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Torts - Surveyor Making an Inaccurate Survey Held Liable to a Third Party Not in Privity on a Theory of Tortious Misrepresentation

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TORTS—Surveyor Making An Inaccurate Survey Held Liable To A Third Party Not In Privity On A Theory of Tortious Misrepresentation

On August 27, 1953, a "spot" survey was made for S.&.S. Builders by John Marnul doing business as Jens K. Doe Survey Service. Between then and the time of a second survey, the lot was purchased by one Harold Nash. On June 27, 1955, Nash procured a building permit and erected a house on the lot. On August 21, 1955, the survey company issued a written location "plat of survey" for the property. This plat simply placed the location of the house on the original plat. The surveyor, John Marnul, testified that he discovered that the survey of August 21 was incorrect, and that he issued a corrected survey on August 27, 1955. However, although he also testified that it was a standard operating procedure to send the corrected blueprints to whomever ordered the original, he later admitted that he had no record of sending them nor a recollection of what took place. Furthermore, neither the savings and loan association which issued Nash a loan on the basis of the August 21, 1955, survey nor anyone else ever received a copy of the corrected survey.

The plaintiffs, Raymond A. Rozny, Jr. and Katherine M. Rozny, first saw the property in January, 1956, when it was shown to them by the builder Nash. Upon learning that they could finance the sale by assuming the mortgage on the construction loan made to Nash, and upon reviewing all the documents concerning the property, including the incorrect survey, the sale was closed in February. Subsequently, in September, 1956, the plaintiffs extended the existing driveway and constructed a garage on the rear of the lot. This was done in reliance upon an iron pipe in the back of the lot and a mark on the front sidewalk, both of which were shown by the plat as being *indicia* of the boundaries. These markings were inaccurate due to the incorrect survey. Due to these inaccuracies, a portion of the existing driveway and the entire extension of it overlapped the west lot line. Also, the west edge of the garage encroached on the adjacent lot from two inches to one foot two inches. The plaintiffs first learned of these errors approximately two years before the trial in September, 1964.

A housemoving and shoring contractor estimated that the cost of correcting these deficiencies would amount to approximately $13,030. The plaintiffs obtained a judgment in the trial court for $13,350; but

the appellate court reversed on the ground that the action was one sounding in contract, and since the plaintiffs were not in privity with the defendant, they could have no cause of action.[1]

HELD: A surveyor making an inaccurate survey may be liable under a theory of tortious misrepresentation to a party other than the person for whom the survey was made. Tort liability arising from the performance of a contract is to be measured by the scope of the duty owed rather than any artificial concepts of privity.[2]

The Illinois Supreme Court's decision in *Rozny v. Marnul* is significant because it involves a clear recognition of the concept that the performance of a contract can result in a duty of care to a third person. The recognition of this duty of care to third parties had its origin in the products liability field, and this case furthers the evolutionary process of the law as to this duty. The case extends recovery in tort to cases involving the sale of labor or services, the "service area," without requiring a showing of privity. Prior to *Rozny*, the advantage of not having to show privity in cases involving mere economic loss had been restricted to the products liability field. In the service area strict liability in tort has not been applied,[3] and recovery for negligence resulting in mere economic loss had been quite difficult because of the defense of lack of privity and the possibility of unlimited liability.

The first issue confronting the court in this case was the defendant's liability. The plaintiffs sought recovery on five different theories, each of which allows recovery against a defendant not in privity with the plaintiff. These five theories were strict liability in tort, implied warranty free of privity, the third-party beneficiary doctrine, express warranty free of the privity requirement, and, finally, tortious misrepresentation.[4] Although the court eventually found the defendant liable on a theory of tortious misrepresentation, it prefaced its actual holding by refusing to find the defendant liable on any or all of the plaintiffs'

1. Rozny v. Marnul, 83 Ill. App. 2d 110, 227 N.E.2d 656 (1969).
2. *Id.* at 60. In response to the defendants' final contention that the damages were excessive and the plaintiffs had failed to mitigate, the court held that the failure to mitigate is an affirmative defense that must be pleaded and proved by the defendant. Since the defendant made no effort to do so at trial, "it is abundantly clear that defendant may not now complain that plaintiffs failed to mitigate damages."
3. Some courts have applied the third party beneficiary doctrine in a way that might lead to a few exceptions. It is safe to say they are far and away the exceptions and not a general rule and are not really true examples of strict liability anyway. *See* PROSSER, LAW OF TORTS, §§ 99, 102 (1964). Some states have statutes holding those with a public responsibility strictly liable.
4. The fact that the plaintiffs had at their disposal five different theories indicates the extent of the confusion in this area. Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656-659 (1969).

first four theories.

The court refused to find the defendant strictly liable in tort on the grounds that *Suvada v. White Motor Co.*[5] imposed strict liability in tort only with respect to products which are in a defective condition which is unreasonably dangerous to the user or the consumer. Since there was nothing that indicated in any way that the survey in *Rozny* was unreasonably dangerous, the theory of strict liability in tort was held inapplicable.[6] Secondly, the court did not feel that it was necessary to even determine the extent of any implied warranties involved in the issuance of a plat since the claim was based on the express representation of accuracy made by the defendant on the face of the plat.[7]

The court also refused to find the defendant liable by the use of the third-party beneficiary doctrine because the contract was not for the direct benefit of the plaintiffs.[8] Although the court recognized that the traditional interpretations of this doctrine have been undergoing a change, and recovery might very well be allowed by recent cases, it still refused to so hold due to its belief that the "fundamental reasoning underlying tortious misrepresentation more nearly accomodates this case."[9] Finally, the court stated that if it was to base liability on an express warranty theory, it must be an express warranty to the consumer

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5. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

6. 43 Ill. 2d at 60, 250 N.E.2d at 659. *See* Cunningham v. MacNeal Memorial Hospital, 113 Ill. 2d 74, 251 N.E.2d 733 (1969). There, the court said that blood furnished by a hospital in a defective condition was a product. This is important for as the case points out, up until this time the courts have found it to be merely part of the service, and hence, no strict liability. One wonders if plats, for example, might come under this new approach to products. It is doubtful in light of the courts' approach in basing its decision on the scope of the duty. This approach permits all the recovery that seems to be needed while protecting against its dangers.

7. 43 Ill. 2d at 60, 250 N.E.2d at 659. The guarantee of accuracy was as follows:

> Before starting any excavating or building, excavators and builders are requested to compare all measurements and should any discrepancies be found, report same to our home office at once.
>
> This plat of survey carries our absolute guarantee for accuracy, and is issued subject to faithful carrying out of the above and foregoing instructions and conditions before any liability will be assumed on part of the Jens K. Doe Survey Service.
>
> State of Illinois)
>)
>) ss
> County of Cook)
>
> I, John Marnul, hereby certify that I have resurveyed and located the building on the property above described and that the plat above is a correct representation of said survey and location
>
> Chicago, August 21st, A.D. 1955.

8. *Id.*

9. *Id.* For the traditional view, *see* Cherry v. Carson Pirie Scott & Co., 372 Ill. 252, 178 N.E. 498, 81 A.L.R. 1262 (1939), cited by the court in *Rozny, Id.* For evidence of the modern trend, *see* Rhodes Pharmacal Co. v. Continental Can, 72 Ill. App. 2d 362, 214 N.E.2d 726 (1966); Vandewater & Lapp v. Sacks Builders, Inc., 20 Misc. 2d 677, 186 N.Y.S.2d 103 (1959).

and not the traditional warranty made to a contracting party.[10]

The court viewed this express warranty to the consumer theory as essentially equivalent to tortious misrepresentation.[11] Wishing to avoid manipulating contracts concepts to accommodate what is essentially a tort action, the court based its holding on a theory of tortious misrepresentation.

The principal established by the court's holding that performance of a private contract can give rise to duties in tort, has had an extremely long and complex history. It represents the culmination of attempts to mitigate the harshness of the "general rule" that no duty could arise from the performance of a contract to a person not a party to it which first appeared in dictum in the early English case of *Winterbottom v. Wright*.[12] Today, the courts are applying the concept of strict liability which they conceive as based not on negligence nor warranty but in tort based on the duty a person has not to injure another.[13] This concept emerged from the simultaneous development and merger of the *MacPherson v. Buick Motor Co.*[14] line of cases which began by doing away with the privity requirement in a suit for negligent manufacture of goods, and the line of cases involving strict liability for breach of warranty.[15] Thus, a duty in tort can arise out of the performance of a contract, and since this duty is ultimately based in tort, no privity of contract is required for its enforcement. The *Rozny* court clearly acknowledged the existence of this concept when it stated:

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10. This theory had its origin in the case of Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932). Most of the cases in this area concern advertising as the means by which the warranty is given.

11. Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966). This case represents the trend in recognizing this fact.

12. 10 M & W 109, 152 Eng. Rep. 402 (1842). This rule was adopted in America by National Savings Bank v. Ward, 100 U.S. 195 (1879).

13. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *See also* Santor v. A & M Karagheusian, 44 N.S. 52, 207 A.2d 305 (1965). For a good account of this development *see* 76 YALE L.J. 887 (1966-67).

14. MacPherson v. Buick Motor Co., 217 N.Y. 382, 389 N.E. 1050 (1916), is perhaps one of the most quoted cases in the law, especially the part that reads as follows: "If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger . . . if to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer . . . is under a duty to make it carefully." Judicial recognition of the fact that this exception is actually the general rule, is indicated by Carter v. Yardley & Co., 64 N.E.2d 693 (1946). This case also contains a good history of the development of this rule.

15. The first cases imposing strict liability were food cases, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913), breach of warranty was quickly seized upon as a justification for this. Although there was great dispute as to the boundaries of this category, Spence v. Three Rivers Builders & Masonary Supply, 353 Mich. 120, 90 N.W.2d 873 (1958) was the case that extended the doctrine to any defective product.

> To eliminate any uncertainty still remaining after *Suvada v. White Motor Co.* . . ., we emphasize that lack of direct contractual relationship between the parties is not a defense in a tort action in this jurisdiction. Thus, tort liability will hence forth be measured by the scope of the duty owed rather than the artificial concepts of privity. Having discarded any remnants of the privity concept, we now concern ourselves with the scope of defendant's liability using traditional tortious misrepresentation standards.[16]

In holding that lack of privity is no longer a defense to what was essentially a tort action, the court has extended recovery for mere economic loss into the service area cases. Prior to *Rozny*, plaintiffs were in the dilemma of determining how to state their cause of action. If a court considered the cause of action to sound in contract it would, in all probability, dismiss for lack of privity.[17] If the plaintiff succeeded in surmounting this obstacle and convinced the court that privity was not needed, he encountered the risk of the court finding that his use of the defendant's services was not "known" to the defendant.[18]

Recovery for economic loss in the service area until now depended upon whether the plaintiff's use of the service was "direct" as distinguished from "incidental," or as the *Rozny* court said, "known" to the defendant and not merely "forseeable" by him. This distinction was the product of a line of cases beginning with *MacPherson v. Buick Motor Co.*, which allowed a person not in privity to recover for bodily injuries. In *Glanzer v. Shepard*,[19] this result was extended to allow recovery for mere economic loss. However, in *Ultramares v. Touche*,[20] *Glanzer* was distinguished on the grounds that the service involved was only "incidentally" for the benefit of the plaintiff and others not in privity with the defendant. In effect, privity was still being considered, if not in so many words, at least by implication. By substituting the "direct-incidental" distinction for a requirement of privity, the courts were applying concepts of contract law in what was essentially a tort

16. 43 Ill. 2d at 62, 250 N.E.2d at 660. Reading the appellate court opinion and the two cases that the court expressly overrules, National Iron and Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924), Albin v. Illinois Crop Improvement Ass'n, Inc. 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961), makes even clearer the court's recognition of this concept. In all three cases the court's decisions are based primarily on the lack of privity, the three courts saw these to be essentially actions based in contract. The Illinois Supreme Court in *Rozny* is making it quite clear that even though technically your cause of action may be phrased in contract terms, you are actually concerned with a duty in tort and privity is not required.

17. *See* Rozny v. Marnul, 83 Ill. App. 2d 110, 227 N.E.2d 656 (1969). *See also* the two cases cited in footnote 16.

18. 43 Ill. 2d at 64, 250 N.E.2d at 661. *See also* text accompanying notes 19 and 20.

19. 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425 (1922).

20. 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (1931).

action.

By restricting recovery on these grounds liability for mere economic injury was reduced substantially. However, the courts expressed a fear that to hold otherwise would result in "liability in an indeterminant amount for an indeterminant time to an indeterminant class."[21]

The Illinois Supreme Court in finding that "the situation is not fraught with such an overwhelming potential liability as to dictate a contrary result"[22] considered the following factors to be relevant to their decision:

> (1) The express, unrestricted and wholly voluntary "absolute guarantee for accuracy" appearing on the face of the inaccurate plat;
>
> (2) Defendant's knowledge that this plat would be used and relied on by others than the person ordering it, including plaintiffs;
>
> (3) The fact that potential liability in the case is restricted to a comparatively small group, and that, ordinarily, only one member of that group will suffer loss;
>
> (4) The absence of proof that copies of the corrected plat were delivered to anyone;
>
> (5) The undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistakes;
>
> (6) That recovery here by a reliant user whose ultimate use was foreseeable will promote cautionary techniques among surveyors.[23]

Thus, the court found that the duty extended, under these factors, to a person who was unknown when the survey was made but whose existence was clearly foreseeable, at least when he is a member of a comparatively small group.

By looking to these factors rather than automatically dismissing the suit on the basis of the prior authorities, the court lent strong support to its basic premise that the proper concern is the scope of the duty owed. The court in *Rozny* has not committed itself to the position that a possibility of potential unlimited liability would not, in the proper case, be a valid defense. Instead, it has concluded that henceforth this is only one of the factors which must be examined in order to determine the scope of the defendant's duty.

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21. 43 Ill. 2d at 63, 250 N.E.2d at 661.
22. *Id.* at 66, at 662.
23. *Id.* at 67, at 663. Some other factors that other courts have considered are seen in Biakanja v. Irving, 320 P.2d 16 (Cal. 1958). There, the court said that liability was a matter of policy and involved balancing many factors including the nature of the injury, foreseeability of harm, closeness of the defendants conduct, and the injury. Other factors include availability of witnesses and records, difficulty of discovering certain wrongs, Owens v. White, 342 F.2d 817 (9th Cir. 1965).

The six factual criteria enumerated by the court which are quite likely to be generalized into factors applied in future cases to determine the scope of the defendants' duty. The questions which must be asked are whether a guarantee of accuracy was made, whether the defendant should have forseen reliance upon his service, and whether the defendant attempted to correct his mistake.[24] Furthermore, the court will consider the size of the class to which the defendant may be liable, the desirability or requiring an innocent party to bear the burden of the mistake, and the desirability of promoting cautionary techniques in the service area. While all these criteria will not be present in every future case, to the extent that they are, they will determine the scope of the duty.

After disposing of the issue of liability, the court turned to the problem of determining the applicable statute of limitations. The plaintiff argued that the written guarantee of accuracy contained in the plat brought the action under the section of the statute dealing with written contracts.[25] The defendant, on the other hand, argued that the shorter statute concerning breach of oral contracts or injury to real property should be applied.[26] The court rejected the plaintiff's argument on the grounds that the written contract provision was not only not intended to cover this type of action, but "to hold it applicable here would be incompatible with our emphasis upon the fact that the basis of liability affirmed here is not contractual in nature."[27] Instead, the court applied Section 15 of the Limitations Act which in pertinent part states that "all civil action not otherwise provided for . . . shall be commenced within five years next after the cause of action accrued." This phrase was previously construed to cover fraud and deceit;[28] the

24. It is interesting to note that in the two cases that the court cites as supporting the relaxation of the fear over unlimited liability, both defendant accountants failed to notify anyone of their errors after they were discovered. This is the situation in *Rozny* for Marnul knew that the survey was wrong, yet he took no action to correct it. *See* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968). Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y. 1967); *see also* 15 HASTINGS L.J. 436 (1964).

25. Except as provided in Section 2---725 of the "Uniform Commercial Code", enacted by the Seventy-Second General Assembly, actions on bonds, notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued . . . ILL. REV. STAT. 1967, ch. 83, § 17, § 16 of the Limitations Act.

26. Except as provided in Section 2-725 of the Uniform Commercial Code, enacted by the Seventy-Second General Assembly, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages from injuries done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. ILL. REV. STAT. 1967, ch. 83, § 16, sec. 15 of the Limitations Act.

27. 43 Ill. 2d 68, 250 N.E.2d at 664.

28. See the cases cited in S.H.A., ch. 83, Sec. 16 (1966).

Rozny court interpreted it to also include tortious misrepresentations. However, the more difficult question was when the cause of action accrued. If it was when the plaintiff first became aware of the defect, approximately two years before the suit was commenced, then the suit was timely. On the other hand, if it commenced to run when the plat was given to the builder or when the plaintiff relied on the guarantee, the statutory period would have run. The court in finding for the plaintiff held that the cause of action accrued when the plaintiff knew or should have known of the defect, applying what is commonly termed as the "discovery rule."

The discovery rule adopted by the court originated in the medical malpractice cases where the negligence charged involved leaving foreign objects within the patient at the conclusion of an operation.[29] Currently the trend is to extend this rule to include cases involving a negligent diagnosis.[30]

The rationale adopted by these cases shows little reason for not extending this rule to other service area cases. In both situations the same three arguments are generally used by the defense in attempting to controvert the adoption of the discovery rule. The first of these arguments is that the statute of limitations was designed to prevent stale or fraudulent claims and the discovery rule partially defeats this purpose; the second is that the defendant cannot present a meritorious defense due to the increased difficulty of proof resulting from the passage of time; and the third is that the adoption of the rule is, in effect, judicial legislation.[31]

These arguments have met with little success. Fraud in these cases is not a relevant consideration because the possibility of a fabricated claim is nullified by the very nature of the negligent act. In the service area cases that involve the performance of labor, for example fixing a car, any negligence will generally be quite easily ascertainable. In other cases where judgment, skill, and training play a more critical part, for example, cases involving doctors, lawyers, architects, and engineers, there will generally be little difficulty in discovering the defect, since there will often be some kind of physical object existing which indicates the nature and the extent of the negligence. In *Rozny* this would be

29. *See* 80 A.L.R.2d 368 (1961) and later case service. This is an excellent summary of the entire area. *See also* Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961), the case that started it all.

30. *See* Frohs v. Greene, 88 Ore. 131, 452 P.2d 564 (1969), Ovens v. Shite, 342 F.2d 817 (9th Cir. 1965), Yoshizaki v. Hilo Hospital, 50 H. 150, 433 P.2d 220 (1967), Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968).

31. 25 WASH. & LEE L. REV. 78 (1968).

the survey plat.

As to the second argument, the adoption of the discovery rule by the court required that it meet the problem thus raised of "balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue."[32] Presumably, the period of time between the preparation of the survey and the actual discovery of the mistake did not so impair the defendant's ability to prove any such defense. First, the arguments used above, concerning frivolous claims, are equally applicable here. Thus, some physical record will usually exist, and if not, there will be some objective standard to measure any breach of the duty. In either case, the mere passage of time does little to counteract these factors. Secondly if any difficulties are generated by the passage of time, the plaintiff is as equally burdened as the defendant. Finally, there exists other safeguards favorable to the defendant.[33] The plaintiff still has the burden of proof; he must still show proximate cause; and he must prove freedom from contributory negligence.

Although the final argument is that the discovery rule is merely judicial legislation, those who advocate this rule often forget that when the legislature has defined the starting period for the running of the statute of limitations by the use of the word "accrued," it is up to the judiciary to define just what this means. To refuse to do otherwise would amount to abdication of the judicial duty to determine the more appropriate rule when there are two or more conflicting interpretations.[34]

In the furtherance of this judicial duty, the *Rozny* court relied heavily upon the legislative policy manifested by a bill introduced before the Illinois General Assembly. An act passed in 1967[35] provides that no action may be brought more than four years after errors or omissions in a survey were or should have been discovered. While, of course, this act was not binding in the instant case, the court was strongly persuaded by the policy adopting a "discovery rule." Considering this act, the statutory enactment of a discovery rule in foreign object medical malpractice cases in Illinois,[36] and recent trends in other jurisdictions, the court felt compelled to interpret Section 15 of the Limitations Act as intended to commence running when the plaintiff knew or should

32. 43 Ill. 2d at 70, 250 N.E.2d at 664.
33. *See* note 31 *supra.*
34. *See also* Yoshizaki v. Hilo Hospital (50 H. 159), 433 P.2d 220, 224 (1967).
35. ILL. REV. STAT. 1967, ch. 83, § 11.
36. ILL. REV. STAT. 1967, ch. 83, § 22.1.

have known of the defendant's error in this type of case.

The Illinois Supreme Court's decision in *Rozny* v. *Marnul* greatly increased the probability of recovery for mere economic loss due to a defendant's errors in the service area. First, the court recognized that the basis of liability is tortious misrepresentation. Traditionally, misrepresentation cases have turned on the deliberate or negligent nature of the misrepresentation. Here, however, there was no question that the misrepresentation was not deliberate and there was no discussion of what acts of the defendant, if any, were of a negligent nature. Rather, the court seems to attach responsibility on the basis that the survey was in fact incorrect. This would appear to establish a type of strict liability but that result may be applicable only where, as here, there was an express guarantee of accuracy. On the other hand this would seem to make the action one for breach of warranty, rather than misrepresentation, a conclusion which the court expressly rejected.

Once the basis of liability was established as tortious misrepresentation and the court held privity never to be a requirement in Illinois in a case sounding in tort, the critical question became the scope of the duty owed, the determination of what class could rightly complain of the error. The court holding on the facts of this case that it extended beyond known users of the service has expanded existing law on this point. The extent of that expansion is, however, as yet unknown, because the court established no rigid test but merely identified the factors they felt supported their conclusion in this case.

Finally, by the application of the discovery rule to determine when the cause of action "accrued", the court placed all cases involving incorrect surveys within the same category, regardless of whether they arise before or after the effective date of the new statute. Because of that statute this holding may be more significant in its possible application to other service area cases where the wrong is unknown until after a substantial period of time has elapsed.

Since the court limited its holding to apply solely to surveyors, it is not clear to whom it will be applied in future cases. It may apply to other professions within the service area such as accountants, engineers, and architects. However, to the extent that these professionals do not certify to the accuracy of their results, it may not be applied to them.

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