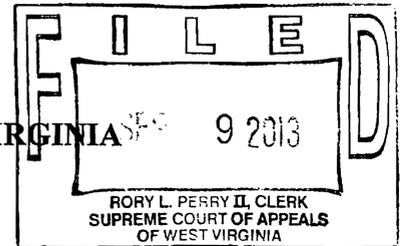


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0387



**GEORGE GROOMS, and
ANNIE GROOMS,**

PETITIONERS,

v.

**Appeal from a final order of the
Circuit Court of Kanawha County
(09-C-AP-132)**

MILDRED GROOMS,

RESPONDENT.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Respondent, Ms. Grooms, is an 82 year old woman residing at the home and property which are the subject of this matter. She has resided at this home since 1975. (App. Vol. I at 6; App. Vol. II at 19.) This home is situated separate and adjacent to her brother's home, that being Mr. Grooms, one of the Petitioners in this matter. (App. Vol. II at 11.) Ms. Grooms' home, however, is situated on a lot owned by Mr. Grooms, which has recently resulted in the issues raised in this instant matter. (App. Vol. I at 6.) The other Petitioner is Mrs. Grooms, who resides with and is the wife of Mr. Grooms.

On the 6th day of May, 2010, a hearing was held in this matter in the Circuit Court of Kanawha County, as an appeal from the Magistrate Court, wherein the Respondent raised a claim to property in a Magistrate hearing for a wrongful occupation brought by the Petitioner, Mr. Grooms in November, 2009. (Id.) At that hearing the Court heard testimony that Ms. Grooms, the

Respondent herein, had lived at her current address for thirty-five (35) years; that when she was looking to buy a home, she sought Mr. Grooms' counsel in purchasing a home. (Id., Vol. II at 20) Whereupon, Mr. Grooms advised her that a home she was considering buying showed signs of termite infestation and invited her to build a home on one of his lots. (App. Vol. II at 21.) That Ms. Grooms took out a loan to pay for the home. (App. Vol. II at 24, 25.) That Ms. Grooms has paid bills and taxes on the home and property since the time of her first occupation. (App. Vol. II at 23; App. Vol. I at 7.) That Ms. Grooms presented a contract indicating that she purchased the home. (App. Vol. II at 24.) That there was an agreement by Petitioner to Ms. Grooms that he would give her a deed to the home in exchange for the monies that she invested in the home. (App. Vol. I at 7.) That in the fall of 2009, Mr. Grooms sought Four Hundred Dollars (\$400.00) monthly "rent" from Ms. Grooms. (App. Vol. II at 6.) Upon Ms. Grooms refusing to pay that amount, Mr. Grooms brought a wrongful occupation action against Ms. Grooms. (App. Vol. II at 5.) At the conclusion of that hearing, the Circuit Court ordered and adjudged the following:

- a. That Mildred Grooms shall be entitled to a life estate in the residence situate at 11637 Kanawha Avenue, Chesapeake, WV 25315.
- b. That title to said real estate shall remain in the name of the plaintiff.
- c. That Mildred Grooms shall pay unto the plaintiffs the sum of One Hundred and Twenty Five Dollars (\$125.00) per month, said payment to be payable on the first day of each month beginning June 1, 2010.
- d. That the plaintiff shall be responsible for the upkeep of the real estate in question and that the defendant shall be responsible for the upkeep of the residence situate thereon.
- e. That the defendant shall be entitled to enjoy quiet possession of the premises for so long as she shall live or desires to have it the same, without interference from the plaintiffs or anyone on their behalf. (App. Vol. V at 1.)

On or about the 29th day of July, 2010, the Respondent herein, Ms. Grooms, filed a Petition

for Contempt with the Court, in which a hearing was held on the same, on the 8th day of September, 2010. (App. Vol. III at 3.)

On October 8, 2010, an Order was entered regarding the September 8, 2010 hearing whereupon, the Court found that George Grooms was in contempt of the May 6, 2010 Order. Furthermore, the Court ordered and adjudged the following:

- a. That the Respondent, George Grooms, shall remove the fence erected on the property of the parties;
- b. That the same shall be removed prior to the 20th day of September, 2010; and
- c. That no fences shall be erected on the subject property so long as petitioner resides there except by agreement of the parties.
- d. That the respondents, George Grooms and Annie Grooms, shall be entitled to claim an insurable interest in the property presently inhabited by the petitioner, Mildred Grooms. (Id.)

On August 23, 2010, attorney Nathan A. Hicks, Jr. Counsel for George Grooms and Annie Groom, filed a Notice of Appearance. (App. Vol. III at 1.)

On November 30, 2011 the Plaintiffs, George Grooms and Annie Grooms, filed a Motion to Reinstate This Civil Action and Modify and/or Clarify the Court's Order of May 6, 2010. (App. Vol. II at 2.)

On January 18, 2013, the Respondent herein filed a Second Petition for Contempt was filed by the counsel for Mildred Grooms. (App. Vol. IV at 4.)

A hearing was held on the Second Petition for Contempt, filed by the Respondent herein, on January 23, 2013. (Id.)

On March 22, 2013, the Court entered a Court's Own Order Again on Grooms Property, regarding the January 23, 2013 hearing, wherein it found the following:

- a. That George and Amy Grooms have again interfered with Mildred Grooms' free use of her life estate by obstructing the use of Ms. Grooms' driveway and yard, by threatening to enter her home, and by harassment of visitors, whether business or personal.
- b. That George and Amy Grooms have an insurable interest in the property presently inhabited by Mildred Grooms. That further, the petitioner (sic) has a life estate in the property, and is to have quiet possession of such, without interference from the respondents or any on their behalf.

The Court ordered and adjudged the following:

- a. That any maintenance or upkeep of the yard, and driveway shall be the responsibility of George and Annie Grooms, but they shall be respectful of Ms. Mildred Grooms when doing so.
- b. That the petitioner, Mildred Grooms, shall insure the residence she currently occupies and shall include the respondents on said policy. (A copy of the current insurance policy with changes is hereto attached)
- c. That the respondents, George and Amy Grooms, or anyone on their behalf, shall immediately cease and desist all harassment, direct or indirect, of the petitioner, and to allow her free and uninterrupted use of her home, her yard, and her driveway, for herself and her visitors.
- d. That if the respondents, their family members, or anyone on their behalf, continue to harass the petitioner that interferes with her quiet possession and use of the property, they shall be forthwith brought before this Court for a proper hearing and sanctions.

Whereupon, the Court dismissed the matter unless further intervention from the Court was needed. (App. Vol. V at 32.)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner affirmatively states that the issues raised in assignments 1 and 2 are issues that have been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for Rule 19 of the West Virginia Revised Rules of Appellate Procedure.

LAW

"A motion to amend or alter judgment, even though it is incorrectly denominated as a motion to 'reconsider', 'vacate', 'set aside', or 'reargue' is a Rule 59(e) motion if filed and served within ten days of entry of judgment." Syllabus Point 1, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992), Syllabus Point 5, *James M.B. v. Carolyn M.*, 456 S.E.2d 16, 193 W.Va. 289 (1995).

"Under W.Va.Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Syllabus Point 3, *James M.B. v. Carolyn M.*, 456 S.E.2d 16, 193 W.Va. 289 (1995).

When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59(e) motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court's entry of judgment, the motion [Page 876][196 W.Va. 696] is treated as a motion to alter or amend under Rule 59(e). If the motion is filed outside the ten-day limit, it can only be addressed under Rule 60(b). *Sly. Pt. 2 Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 196 W.Va. 692 (1996).

"[A] motion for reconsideration does not toll the time for appeal." *Rowan v. McKnight*, 184 W.Va. 763, 403 S.E.2d 780 (1991).

"A motion made pursuant to Rule 60(b), W.Va.R.C.P., does not toll the running of the appeal time of eight months provided by West Virginia Code, Chapter 58, Article 5, Section 4, as amended." Syllabus Point 1, *Toler v. Shelton*, 204 S.E.2d 85, 157 W.Va. 778 (W.Va., 1974).

"An order denying a motion under Rule 60(b), W.Va.R.C.P., is final and appealable."

Syllabus Point 2, Id.

“An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.” Syllabus Point 3, Id.

“In reviewing an order denying a motion under Rule 60(b), W.Va.R.C.P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner.” Syllabus Point 4, Id.

“A motion to vacate a judgment made pursuant to Rule 60(b), W.Va.R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” Syllabus Point 5, Id.

“A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W.Va.R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits.” Syllabus Point 6, Id.

"Under the Rules of Civil Procedure, Rule 72, the full time for filing a petition for appeal commences to run and is to be computed from the entry of the judgment order, unless some timely motion is made under the rules referred to in Rule 72 which would suspend the commencement of the appeal period." Id., at page 459 of the West Virginia Report, 128 S.E.2d p. 458. Id. at 88 citing Syllabus Point 2, *Sothen v. Continental Assur. Co.*, 128 S.E.2d 458, 147 W.Va. 458 (1962).

“No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed

was entered: Provided, That the judge of the circuit court may, prior to the expiration of such period of four months, by order entered of record extend and reextend such period for such additional period or periods, not to exceed a total extension of two months, for good cause shown, if the request for preparation of the transcript was made by the party seeking such appellate review within thirty days of the entry of such judgment, decree or order.” W. Va. Code § 58-5-1 (2009).

SUMMARY OF ARGUMENT

Petitioners appeal the granting of a life estate awarded to Respondent by Order of the Circuit Court of Kanawha County on May 6, 2010. Petitioners’ appeal is untimely and as a result, the Court lacks jurisdiction to review Petitioners’ first assignment of error. In the alternative, Petitioners appeal their Motion to Reinstate This Civil Action and Modify and/or Clarify the Court’s Order of May 6, 2010. The Circuit Court has issued three Orders in total, each providing further clarification of the Respondent’s and Petitioners’ rights and responsibilities as to their respective interests in the life estate.

ARGUMENT

I. The Court lacks jurisdiction to review the Circuit Court’s Order affirming Ms. Groom’s life-estate in her home.

In Toler, the Court lacked jurisdiction to consider a direct appeal of the final judgment entered in that case because the judgment was entered more than eight months prior to the filing of a proper petition for appeal in this Court. *ibid.* at 88, 783. In the instant matter before the Court, the judgment of the Circuit Court being appealed was made on May 6, 2010. A notice of appeal was filed on April 19, 2013, nearly three years after the entry of the order being appealed.

Petitioners filed a Motion to Modify and/or Clarify the Court’s Order of May 6, 2010 on

November 30, 2011. (App. Vol. V at 2.) Petitioners' November 30, 2011 motion is addressed under Rule 60(b), because the motion was filed more than ten (10) days past the entry of the Circuit Court's Final Order of May 6, 2010. Syl. Pt. 2 Powderidge Unit Owners Ass'n A motion made pursuant to Rule 60(b), W.Va.R.C.P., does not toll the running of the appeal time of eight months, provided by West Virginia Code, Chapter 58, Article 5, Section 4, as amended. Syl. Pt. 1 Toler. As a consequence of not filing a timely appeal, the Court cannot consider Appellants first assignment of error. id. at 783, 88,89.

While not in the appendix docket, Petitioners' Motion to Reconsider, filed on May 25, 2010, is also addressed under Rule 60(b) because the motion was filed more than ten (10) days past the entry of the Circuit Court final Order of May 6, 2010. Syl. Pt. 2 Powderidge Unit Owners Ass'n A motion made pursuant to Rule 60(b), W.Va.R.C.P., does not toll the running of the appeal time of eight months provided by W.Va. Code § 58-5-4 as amended. Syl. Pt. 1 Toler. As a consequence of not filing a timely appeal the Court cannot consider Appellants first assignment of error. id. at 783, 88,89.

Any suggestion that the Petitioners' being pro-se should be granted an excusable extension of time, is without merit. Respondent would point out that Petitioners were represented by counsel as early as the 23rd day of August, 2010, wherein attorney Nathan A. Hicks, Jr., filed a Notice of Appearance as counsel for George Grooms and Annie Grooms, placing Petitioners well within the timeframe allotted for filing a timely appeal of the Order currently being appealed in this instant matter.

II. If the Court finds the appeal timely, Respondent maintains that the Court's finding of a life estate should stand.

“Rules of Civil Procedure provides that a trial court's findings of fact made pursuant to a bench trial “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” We have explained: “““The finding of a trial court upon the facts submitted to it in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding.” Syl. pt. 7, Bluefield Supply Company v. Frankels [Frankel's] Appliances, Inc., 149 W.Va. 622, 142 S.E.2d 898 (1965).’ Syl. pt. 1, Burns v. Goff, 164 W.Va. 301, 262 S.E.2d 772 (1980).” Syllabus Point 2, Shrewsbury v. Humphrey, 183 W.Va. 291, 395 S.E.2d 535 (1990). Syl. Pt. 1, Strahin v. Lantz, 193 W.Va. 285, 456 S.E.2d 12 (1995). The Court further notes that: “[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.” Michael D.C. v. Wanda L.C., 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997); accord Gum v. Dudley, 202 W.Va. 477, 484, 505 S.E.2d 391, 398 (1997). Webb v. W.Va. Bd. of Med., 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002). “In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syllabus Point 1, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996). Syl. Pt. 2, Timberline Four Seasons Resort Mgmt. Co. v. Herlan, 223 W.Va. 730, 679 S.E.2d 329 (2009). In a case tried without the aid of a jury, the circuit court judges the weight of the evidence. It is clear that the burden on petitioner “attempting to show clear error is especially strong when the findings are primarily based upon oral testimony and the circuit court has viewed the demeanor and judged the credibility of the witnesses.” Brown v. Gobble, 196 W.Va. 559, 565, 474 S.E.2d 489, 495 (1996)(citation omitted).” Toler v. Merritt (W.Va., 2013) No. 12-0394.

In finding that the Respondent has a life estate in the contested property, the Court took several factors into consideration including the length of time in which respondent has lived at her current address; (App. Vol. II at 9.) the money she paid for the home; (App. Vol. II at 24.) the

understanding of the parties at the time Ms. Grooms purchased her home; (App. Vol. I at 7.) and that Ms. Grooms reimbursed the Petitioner for the taxes on the property every year. (App. Vol. II at 23.) The Circuit Court took oral testimony of the parties and determined that the parties had entered into an agreement where a life estate was created. Additionally, the Court was correct in its finding so as to avoid unjustly enriching the Petitioner in this matter, who seeks to lay claim to Respondent's home because it is situated on the Petitioner's land, as it has been since Ms. Grooms purchased the home.

To choose the alternative of partition would result in an eighty-two (82) year old woman being put out of her home of thirty-five (35) years and unjustly enrich the Petitioner.

III. The Court has not issued a Final Order explicitly denying Petitioners' Motion to Modify and/or Clarify the Court's Order of May 6, 2010.

"Under W.Va.Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Syllabus Point 3, James M.B. v. Carolyn M., 456 S.E.2d 16, 193 W.Va. 289 (1995).

Petitioners' Motion to Modify and/or Clarify the Court's Order of May 6, 2010, is a motion to reconsider. The Court has not issued a Final Order explicitly denying Petitioners' motion to reconsider. Without a final Order this Court does not have jurisdiction to hear the appeal. id.

IV. Should the Court consider the Petitioners' Motion denied by the Circuit Court, Respondent avers that the Circuit Court did not abuse its discretion when denying Petitioners' motion to reconsider.

Respondent maintains that Petitioners have slept on their rights as to appealing the Circuit Court's finding of a life estate and that no Order has explicitly denied Petitioners' motion to

reconsider. However, should the Court consider the Petitioners' motion to reconsider denied by the Circuit Court, Respondent avers that the Circuit Court did not abuse its discretion when denying Petitioners' motion to reconsider.

“An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.” Syllabus Point 3, Toler, *ibid*.

“An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order.” Syllabus Point 3, *Id*.

“In reviewing an order denying a motion under Rule 60(b), W.Va.R.C.P., the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner.” Syllabus Point 4, *Id*.

In their motion, Petitioners seek clarification from the Court as to the rights and responsibilities of Petitioner and Respondent in relation to the life estate held by Ms. Grooms. Specifically, Petitioner's seek clarification of the Order regarding the erection of a fence, Vol V page 3; Maintenance of the lawn; *id.*, Rights of ingress and egress involved with a shared drive way and the driveway designated for Respondent's home; Vol. V page 4 and 5, and Petitioner's right to remainder man insurance; *id.*, The Court's Orders as to clarification have included the following in the May 6, 2010 Order;

- a. That Mildred Grooms shall be entitled to a life estate in the residence situate at 11637 Kanawha Avenue, Chesapeake, WV 25315;

- b. That title to said real estate shall remain in the name of the plaintiff;
- c. That Mildred Grooms shall pay unto the plaintiffs the sum of \$125.00 dollars per month said payment to be payable on the first day of each month beginning June 1, 2010;
- d. That the plaintiff shall be responsible for the upkeep of the real estate in question and that the defendant shall be responsible for the upkeep of the residence situate thereon;
- e. That the defendant shall be entitled to enjoy quiet possession of the premises for so long as she shall live or desires to have it the same, without interference from the plaintiffs or anyone on their behalf; (App. Vol. V at 1.)

And in the March 22, 2013 Order;

- a. That any maintenance or upkeep of the yard, and driveway shall be the responsibility of George and Annie Grooms, but they shall be respectful of Ms. Mildred Grooms when doing so;
- b. That the petitioner, Mildred Grooms, shall insure the residence she currently occupies and shall include the respondents on said policy;
- c. That the respondents, George and Amy Grooms, or anyone on their behalf, shall immediately cease and desist all harassment, direct or indirect, of the petitioner, and to allow her free and uninterrupted use of her home, her yard, and her driveway, for herself and her visitors;
- d. That if the respondents, their family members, or anyone on their behalf, continue to harass the petitioner that interferes with her quiet possession and use of the property, they shall be forthwith brought before this Court for a proper hearing and sanctions;

(App. Vol. V at 32.)

The Court did not abuse its discretion in granting Mildred Grooms “free and uninterrupted use of her home, her yard, and her driveway, for herself and her visitors” The Court established an easement right for ingress and egress to Ms. Grooms’ house.

To establish an easement implied by a prior use of the land, a party must prove four elements:

(1) prior common ownership of the dominant and servient estates; (2) severance (that is, a

conveyance of the dominant and/or servient estates to another); (3) the use giving rise to the asserted easement was in existence at the time of the conveyance dividing the property, and the use has been so long continued and so obvious as to show that the parties to the conveyance intended and meant for the use to be permanent; and (4) the easement was necessary at the time of the severance for the proper and reasonable enjoyment of the dominant estate. Syllabus Point 6, Cobb v. Daugherty, 225 W.Va. 435, 693 S.E.2d 800 (2010).

The Court established all of the elements listed in Cobb. The land was once commonly owned by the Petitioner; (App. Vol. II at 13.) The property was conveyed to Ms. Grooms as a life estate. (App. Vol. V at 1.) The driveways were established when this issue was presented to the Court and the easement is necessary, being the only way the Respondent can access her house. (App. Vol. IV at 46-48.)

The Court addresses the Respondents fence and lawn issues in an Order entered by the Court on September 8, 2011, from the hearing held on the same day where the Court found that Respondents erected a fence in the Petitioners front yard for the sole purpose of harassing the Respondent. The Order is not included in the Appendix Record. (App. Vol. III at 3-8.)

The Court granted the Petitioner the right to acquire remainder-man insurance. (App. Vol. V at 31.)

The Court did not abuse its discretion finding Ms. Grooms' grandson could live with her as an ordinary use of her home. The term "waste" implies neglect or misconduct resulting in material damage to or loss of property, but does not include ordinary depreciation of property due to age and normal use over a comparatively short period of time. Moore v. Phillips, 6 Kan.App.2d 94, 97, 627 P.2d 831, 834 (1981). Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (W.Va., 1997).

CONCLUSION

The Court should find that it has no jurisdiction to review the Circuit Court's granting Petitioner a life estate, as the petition was not timely filed. In the alternative, should the Court retain jurisdiction, the Court should affirm the Circuit Court's decisions, as the Petitioner has not met the burden showing that the Circuit Court has abused its discretion and made an erroneous decision. Further, the Court should deny and dismiss the remainder of Petitioners' appeal, in that they have not shown that the Circuit Court abused its discretion or made any erroneous rulings. Furthermore, this case has persisted because Petitioners have regularly harassed Respondent and flaunted orders of the Circuit Court. (App. Vol. IV at 28-46; App. Vol. III at 3-8.) Petitioners' behavior should not be rewarded by an extension to file an appeal in this matter.

MILDRED GROOMS,
By Counsel

Respectfully submitted by:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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MILDRED GROOMS,

RESPONDENT.

CERTIFICATE OF SERVICE

I, David M. Dawson, counsel for the Petitioner, Mildred Grooms, do hereby certify that service of the foregoing "**Respondent's Brief**" has been made this 9th day of September, 2013 by facsimile and by placing a true and exact copy in the United States Mail, postage prepaid to the following:

**Herbert L. Hively, II, Esq.
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