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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 293688

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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BETTY JEAN TRIPLETT, et al,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES, et al,

Appellants.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

### A. **RCW 4.20.020 Establishes Beneficiaries Entitled To Recover In Wrongful Death Actions Without Regard To Whether The Deceased Was Disabled**

Ms. Triplett and Mr. Smith do not dispute that the plain language of RCW 4.20.020 requires that in order to maintain an action for wrongful death for the benefit of a parent or sibling of the deceased, the personal representative of the deceased's estate must show (1) that there are no "first tier beneficiaries" (spouse, registered domestic partner, or children of the deceased) and (2) that the parent and/or sibling was "dependent on the deceased for support." Ms. Triplett and Mr. Smith also do not dispute that neither of them was dependent on Kathleen Smith for support at the time of her death. In short, Ms. Triplett and Mr. Smith concede that they have no cause of action under RCW 4.20.020.

Instead, Ms. Triplett and Mr. Smith argue, citing many well known rules of statutory construction, that the legislature did not intend for RCW 4.20.020's limitation of beneficiaries to be applied when, because of mental disability, the deceased was not capable of providing support to his or her parents and siblings. Therefore, Respondents contend, non-dependent parents and siblings of deceased's who were mentally disabled to the extent they could not have provided support must be allowed to maintain a wrongful death action. Since they can cite to no precedent of

any kind to support this view of the law, Ms. Triplett and Mr. Smith characterize this as an “issue of first impression.” However, RCW 4.20.020 is plain, clear, and unambiguous, Washington decisional law pertaining to the beneficiaries allowed to recover in wrongful death actions is well settled and Respondents’ strained and meritless reading of the statute does not transform the issue here to one of first impression.

The firmly settled rule in Washington is that non-dependent parents and siblings are not recognized as beneficiaries under RCW 4.20.020:

The wrongful death statute, RCW 4.20.010, provides that when the death of a person is caused by the wrongful act of another, his personal representative may maintain an action for damages against the person causing the death.” . . . The wrongful death statute, however, is expressly limited to two tiers of beneficiaries:

The first tier of beneficiaries includes the spouse and children of the deceased; these beneficiaries need not establish dependence on the deceased. The second tier of beneficiaries, which includes the parents and siblings of the deceased, may recover only if there are no first tier beneficiaries *and* only if the designated beneficiaries were dependent for support on the deceased.

*Tait v. Wahl*, 97 Wn. App. 765, 769, 987 P.2d 127 (1999), *review denied*, 140 Wn.2d 1015 (2000).

Ms. Triplett and Mr. Smith argue that the legislature did not intend RCW 4.20.020’s limitation of beneficiaries to apply when the deceased

was disabled and unable to provide support to parents or siblings. The argument is resolved by the plain language of the statute and by *Schumacher v. Williams*, 107 Wn. App 793, 28 P.3d 792 (2001), *review denied*, 145 Wn.2d 1025 (2002). In *Schumacher* the deceased was a woman disabled by Downs Syndrome who died after a scalding bath at an adult boarding home. The deceased was survived by a non-dependent brother who sued under state and federal statutes pertaining to abuse of vulnerable adults which allowed the action to be maintained for the benefit of “the surviving spouse, child or children, or other heirs set forth in RCW 4.20.” Dismissal of the claims was affirmed because, under the wrongful death (RCW 4.20.020) and survival statutes (RCW 4.20.046), regardless of the deceased’s disability, her non-dependent brother was not a beneficiary entitled to recover and therefore not an heir under the vulnerable adult statute.

The court in *Schumacher* first pointed out, as other courts have often done, that in Washington, beneficiaries under the wrongful death and survival statutes “have not included siblings or parents who are not dependent on the decedent for support.” *Schumacher*, 107 Wn. App. at 801-02, citing *Tait v. Wahl*, 97 Wn. App. at 769. Noting that, “A review of the history of the wrongful death and survival action statutes reflects a consistent conservatism on the part of the Legislature with regard to the

beneficiaries of those statutes,” *id.*, the court went on to hold that the statutes creating liability for abuse of vulnerable adults, like the deceased in *Schumacher*, could not reasonably be read to allow claims to survive to non-dependent siblings or parents:

To interpret the phrase “or other heirs set forth in chapter 4.20 RCW” to *not* include the dependency requirement for those “other heirs” would work a significant change in the law, would essentially amend chapter 4.20 RCW by implication, and would require an interpretation of the abuse of vulnerable adult statute that is inconsistent with chapter 4.20 RCW.

*Schumacher v. Williams*, 107 Wn. App. at 802.

The *Schumacher* court recognized that applying the statutory beneficiary limitations of the wrongful death and survival statutes was particularly harsh in a case where the deceased had no qualifying beneficiaries because she was unable to have children or an income, but concluded that the statutes were clear and that in such cases non-dependent siblings and parents have no cause of action. *See Schumacher*, 107 Wn. App. at 805, Judge Ellington, concurring:

Had Maria Schumacher survived her scalding bath, she would have had a cause of action under the statute. But when abuse or neglect results in death, instead of just injury, the wrong goes without remedy unless the deceased is survived by a spouse, a child, or *dependent* parents or siblings.

Certainly there are many vulnerable adults with spouses or children. Probably some few even have wealth, so that dependent heirs, parents or siblings, may exist. Maria Schumacher, as it happened, had neither wealth, nor spouse or children. So, her family is left without recourse, and those whose negligence allegedly led to her death are left unaccountable. In cases of vulnerable adults without statutory heirs, the message to caregivers seems to be that fatal negligence is preferable to mere injury.

I nonetheless concur in the majority opinion, because courts must not, despite strong policy considerations, bend the rules of statutory construction to work an unstated change in the law. The majority correctly refuses to do so. This is a matter the legislature must address, as I hope it does.

Since the decision in *Schumacher*, almost ten years ago, the legislature has repeatedly taken up the issue of whether wrongful death and survival statute beneficiaries should, in any circumstances, include non-dependent siblings and parents. As pointed out in Appellant's Opening Brief (Appellant's Br.) at 23-24, the Legislature has consistently rejected the invitation to expand the list of beneficiaries to include non-dependent parents and siblings.

Ms. Triplett and Mr. Smith argue that applying the beneficiary limitations to Ms. Smith's non-dependent mother and brother causes an absurd result because in enacting the limitations, legislators must have "presumed" that deceased's would be capable of providing financial support or services, and it would therefore be absurd to apply the statute to

the beneficiaries of a deceased who obviously lacked the ability to provide services or financial support. Respondents' argument flies in the face of reason. First, it is commonly known that many persons, with disabilities or without disabilities, reach the end of life without first tier beneficiaries or dependent parents, brother or sisters. For a variety of reasons, these decedents leave no net financial accumulation. Whether such decedents were disabled or not, the Legislature has consistently declined to include their non-dependent parents and siblings as beneficiaries under RCW 4.20.020.

In addition, reasonable legislators in modern Washington would not *presume*, as respondents urge, that parents and/or siblings usually rely on their children, brothers and/or sisters for financial support and services. On the contrary Washington legislators, as most Washingtonians, would likely presume that parents and siblings usually do not rely on their children, brothers and sisters for support or services. In other words, when enacting RCW 4.20.020, Washington legislators were aware that many decedents would not have had the means to provide support to parents and siblings and knew that most parents and siblings would not be dependent on their deceased adult child, brother or sister, and with that knowledge provided a remedy to only those parents or siblings of adult decedents who would suffer financially as a result of the death because they were

dependent. In plain language, the Legislature did not intend, in any circumstances, that non-dependent siblings or parents would be beneficiaries under RCW 4.20.020. *Tait v. Wahl*, 97 Wn. App. at 769; *Masunaga v. Gapasin*, 57 Wn. App. 624, 631, 790 P.2d 171 (1990).

The obvious intent of the wrongful death and survival statutes was to provide the cause(s) of action to spouses, children and registered domestic partners – persons who would typically rely on the deceased for financial support and services – and to allow parents, brothers and sisters of adult decedents to recover only in those cases where it can be shown that parents or sibling did rely on the deceased child, brother or sister for financial support and/or services of the significance shown in *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d. 914 (2009). Application of the statute to Ms. Smith is not absurd but in complete harmony with the clear intent of the Legislature.

Here, the absurd result would occur if the strained reading of the statute urged by Ms. Triplett and Mr. Smith were adopted since, contrary to the express language of the statute, parents, brothers or sisters who were not dependent on the deceased would be allowed to pursue an action if they could show that their deceased child or sibling was disabled and not capable of working. At the same time, the non-dependent parents and siblings of a deceased child, brother or sister who was capable of working

would not be able to recover. The statute expresses no such intent, and an interpreting RCW 4.20.020 “to *not* include the dependency requirement for those [whose child or sibling was mentally disabled] would work a significant change in the law, [and] would essentially amend chapter 4.20 RCW by implication.” *Schumacher*, 107 Wn. App. at 802. The Legislature, not the court, must amend the statutes if it sees fit and it has not done so. It was clear error for the trial court to decline to apply the second tier beneficiary restrictions of RCW 4.20.020.

**B. RCW 4.20.020 Did Not Restrict Kathleen Smith’s Access To The Courts**

At common law, no cause of action for personal injuries survived the death of the individual, and there was no right of recovery after death. *Cooper v. Runnels*, 48 Wn.2d 108, 291 P.2d 657 (1955). The wrongful death and survival statutes were enacted by the legislature to address the harshness of the common law and allow the personal representative and/or specified heirs to recover. *Gray v. Goodson*, 61 Wn.2d 319, 326-27, 378 P.2d 413 (1963); *Tait v. Wahl*, 97 Wn. App. 765. *See also Walton v. Absher Const. Co., Inc.*, 101 Wn.2d 238, 242-43, 676 P.2d 1002 (1984) citing Martin, *Measuring Damages in Survival Actions For Tortious Death*, 47 Wash. L. Rev. 609, 616-17 (1972). Here, Ms. Triplett and Mr. Smith argue that because Ms. Smith’s estate is limited to recovery of

“net accumulations” and she was incapable of employment and therefore incapable of achieving a positive net accumulation, RCW 4.20.020 unlawfully restricts Kathleen Smith’s access to the courts. Plaintiff relies on *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991), a case involving a civil plaintiff’s right to obtain discovery of the identity of the donor of HIV infected blood. However as the court in *Doe* noted,

[O]ur consideration here is of the right of *access*. We are not here considering the validity of a theory of recovery. We are not considering legislative or judicial creation or abolition of a cause of action. We are not considering the abrogation or diminishment of a common law right. These are all issues for other cases.

*Doe v. Puget Sound Blood Center*, 117 Wn.2d at 781.

RCW 4.20.020 does not purport to provide a cause of action or access to the courts to the deceased person. The statute provides remedy to the personal representative of the deceased’s estate, who may pursue causes of action on behalf of the heirs specified in the statute. But none of the cases cited by Respondents establish a right of access to the courts for persons who are deceased. Since 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.

Under the survival statutes, the personal representative may pursue any cause of action the deceased could have brought had they not died. RCW 4.20.046, .060, *Federated Services Ins. Co. v. Personal Representative of Estate of Norberg*, 101 Wn. App. 119, 126-128, 4 P.3d 844 (2000). Washington's survival statutes are specific, clear and unambiguous that claims for pre-death pain and suffering are limited:

PROVIDED HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress on behalf of those beneficiaries enumerated in RCW 4.20.020 . . . .

RCW 4.20.046(1). *See also* RCW 4.20.060, limiting the right of action for personal injury that resulted in death to “a surviving spouse, state registered domestic partner, or child living, including stepchildren, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers.”

Under Washington's survival statutes, the only cause of action that survived Kathleen Smith's death was the action for economic loss, measured by Ms. Smith's “net accumulations.” *Federated Services Ins. Co. v. Personal Representative of Estate of Norberg*, 101 Wn. App. at 126-27. If she had lived, Ms. Smith would have been able to pursue the

cause of action for any economic loss she suffered as a result of the negligence or other actionable conduct of the defendants. Access to the court would not have been denied. However, if she had pursued such an action, Ms. Smith, like any other plaintiff, would have been required to prove that she suffered an economic loss as a result of actionable conduct by the defendants.

Since she was not working, Ms. Smith would not have been able to prove that element of damages. Therefore, the issue here is not lack of access to the courts, but lack of economic damage. By being required to prove that an economic loss occurred, the personal representatives of Ms. Smith's estate are not denied access to the court but are treated the same as any other litigant required to prove the element of damages.

**C. 52 Year Old Kathleen Smith Was Not A Minor At The Time Of Her Death**

Ms. Triplett and Mr. Smith next contend that, because of her mental age, Kathleen should be considered to be a minor child under RCW 4.24.010. Plaintiff erroneously advises that "RCW 26.28.015 defines the age of majority. . . ." Respondent's Brief (Respondent's Br.) at.16. That statute actually enumerates specific purposes for which persons are to be deemed of "full age" and provides, in pertinent part:

*Notwithstanding any other provision of law, and except as provided under RCW 26.20.020, all persons shall be*

deemed and taken to be of full age *for the specific purposes hereafter enumerated* at the age of eighteen years:

RCW 26.28.015 (emphasis supplied). The age of majority in Washington is set forth in the preceding section, RCW 26.28.010:

Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years. . . .

The statutes evidence the legislature's knowledge and intent that in some cases, whether they are 18 or not, persons may be treated as adults, or not, depending on the specific purpose age is being considered. For example, RCW 67.04.090 defines "minor, " for the purposes of RCW 67.04.090 through 67.04.150, which deal with baseball contracts with minors, as "any person under the age of 18 years, and who has not graduated from high school: PROVIDED, that should he become eighteen during his senior year he shall be a minor until the end of the school year." Again, in RCW 11.114.010, the portion of the probate code dealing with transfers to minors, the legislature defines minor as "an individual who has not attained the age of twenty-five years." In both RCW 70.96A.020 and RCW 71.06.010, the legislature defines minor as a person "under eighteen years of age." In RCW 9A.44.093, which defines sexual misconduct with a minor, "minor" includes some persons up to age 21. *See State v. Hirschfelder*, 170 Wn.2d 536, 548-49, 242 P.3d 876 (2010). These

statutes are but a few examples of the legislature defining its specific intention when using the word “minor” in connection with a particular statute or group of statutes. In other words, when the legislature intends a definition of minor different than that prescribed by RCW 26.28.010, it specifically sets forth that intent. When that intent is not set forth, RCW 26.28.010 applies. RCW 26.28.10 is unambiguous and the court should assume the legislature means what it says and need not engage in statutory construction past the plain meaning of the words. *Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 371, 203 P.3d 1069 (2009).

RCW 4.24.010 provides, in pertinent part:

A mother, father, or both, who has regularly contributed to the support of his or her *minor child*, and the mother or father or both, of *a child* on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of *the child*. (emphasis supplied).

The statute uses the word minor as an adjective modifying the word child, and contains no definition of minor. In the absence of specific statutory definitions, courts give words their common legal or ordinary meaning. *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Non-technical words are given their dictionary definition. *Id.* *Webster’s Third New International Dictionary* defines minor as: “Mi-nor *adj.*: not having

reached majority.” Under Washington law, unless otherwise specifically provided, one reaches majority at 18 years of age. No statute or decisional law makes an exception based on mental age. Clearly, when the Washington Legislature has chosen to include adults with mental disabilities in the same category as minors, they have explicitly done so. *See* RCW 4.16.190(1) and 5.60.030 for example.<sup>1</sup> Moreover, in determining the meaning of “minor child” for purposes of RCW 4.24.010, a Washington court has held, “RCW 4.24.010 refers to a ‘minor child,’ and age of majority is defined in RCW 26.28.010,” and that RCW 66.44.270, specifically providing that the legal drinking age is 21 did not create an ‘exception specifically provided by law’.” *Burt v. Ross*, 43 Wn. App. 129, 131, 715 P.2d 538 (1986). A person’s chronological age, not their “mental age” establishes majority under RCW 26.28.010. *Higgins v. East Valley School District*, 41 Wn. App. 281, 282, 704 P.2d 630 (1985), where in a personal injury action brought by an 18 year old whose mental age was 11, the court held that the adult standard of care applied and that a jury instruction defining standard of care for a child was “properly rejected based on Mr. Higgins’ chronological adulthood.” *Id.*

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<sup>1</sup> There are many other examples of statutes where the legislature uses the terms “minor” and “incompetent” person for the same purpose. *See*, for example: RCW 11.02.080(3); 11.36.010; 11.86.021; 11.88.010, et. seq.; 11.96A.250; RCW 13.40.165(7), .190(4); RCW 30.22.070; RCW 32.08.210(2); RCW 42.48.010; RCW 70.96A.110; RCW 84.64.070; RCW 90.03.150; Const. Art. I, §35;

It is undisputed here that Kathleen Smith was 52 years old when she died and that neither Ms. Triplett nor Mr. Smith was dependent on her for support. Under the plain language of RCW 4.24.010, neither has a cause of action based on the death of Kathleen Smith and denial of Appellants' motion for summary judgment was error.

**D. There Is No Common Law Remedy Allowing Non-Dependent Parents and/or Siblings To Recover For the Wrongful Death Of A Mentally Disabled Child or Sibling**

Ms. Triplett and Mr. Smith next contend that this court should establish a common law action allowing parents and siblings to recover for the wrongful death of a child, brother or sister who was unable to work as a result of mental disability. Washington law on this point is well settled: "Our Supreme Court has rejected the argument that a common law cause of action may lie for wrongful death." *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 821, 732 P.2d 1021 (1987), citing *Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 680 P.2d 58 (1984), where the court stated the often cited rule applicable to wrongful death actions:

The formulation of new policy with regard to this statutory cause of action is the responsibility of the Legislature, not a task for this court.

*Huntington*, 101 Wn.2d at 470.

Ms. Triplett and Mr. Smith's arguments here, based primarily on *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), and

similar cases, were most recently considered and rejected by the Supreme Court in *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004), where plaintiffs urged the court to recognize a common law action for loss of consortium on behalf of parents of an adult child killed or injured by a negligent defendant:

However, unlike the actions in *Frank* and *Ueland*, the cases before this court are governed by statute. *Frank* and *Ueland* dealt with the expansion of damages within the common law framework, while the plaintiffs here ask that we adopt a common law cause of action which would directly conflict with existing statutes.

The “courts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.” The legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and there is no room for this court to act in that area. (Citation omitted). “It is neither the function nor the prerogative of courts to modify legislative enactments.”

The legislature has identified the statutory beneficiaries. While we may agree that the value parents place on children in our society is no longer associated with the child's ability to provide income to the parents, the legislature has defined who can sue for the wrongful death and injury of a child and we cannot alter the legislative directive. The change the plaintiffs seek must come from the legislature rather than this court. (Citations omitted).

*Philippides*, 151 Wn.2d at 390.

Before *Philippides*, Respondents’ argument, under *Ueland*, for creation of a common law wrongful death action for family members who

were not recognized as beneficiaries under RCW 4.20.020, was soundly rejected in *Long v. Dugan*, 57 Wn. App. 309, 788 P.2d 1 (1990), *review denied*, 114 Wn.2d 1018 (1990), where the court gave the following analysis:

Unlike the claim in *Ueland*, the claim in this action does not appear to be one the Legislature failed to consider. Rather, the statute demonstrates the Legislature considered wrongful death claims of siblings and decided to allow them only if the survivor was dependent upon the decedent. RCW 4.20.020.

It is well established law in this state that wrongful death claims have not been recognized in common law, but rather are a creature of statutes. The cases cited further make it clear that any changes or supplements to the wrongful death statute must come from the Legislature. . .

Loss of consortium is not, in and of itself, a cause of action but rather an element of damages. In a wrongful death action, one of the elements of damages is loss of consortium. Hence, it follows that the respondents' claim must be brought within the subject of the limitations of the wrongful death statute. . .

Finally, respondents contend Washington case law holding that there was no common law action for wrongful death is based upon an erroneous interpretation of common law and should be overruled. This we decline to do.

*Long*, 57 Wn. App. at 312-13.

Respondent's argument that a common law cause of action for wrongful death should be recognized because the legislature has not pre-empted this area of law, cannot be well taken in light of the court's clear

pronouncements on the same issue in *Long, Philippides* and other cases. In addition, while the Respondents direct the court to “an arsenal of technical rules that could be deployed to defeat the cause of preemption” *Washington Water Power v. Graybar Elec. Co.*, 112 Wn.2d 847, 856, 774 P.2d 1199 (1989), “overriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the legislature was attempting to achieve. *Id.* (holding that the Washington Product Liability Act pre-empted common law product liability remedies).

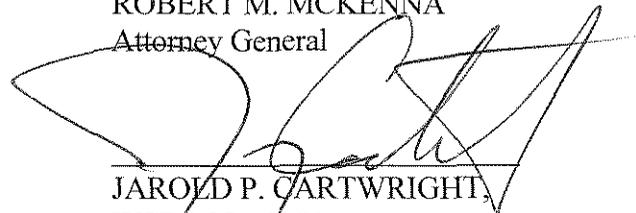
Washington’s Legislature has repeatedly declined to create a wrongful death cause of action for the non-dependent parents of adult children, whether they are disabled or not. If RCW 4.20.020 and/or RCW 4.24.010 are to be modified in the manner urged by Ms. Triplett and Mr. Smith, it is for the legislature, not the courts to do so.

## II. CONCLUSION

Appellant requests that the trial court’s order denying summary judgment be reversed and the case remanded with instructions to enter judgment dismissing Plaintiffs’ claims based on RCW 4.20.020, .046, .060 and 4.24.010.

RESPECTFULLY SUBMITTED this 17 day of May, 2011.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'Jarold P. Cartwright', written over a horizontal line.

JAROLD P. CARTWRIGHT,  
WSBA No. 9595  
Assistant Attorney General  
Attorney for Respondents

**PROOF OF SERVICE**

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

Delivery to:

Mark Kamitomo  
The Markam Group, Inc., P.S.  
421 W. Riverside, Suite 1060  
Spokane, WA 99201

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17 day of May, 2011, at Spokane, Washington.

  
\_\_\_\_\_  
NIKKI GAMON