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Supreme Court No. 90851-6  
Court of Appeals No. 44328-7-II

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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EARL VERNON, individually and as Personal Representative  
of the ESTATE OF HENRY DAVID VERNON,

Appellant,

v.

AACRES ALLVEST, LLC, a Limited Liability Corp.,  
AACRES LANDING, INC., AACRES WA, LLC,  
a Limited Liability Corp., and AALAN HOLDINGS, INC.,

Respondents.

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**DISABILITY RIGHTS WASHINGTON  
AMICUS CURIAE BRIEF**

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 ORIGINAL

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## I. INTEREST OF AMICUS CURIAE

Amicus Disability Rights Washington (DRW) advocates for the rights of people with disabilities. *See* DRW Motion to Appear as Amicus. DRW seeks to assist the Court to understand how the beneficiary provisions of the wrongful death statute render the lives of many people with disabilities worthless and how this Court can remedy this injustice.

## II. STATEMENT OF THE CASE

Amicus joins in Appellant's Statement of the Case.

## III. ISSUES ADDRESSED BY AMICUS

- A. **Whether there is an issue of substantial public interest warranting this Court's review when people with developmental disabilities are excluded from the statutory remedy for wrongful death claims. RAP 13.4(b)(4).**
- B. **Whether describing a common law cause of action circumvents or amends the wrongful death and survival statutes as they are written.**

## IV. ARGUMENT

- A. **Review by this Court is proper because it addresses an issue of significant public interest, the systemic devaluation of the lives of people with disabilities.**

Because of the economic and social realities of living with disabilities, many individuals are unable to recover under the wrongful death statutory scheme. This is a systemic devaluation of the lives of people with disabilities.

As the parties' briefs detail, Washington's wrongful death statute provides two categories of people who may recover when someone wrongfully dies. The first tier of people allowed to recover are the spouse or children of the decedent. RCW 4.20.020. If the decedent has no one in that category, individuals from the second tier of beneficiaries, parents or siblings of the decedent who are dependent on the decedent, may recover. *Id.* Due to a variety of factors outside their control, many people with disabilities do not have statutory beneficiaries. This leaves them with no value if they are wrongfully killed by another's actions.

People with disabilities are less likely than the general population to have Tier 1 beneficiaries due to social and legal barriers to such relationships. For example, for many people with disabilities, their only source of income is Supplemental Security Income (SSI), income-based government benefits provided by the Social Security Administration.<sup>1</sup> Recipients of SSI benefits face a "marriage penalty." Generally, an

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<sup>1</sup> According to numbers compiled by Disability Compendium, based on the 2013 Census, in 2013, 480,118 people with disabilities lived in Washington State. *Table 4.1: Poverty – Civilians with Disabilities Ages 18-64 Years Living in the Community for the United States and States: 2013*, <http://disabilitycompendium.org/compendium-statistics-2014/poverty> (follow Table 4.1 hyperlink) (last visited Nov. 21, 2014) [hereinafter *Table 4.1*]. There were 150,239 SSI beneficiaries in Washington State in 2013. *Table 1: Number of recipients by state or other area, eligibility category, age, and receipts of OASDI benefits, December 2013*, [http://www.ssa.gov/policy/docs/statcomps/ssi\\_sc/2013/table01.pdf](http://www.ssa.gov/policy/docs/statcomps/ssi_sc/2013/table01.pdf) (last visited Nov. 24, 2014). Meaning almost a third of people with disabilities in Washington receive SSI in 2013.

individual will receive a higher benefit rate and be permitted to have more resources and assets as an individual than part of a married partnership.<sup>2</sup> Moreover, people who have guardians may be legally precluded from marrying. *See* RCW 11.88.030 (notice of a petition for guardianship should include rights that an individual could lose if a guardian is appointed, including the right to marry or divorce).

In addition to the monetary disincentive and legal barriers to marry, people with developmental disabilities are often not supported in having personal relationships that would result in marriage or children. This is not surprising given DRW's finding regarding the lack of support generally for people with disabilities to make their own decisions.<sup>3</sup> Furthermore, even if people with intellectual disabilities have children, they lose them in termination proceedings at a significantly high rate.<sup>4</sup>

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<sup>2</sup> In 2014, a single eligible individual may receive \$721 per month, but an eligible couple may only receive \$1082 per month. *SSI Federal Payment Amounts*, SOCIAL SECURITY ADMINISTRATION, <http://www.ssa.gov/oact/cola/SSIAMts.html> (last visited Nov. 21, 2014). *See also* Richard Balkus and Susan Wilshke, *Social Security Administration Issue Paper: Treatment of Married Couples in the SSI Program*, (Dec. 2003), <http://www.ssa.gov/policy/docs/issuepapers/ip2003-01.html> (discusses how marital status affects benefit rates, counting of income, and resources in determining SSI eligibility) and *Self-Advocacy Assoc. of NYS, Inc., SSI Marriage Penalty Video*, YOUTUBE (Apr. 19, 2010), <https://www.youtube.com/watch?v=sPqo0V9BGD8> (video made by self-advocates highlighting first-hand accounts about how the marriage penalty affects people with disabilities).

<sup>3</sup> *See* Disability Rights Washington, *Empowering Choice: From Pizza to Politics* (2013), <http://www.disabilityrightswa.org/empowering-choice> (investigative report on autonomy and decision-making in Supported Living settings).

<sup>4</sup> Estimates for parents with intellectual disabilities indicate termination of parental rights at a rate of between 40% and 60%. *See* David McConnell & Gwynnyth Llewellyn,

People with disabilities are also less likely to have Tier 2 beneficiaries. SSI benefits are often their only source of income and, in 2014, the maximum amount a beneficiary can receive is \$721 a month. *SSI Federal Payment Amounts, supra* note 2. Even if an individual has an alternative source of income, people with disabilities are more than twice as likely to live in poverty as people without disabilities in Washington.<sup>5</sup> This means 133,605 people with disabilities in our state are living in poverty. *Table 4.1, supra* note 1. As such, many people with disabilities will not be able to financially support Tier 2 beneficiaries, dependent parents or siblings.

Thus, the wrongful death statutory scheme denies people with disabilities due process and renders them meaningless when killed due to other's actions. This is, therefore, a matter of substantial public interest.

**B. Court recognition of a common law cause of action is proper where the absence of a cause of action for a broad class of people frustrates the purpose of the statute and public policy.**

The purpose of awarding damages under the survival statutes is “to remedy the common law anomaly which allowed tort victims to sue if they

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*Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 299-300 (2002).

<sup>5</sup> In 2013, 27.8% of people with disabilities ages 18-64 are living in poverty compared to 12.1% of people without disabilities. *Table 4.1, supra* note 1, and *Table 4.2: Poverty and People with Disabilities, supra* note 1, and *Poverty – Civilians without Disabilities Ages 18-64 Years Living in the Community for the United States and States: 2013*, <http://disabilitycompendium.org/compendium-statistics-2014/poverty> (follow *Table 4.2* hyperlink) (last visited Nov. 21, 2014) [hereinafter *Table 4.2*].



survived but barred their claims if they died.” *Otoni ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). The wrongful death statute creates a cause of action when a person dies as a result of the “wrongful act, neglect, or default of another.” RCW 4.20.010. The policy underlying the statute is not to ensure specific beneficiaries are compensated, rather it is to “preserve a cause of action that the decedent could have brought had he or she survived.” *Otonoi ex re. Shigaki*, 151 Wn.2d at 755. The statutory beneficiaries are simply a mechanism to implement this policy.

Recognizing a common law cause of action does not circumvent or amend the statute as it is written. Instead, cases like this expose a gap in the statutory scheme whereby individuals are excluded from the available remedy in a way that is inconsistent with the underlying policy.

This Court recognizes a common law cause of action can exist even where statutory provisions would otherwise preclude a remedy. *Roberts v. Dudley*, 140 Wn.2d 58, 93 P.2d 901 (2000).

In *Roberts*, the Court examined the Washington Law Against Discrimination (WLAD) which provided remedies only when an employee worked for an employer of eight or more employees. The Court recognized a cause of action for the tort of wrongful discharge by employers of fewer than eight employees because the overriding public

policy established by the statute prohibited sex discrimination in employment. *Id.* Using an analogous analysis here, David Vernon’s wrongful death claim meets the required elements to state a common law cause of action for wrongful death in violation of public policy which is to “preserve a cause of action that the decedent could have brought had he or she survived.” *Otoni ex rel. Shigaki*, 151 Wn.2d at 755.

The test in *Roberts* required four elements to be met: (1) clarity – the plaintiffs must prove the existence of a clear public policy; (2) jeopardy – the plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy; (3) causation – the plaintiffs must prove that the public policy linked conduct caused the harm; (4) absence of justification – the defendant must not be able to offer an overriding justification for the dismissal. 140 Wn.2d at 64-65.

**1. There is a clear public policy valuing people with disabilities.**

In *Roberts*, the Court looked to *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), which established a “court may not sua sponte manufacture public policy but must rely on that public policy previously manifested in the constitution, a statute, or a prior court decision.” 102 Wn.2d at 232. Recognition of existing public policy in one of these sources satisfies the clarity element. *Roberts*, 140 Wn.2d at 67.

Here, the Court has an abundance of public policy upon which to rely. Congress found that

disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently, to exert control and choice over their own lives, and to fully participate in and contribute to their communities through full integration and inclusion in the economic, political, social, cultural, and educational mainstream of United States society.” 42 U.S.C. § 15001(a)(1).

Furthermore, “individuals with developmental disabilities are at a greater risk than the general population of abuse, neglect, financial, and sexual exploitation, and the violation of their legal and human rights.” *Id.* at § 15001(a)(5).

Washington State also recognizes the need to prevent the mistreatment of some adults with disabilities from “abuse, neglect, fraud, exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult.” RCW 74.34.005(1) (known as the Vulnerable Adult Protection Act (VAPA)).

Additionally, just as WLAD provided the public policy direction against sex discrimination used in *Roberts*, WLAD describes the public policy of not discriminating against people due to the

presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants, but menaces

the institutions and foundation of a free democratic state. RCW 49.60.010.

Both federal and state statutes express a clear public policy to value and protect individuals with disabilities and afford them equal rights.

**2. Public policies valuing people with disabilities are jeopardized by an absence of civil disincentive for caregiver-caused deaths.**

The absence of a cause of action for wrongful death for many people with disabilities jeopardizes the public policies of the federal and state governments. The service delivery system for people with disabilities has many shortcomings, and the existing system the state has for stopping abuse and neglect is inadequate, resulting in unsafe living situations going unchecked.<sup>6</sup> Therefore, without a state system that stops harmful conditions, the lack of a private cause of action leaves the public policy in great jeopardy as evidenced by the instant case.

Here, the Supported Living care company, Aacres, tasked with providing a safe living environment for David Vernon failed to do so. This directly resulted in David's death. Because the state's wrongful death and survival statutes do not provide statutory redress for David, through his

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<sup>6</sup> See Disability Rights Washington and Columbia Legal Services, *Too Little, Too Late: A Call to End Tolerance of Abuse and Neglect* (November 1, 2012), <http://www.disabilityrightswa.org/too-little-too-late> (investigative report discussing ongoing tolerance of abuse and neglect in the Supported Living program of the Department of Health and Social Services).

brother and personal representative, Earl Vernon, the legal system has declared that David's life had no value. This leaves the established public policy unfulfilled and Aacres with no accountability for the death of its client. Aacres continues to operate as a state-certified service provider for people with disabilities and has virtually no disincentive to engage in activities that jeopardize the safety of those to whom they are obligated to provide services. There is a long list of people waiting to get these scarce supports they provide which, combined with no liability for wrongful death, results in no financial disincentive for acts that cause client death.

**3. Harm is caused by failing to uphold public policies that value people with disabilities.**

The failure to uphold public policies valuing people with disabilities causes harm. In this case, Aacres was responsible for providing a safe environment and support David to make safe decisions. They failed to do this which resulted in David's death. The lack of an effective abuse response system combined with the lack of civil penalties results in care providers failing to appreciate the gravity of the situation.<sup>7</sup>

**4. There is no overriding justification for devaluing people with disabilities.**

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<sup>7</sup> In fact, the day after David died from overheating, another Aacres client was hospitalized due to the heat. See Adam Lynn, *Family Unhappy with Group Home's Handling of Daughter*, THE NEWS TRIBUNE, Oct. 24, 2010, available at 2010 WLNR 21267764.

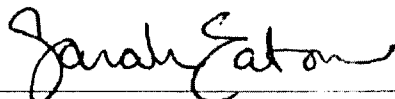
There are no overriding competing policies or safety concerns that would permit or promote the systemic devaluing of people with disabilities created by the lack of a common law cause of action.<sup>8</sup>

## V. CONCLUSION

Amicus respectfully requests the Court grant the appellant's petition for review because of the substantial public interest in valuing individuals with disabilities as full members of society. The wrongful death and survival statutes fail to extend the remedy to individuals like David, who have no statutory beneficiaries and will never be made whole by the statutory remedy, thus devaluing his life and rendering blameless the caregiver who failed to provide a safe environment.

Dated this 24th day of December, 2014.

Respectfully submitted,

By   
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<sup>8</sup> In *Roberts*, even with a competing public policy, the court found that a common law cause of action for wrongful discharge could be predicated on a clear public policy against sex discrimination in employment in spite of an established policy of protecting small employers. 140 Wn.2d at 76-77.

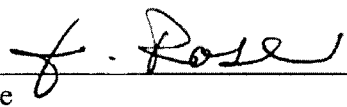
**Certificate of Service**

I certify under penalty of perjury pursuant to the laws of the State of Washington that on December 24, 2014 I caused to be served a true and correct copy of the foregoing document upon counsel listed below via United States Postal Service by first-class mail, postage prepaid, at the following addresses:

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DATED December 24, 2014 at Seattle, Washington.

  
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Jodi Rose

