suffered pump failure three times previously, investigation revealed a foreign object in the pump, the pump's previous repairs had been made with improper parts, and the repairs were undocumented in violation of regulation. The pilot was the owner of the plane and responsible for its being airworthy. Clearly, there was sufficient evidence to support the award of punitive damages.

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