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Court of Appeals No.: 44328-7-ii

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/Petitioner,

v.

AACRES ALLVEST, LLC, a limited corporation; AACRES LANDING,  
INC.; AACRES WA LLC, a limited liability corporation; and  
AALAN HOLDINGS, INC.,

Respondents.

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ANSWER TO DISABILITY RIGHTS WASHINGTON'S AMICUS  
CURIAE BRIEF

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 ORIGINAL

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## I. INTRODUCTION

Disability Rights Washington's ("DRW") amicus curiae brief is a regurgitation of Petitioner's arguments. DRW fails to provide any legal support for its argument that the wrongful death statute denies deceased people with disabilities due process postmortem. In addition, DRW has attempted to expand an unrelated holding in *Roberts v. Dudley* without providing any support that the specific holding in *Roberts* confined to the Washington Law Against Discrimination should be expanded to apply to the subject issue. *Roberts v. Dudley*, 140 Wn.2d 58, 93 P.2d 901 (2000). There is absolutely no relationship between the Court's recognition of a common law cause of action in the employee discrimination context and a wrongful death common law cause of action which conflicts with the existing statutory framework.

For these reasons, and the reasons set forth below, DRW's amicus curia brief is without merit and the Court should deny the petition for review.

### A. THE DECEDENT IS NOT DENIED DUE PROCESS POSTMORTEM

DRW argues that the current statutory framework prevents a disabled decedent from seeking redress. However, DRW's argument is a reiteration of Petitioner's unsuccessful argument. As the Court of Appeals confirmed, the decedent is not unconstitutionally denied due process because the decedent: (1) cannot pursue an action in the courts postmortem; (2) has no constitutional right of access to the judiciary

postmortem; and (3) does not maintain any constitutional rights postmortem.

DRW's arguments, like Petitioner's arguments, were rejected by the Court of Appeals. *Vernon v. Acres Allvest, LLC*, No. 12-2-10662-8, 2014 Wash. App., at \*11 (Div. II. Sept. 3, 2014). In rejecting Petitioner's arguments, the Court of Appeals relied on the reasoning set forth in *Triplett v. Dep't of Soc & Health Servs.*, 166 Wn. App. 423, 429, 268 P.3d 1027 (2012), *review denied*, 174 Wn.2d 1003, 278 P.3d 1111 (2012). The appellate court held in *Triplett* that the "access-to-courts argument has no merit...[s]ince a person who is dead cannot pursue an action, it is *absurd* to suggest that the wrongful death statute unlawfully restricts their access to the courts." *Triplett*, 166 Wn. App. at 429.

The statutory framework that provides the causes of action for wrongful death and survival actions does not create a constitutional right for the decedent to pursue a cause of action. The general survival statute preserves all causes of action that a decedent could have brought had he or she survived. *Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755-756, 92 P.3d 192 (2004).

DRW has failed to add any compelling arguments to Petitioner's already rejected arguments. As such, this Court should deny the petition for review.

**B. A COMMON LAW CAUSE OF ACTION THAT CONFLICTS WITH THE EXISTING STATUTORY FRAMEWORK IS NOT APPROPRIATE**

Like the Petitioner, DRW argues for recognition of a wrongful death common law cause of action. The Court of Appeals confirmed that it cannot recognize a common law wrongful death cause of action because doing so would conflict with the existing statutory framework and it is not the function of courts to modify legislative enactments. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7. As the Court of Appeals confirmed, the Supreme Court in *Philippides v. Bernard* rejected adopting a common law cause of action for wrongful death because doing so would create a direct conflict with the existing statutory scheme. 151 Wn.2d 376, 88 P.3d 939 (2004); *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7-9.

DRW's argument for a dramatic expansion of the holding in *Roberts v. Dudley* is without support. In *Roberts*, the Court recognized a cause of action for the common law tort of wrongful discharge in violation of public policy against an employer with fewer than eight employees who allegedly had discharged the plaintiff because she was pregnant. *Roberts*, 140 Wn. 2d at 58. The Court examined statutory declarations of public policy with regard to sex discrimination, including Washington's Law Against Discrimination, and a judicial affirmation of the policy in a case of sex discrimination, and concluded that there is, in Washington, a clear mandate of public policy against sex discrimination. *Id.*

Therefore, the Court held that the clear mandate of public policy against sex discrimination supports the long-established tort of wrongful discharge in violation of public policy where an employee is discharged based on sex discrimination. *Id.* at 76. The holding in *Roberts* has been confined to the area of wrongful discharge and there is no basis with which to support expanding the holding to the unrelated issue of wrongful death actions. The Court's holding in *Roberts* relies on the Court's prior recognition of an exemption to the at-will rule in the form of a common law cause of action in tort for wrongful discharge of an employee where the discharge contravenes a clear mandate of public policy that was already clearly expressed in the constitution, a statute, or a prior court decision. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

Here, there is no applicable authority for the theory advocated by DRW. Recognizing a wrongful death common law cause of action would work a significant change in the law, and would require an interpretation of the wrongful death statute that is inconsistent with RCW 4.20, *et seq.* Survival of the action to the benefit of siblings who are not dependent on the decedent is not necessary to the legislative purpose. *Schumacher v. Williams*, 107 Wn. App. 793, 802, 28 P.3d 792 (2001).

As the Court of Appeals decision confirms, Washington's courts have long and repeatedly held causes of action for wrongful death and survival are strictly a matter of legislative grace and are not recognized in the common law. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7;

*see also Tait v. Wahl*, 97 Wn. App. 769, 771, 987 P.2d 127 (1999). Throughout the long history of these wrongful death and survival statutes, second tier beneficiaries have been required to prove they were dependent on the decedent for support in order to qualify for relief. The beneficiaries under both the survival and the wrongful death statutes have never included siblings who are not dependent on the decedent for support. *Schumacher*, 107 Wn. App. at 802.

In sum, the decision in *Roberts* has no application to the issue before the Court. The holding in *Roberts* is narrowly confined to issues involving wrongful discharge. In addition, causes of action for wrongful death and survival are strictly a matter of legislative grace and are not recognized in the common law. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7; *see also Tait*, 97 Wn. App. at 771. Thus, DRW's arguments have no merit and this Court should deny the petition for review.

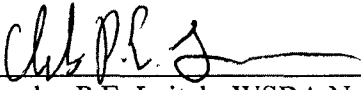
## II. CONCLUSION

The Court of Appeals correctly affirmed the trial court's dismissal of Petitioner's unsupported and unworkable theory of recovery under the wrongful death statutes. DRW has not offered any compelling reason for the Court to accept review of the Court of Appeals' published opinion; thus, the Court should deny the petition for review.



RESPECTFULLY SUBMITTED this 13 day of June, 2015.

PATTERSON BUCHANAN  
FOBES & LEITCH, INC., P.S.

By:   
Charles P.E. Leitch, WSBA No. 25443  
Andrew M. Weinberg, WSBA No. 36838  
Of Attorneys for Respondent

DECLARATION OF SERVICE

I, John Carlo Balcita, hereby declare under penalty of perjury that the following statements are true and correct: I am over the age of 18 years old and am not a party to his case.

On January 13, 2015, I caused to be served to the attorney for the Appellant, a copy of the **ANSWER TO DISABILITY RIGHTS WASHINGTON'S AMICUS CURIAE BRIEF**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

**Filed with the Supreme Court in and For the State of Washington:**  
Via Email to:


Supreme@courts.wa.gov

**The address to which these documents were provided to Appellant:**

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911 Pacific Ave., Ste. 200  
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[ x ] Via Legal Messenger (ABC Messenger Service)

DATED January 13, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
John Carlo Balcita,  
Legal Assistant

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*Vernon v. Aacres Allvest, et al*  
Supreme Court No. 90851-6  
Court of Appeals No. : 44328-7-ii

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