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

BETTY JEAN TRIPLETT et al,

Respondents,

v.

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

Petitioners

BRIEF OF PETITIONERS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington State Department of Social and Health Services (DSHS) and its Division of Developmental Disabilities, Aging and Disability Services Administration, Lakeland Village, Secretary Robin Arnold-Williams, Director Linda Rolf and Michael Noland (hereinafter collectively referred to as DSHS or defendants) appeal the trial court's August 17, 2010 order denying summary judgment and allowing a non-dependent parent and non-dependent brother of a 52 year old decedent to maintain actions under Washington wrongful death, survival and wrongful death of a child statutes. The trial court denied DSHS's motion and would allow the action to proceed even though the plaintiff co-personal representatives (the mother and brother of the deceased) lacked standing to sue under RCW 4.20.020, RCW 4.20.046 and/or RCW 4.24.010 because the decedent, while mentally disabled, was an adult at the time of death and plaintiffs were not dependent on the decedent for support. This court granted discretionary review following the trial court's certification pursuant to RAP 2.3(b)(4).

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to dismiss Plaintiff's claims under the wrongful death (RCW 4.20.020) and survival (RCW 4.20.046) statutes for lack of standing to sue.

2. The trial court erred in failing to dismiss Plaintiff Betty Jean Triplett's claim under the wrongful death of child statute (RCW 4.24.010) for lack of standing to sue.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the personal representatives of the estate of a 52 year old mentally disabled decedent with no dependent heirs may maintain a wrongful death action seeking damages other than net economic loss to the estate under RCW 4.20.020 or .046?

2. Whether the non-dependent parent of a 52 year old child with a mental disability may maintain an action for wrongful death of the child under RCW 4.24.010?

3. Whether RCW 4.20.020, 4.20.046 and/or RCW 4.24.010 unlawfully discriminate against heirs of persons with mental disabilities?

IV. STATEMENT OF THE CASE

On May 19, 2009, Plaintiffs Betty Jean Triplett and Kevin Smith, individually and as co-personal representatives of the Estate of Kathleen

Smith filed this wrongful death and 42 U.S.C. § 1983¹ action against the defendants. CP at 1. Plaintiffs sought damages under Washington wrongful death statutes including economic and non-economic losses (decedent's pre-death pain and suffering). CP at 8-9. It was undisputed that the deceased was a single 52 year old with no children and no other persons dependent on her for support. CP at 19, 36-37. Defendants moved to dismiss because Washington's wrongful death (RCW 4.20.020), survival (4.20.046), and wrongful death of child (RCW 4.24.010) statutes do not provide parents and/or siblings standing to sue for damages other than net economic loss to the estate of the deceased, unless the parent and/or sibling were dependent on the deceased for financial support. CP at 15-28. For purposes of the motion to dismiss,² Defendants admitted the following facts based on the allegations in Plaintiffs' Complaint:

1. Kathleen Smith died March 21, 2006 at the age of 52 years.

Ms. Smith was developmentally disabled to the extent that her level of function was the same as a five or six year old.

Complaint 2.1-2.2.

¹ While Defendants sought dismissal of the civil rights claim on the grounds that it was not commenced within the 3 year statute of limitations, Defendant seeks discretionary review only with respect to the wrongful death causes of action brought under RCW 4.20.020, .046 and RCW 4.24.010. Defendants anticipate summary judgment dismissing the federal claims on separate substantive federal law grounds.

² Because the trial court considered matters outside the pleadings it was agreed that the motion was considered and decided as a motion for summary judgment.

2. BettyJean Triplett is the mother of Kathleen Smith. Kevin Smith is the brother of Kathleen Smith. Ms. Triplett and Mr. Smith are co- personal representatives of the Estate of Kathleen Smith. The complaint does not allege that at the time of her death, Kathleen Smith had other living parents or siblings and the complaint does not allege that she was ever married or that she had any children. The complaint does not allege that any person was financially dependent on Kathleen Smith for support. Complaint 1.4, et seq.
3. At the time of her death, Kathleen Smith was a voluntary resident admitted to Lakeland Village, a residential care facility for developmentally disabled persons owned and operated by the State of Washington Department of Social and Health Services (DSHS). Complaint 2.1.
4. On March 21, 2006, Kathleen Smith died by drowning in the bathtub while residing at Lakeland Village. Complaint 2.2.
5. At the time of the death of Kathleen Smith, Michael Noland was employed by The State of Washington Department of Social and Health Services as an Attendant Counselor Three at Lakeland Village and was assigned to provide care and assistance to Kathleen Smith. Michael Noland's assignment included

supervising Kathleen Smith while she was bathing. Complaint

2.2.

6. On March 18, 2009, BettyJean Triplett and Kevin Smith filed a Tort Claim with the State of Washington Office of Risk Management. Complaint 1.2.

7. On May 19, 2009 this action was commenced by filing of the Summons and Complaint in Spokane County Superior Court.

CP at 19-20.

In response to the motion to dismiss, plaintiffs raised no facts that conflicted with the facts admitted by defendant, but raised the purely legal argument that, because the deceased was mentally disabled, the limitations on standing to sue contained in RCW 4.20.020, .046 and RCW 4.24.010 unfairly limited the deceased's access to the courts and therefore should not apply and that her non-dependent mother and brother should be allowed to proceed with actions under those statutes. CP at 35-47.

On August 17, 2010, the trial court found that the standing limitations of the statutes did not apply to plaintiff's claims and denied DSHS's Motion for Summary Judgment. CP at 117-18. The trial court then certified to this court, pursuant to RAP 2.3(b)(4), the question of whether the beneficiary limitations in RCW 4.0.020 apply when the decedent is a 52 year

old (with a mental age of 8) who was mentally disabled from birth. CP at 136-37.³

V. ARGUMENT

A. Standard Of Review

“Statutory interpretation is a question of law reviewed *de novo*.” *Beggs v. Dept. of Soc. & Health Services*, No. 84098-9, slip op. at 5-6 (Wash. February 17, 2011). The standard of review of the trial court’s order denying summary judgment is *de novo* review considering the same evidence presented below. Like the trial court, the appellate court must view the facts, and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. If there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should be granted. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 212, 229 P.3d 871, *review denied*, 241 P.3d 413 (2010). Here, no material facts are in dispute, and the court is presented with a pure question of law concerning the applicability of unambiguous language of RCW 4.20.020, .046 and RCW 4.24.010, all of which preclude wrongful death and/or survival

³ The language of the certification is somewhat confusing concerning the issues involving RCW 4.24.010, however, the court was clear in the oral ruling and explanation of the order that she intended for the issues raised under the statute to be raised in the appellate court. CP at 144-45.

claims for non-economic loss by non-dependent parents or siblings of adult decedents.

B. RCW 4.20.020 Does Not Provide A Cause Of Action For Wrongful Death For Non-Dependent Parents Or Siblings

Under Washington law, wrongful death actions are strictly governed by statute. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662, 664 (2007). “When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing death. . .” RCW 4.20.010. The statute goes on to specify that the action is for the benefit of the husband, wife, state registered domestic partner or children of the deceased and specifically provides that where the deceased leaves no surviving husband, wife, state registered domestic partner or child, the action “may be maintained for the benefit of the parents, sisters, or brothers, *who may be dependent upon the deceased person for support....*” RCW 4.20.020 (emphasis added). Therefore, Ms. Triplett and Mr. Smith may recover only if there are no first tier beneficiaries (husband, wife, state registered domestic partner, or child) and only if, as the surviving parent and sibling, they were dependent on Kathleen Smith for financial support. *Beggs*, No. 84098-9, slip op. at 12-15; *Schumacher v. Williams*, 107 Wn. App. 793, 798, 28 P.3d 792 (2001), *review denied*, 145 Wn.2d

1025, 41 P.3d 484 (2002). Here, it is undisputed that Ms. Smith was not married and had no children. It is also undisputed that neither Ms. Triplett nor Mr. Smith was dependent on Kathleen for support. Therefore, they do not have standing to pursue an action under RCW 4.20.010-.020.

C. RCW 4.20.046 Does Not Provide A Cause of Action For Pre-Death Pain and Suffering Unless The Beneficiaries Of The Estate Were Dependent On The Deceased For Support

Survival actions seeking damages for pre-death pain and suffering brought under RCW 4.20.046 are limited to cases where there are one or more “tier 1” beneficiaries or if no spouse, state registered domestic partner or children, parents or siblings dependent on the deceased for support. *Schumacher*, 107 Wn. App at 802. The survival statute provides in pertinent part:

All causes of action by a person . . . against another person . . . shall survive to the personal representative of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether . . . such actions would have survived at the common law . . . 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 and such damages are recoverable regardless of whether . . . the death was occasioned by the injury that is the basis for the action. . . .

See also Philippides v. Bernard, 151 Wn.2d 376, 88 P.3d 939 (2004), and *Tait v. Wahl*, 97 Wn. App. 765, 987 P.2d 127 (1999), *review denied*, 140

Wn.2d 1015, 5 P.3d 9 (2000).

Accordingly, unless there are qualified beneficiaries (spouse, state registered domestic partner, children or if none, parents or siblings who were dependent on Ms. Smith for support), damages in the survival claim under 4.20.046 are limited to “prospective net accumulations” and the cause of action claiming damages for pre-death pain and suffering should be dismissed. *Tait*, 97 Wn. App. at 774-775. *See also Federated Services Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000), *review denied*, 142 Wn.2d 1025, 21 P.3d 1150 (2001), where the court stated the proper method of calculating damages in such cases:

In a survival action, the only allowable recovery is ‘the net accumulations which the estate would have acquired if the decedent had survived to the expected life time.’ Citation omitted.

Typically, net accumulations are the decedent's net earnings over a normal life span, calculated by determining the decedent's probable gross earnings, subtracting personal and family support expenditures, and then reducing the figure to present value. Citations omitted.

Id., 101 Wn. App. at 126.

Here, it is undisputed that since Kathleen Smith was not employed and had no future earning capacity, the net accumulations of the estate are zero.

D. RCW 4.24.010 Does Not Provide A Cause Of Action For The Wrongful Death Of An Adult Child Unless The Parent Was Dependent On The Child For Support

Washington law provides for a parent's action for the wrongful death of a minor child or adult child if the parent is dependent on the child for support. RCW 4.24.010 provides:

A mother or 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 for the injury or death of the child.

“Minor” for purposes of the statute is defined by 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.” RCW 26.28.010, *Burt v. Ross*, 43 Wn. App. 129, 130, 715 P.2d 538 (1986).

In the instant case, Plaintiffs contend that, although 52 years old at the time of her death, Kathleen Smith should be considered a minor because her disability caused her to have the mental capacity of a five or six year old. Plaintiffs' Complaint at paragraph 3.1. No statute or precedent supports Plaintiffs' contention.

While this precise question has never been decided by any Washington court, a similar argument was rejected in *Burt, id.*, where the parents argued that their 20 year old daughter, who they claimed died as a

result of being served alcohol while underage, should be considered a minor. The court stated:

The short answer to the Burts' contention is that RCW 4.24.010 refers to a "minor child" and age of majority is defined in RCW 26.28.010. RCW 66.44.270 refers to people under 21 – as it could refer to people under 50 - and has nothing to do with minors. . . the linkage of the drinking age statute to the wrongful death statute is too remote to be considered an exception "specifically provided by law" to the age of majority of 18.

Id., 43 Wn. App. at 132.

Washington legislators could have changed the age of majority requirements and excluded incapacitated persons, but have not:

The Legislature is presumed to be familiar with judicial decisions construing RCW 4.24.010 to require financial dependence as a condition precedent to maintenance of an action by parents for the wrongful death of an adult child. (Citation omitted). The Legislature's failure to change the dependence requirement, despite subsequent amendments to RCW 4.24.010, indicates approval of this construction. (Citation omitted). Moreover, this court may not amend an unambiguous statute merely because we believe that the Legislature intended something else but failed to express it adequately. (Citation omitted).

Masunaga v. Gapasin, 57 Wn. App. 624, 629-31, 790 P.2d 171 (1990). The relevant case law known to the legislature includes *Burt*, 43 Wn. App. at 130, where the court concluded that the age of majority for purposes of RCW 4.24.010 is, in accordance with RCW 26.28.010, 18 years. It is noteworthy that in statutes where the legislature has intended to include

mentally incompetent or disabled persons in the same category as minors, it has done so explicitly. See, for example, RCW 4.16.190(1) (providing that a statute of limitations is tolled while a person is under the age of eighteen years or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings) and RCW 5.60.030 (regarding competency of witnesses). The legislature has never expressed the intent to include persons over the age of majority, whether disabled or not, as “minor” children for purposes of RCW 4.24.010 and, since *Burt*, the legislature has had ample opportunity to do so. While Plaintiffs here contend that because many disabled persons lack legal capacity to conduct many aspects of their lives, the legislature must have intended to consider them as minors, Plaintiffs come forward with no authority that supports the argument. Nevertheless, even if the Court believes the legislature intended to include adults with mental disabilities in the definition of “minor,” it is not within the power of the Court “to add words to a statute even if we believe the legislature intended something else but failed to express it adequately.” *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

E. Washington’s Wrongful Death And Survival Statutes Do Not Unlawfully Discriminate Against The Heirs Of Persons With Disabilities

In the instant case, Plaintiffs argue that “*While the statutes at issue would concededly pass constitutional muster as they pertain to individuals with normal capacity, the statutes, nonetheless, discriminate against those like Ms. Smith who suffer from profound mental retardation and have no ability to work.*” CP at 41. Plaintiffs’ equal protection arguments here are not novel but reflect the same reasoning considered and rejected in *Philippedes*, 151 Wn.2d 376 and *Masunaga*, 57 Wn. App. at 631. It is notable in this regard that the court in *Philippedes* found that the law passed constitutional muster despite the fact that at least two of the deceased children in *Philippedes* could arguably be considered mentally incompetent or severely disabled. Kelly Loomis was a 34-year-old unmarried man who suffered from schizophrenia and died following a struggle with police during a schizophrenic episode. *Philippedes*, 151 Wn.2d at 382. John Carlisle, another decedent in the case, was a 39-year-old unmarried man with cerebral palsy who lived with his parents. *Id.* The facts presented here are, therefore, not materially different from those already considered by the Washington State Supreme Court in *Philippedes*. See also *Schumacher*, 107 Wn. App.793, where the deceased was an adult with Downs Syndrome who resided in a state licensed boarding home and died from burns received in an unsupervised scalding bath.

The question of the constitutionality of the child wrongful death statute was before the Washington Supreme Court and analyzed in depth in *Philippedes*. That case consolidated four suits brought by non-dependent parents of adult deceased children. There, the court was confronted with and answered the question of whether RCW 4.24.010's requirement of dependency for parents of adult children violates the equal protection clause of the United States Constitution or the privileges and immunities clause of Washington State's Constitution. *Philippedes*, 151 Wn.2d at 390-91. Applying rational basis scrutiny, the court found that the statute was consistent with both the Federal and State constitutions because the limitations placed on parents' recovery reasonably relate to the statute's purpose of compensating those parties most directly and significantly affected by the loss of a child. *Id.* at 391-93.

Ms. Triplett's contentions notwithstanding, RCW 4.24.010 survives rational basis scrutiny even when applied to the parents of severely disabled children. Where a suspect classification or a fundamental right is not implicated, the court should review the statute using a rational basis standard. *Id.* at 391; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) ("Because the disabled do not constitute a suspect class for equal protection purposes, a governmental policy that purposefully treats the disabled differently from the non-

disabled need only be rationally related to legitimate legislative goals to pass constitutional muster."). "In reviewing a statute, [Washington courts] will construe a statute as constitutional if at all possible." *Philippedes*, 151 Wn.2d at 391 (citing *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 816 P.2d 725, 729 (1991)). Using a rational basis standard, "[t]he statute is presumed constitutional and the party challenging it has a heavy burden of proof." *Id.* (citing *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 733 P.2d 539, 543 (1987)). Under the rational basis test, the court determines: (1) whether the legislation applies alike to all members of the designated class, (2) whether there are reasonable grounds to distinguish between those within and those without the class, and (3) whether the classification has a rational relationship to the purpose of the legislation.' *Id.* (citing *Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 730 P.2d 636 (1986)).

Concerning the first prong of the rational basis test, Washington courts recognize that RCW 4.24.010 treats all persons in each of the categories it establishes similarly. *Id.*; *Masunaga*, 57 Wn. App at 632. The statute provides relief to a mother or father, or both, who has regularly contributed to the support of his or her minor child, and to the mother or father, or both, of a child on whom either, or both, are dependent for support. All parents of adult children--whether or not the children are

disabled--must be financially dependent on the children to recover; all parents of minor children--whether or not the children are disabled--who have regularly contributed to the support of the children may recover. Accordingly, the statute applies alike to all members of the designated class.

The second prong of the rational basis test requires there be a reasonable basis for distinguishing between parents who are able to recover and parents who are not. "The one challenging the classification must overcome a presumption that the classification is reasonable." *Philippedes*, 151 Wn.2d at 391-92. In *Masunaga*, the Washington Court of Appeals held that there were reasonable grounds to distinguish between parents who were financially dependent upon an adult child and those who were not because parents who are financially dependent on an adult child are affected differently and more directly by that child's death than are non-dependent parents. 57 Wn. App at 633 (holding that "[t]he fact that non-dependent parents, as well as siblings, friends and acquaintances suffer emotionally from a wrongful death does not render the statutory classification unreasonable for purposes of equal protection analysis."). The Washington Supreme Court agreed with *Masunaga*, stating that "[o]bviously a parent who is dependent on a child for material well-being and the basic physical necessities of life is impacted in a way unlike an

independent parent." *Philippedes*, 151 Wn.2d. at 392. The court also found that there was a reasonable basis for distinguishing between the parents of adult and minor children because a minor child's needs for love, guidance, and support were not the same as those of an adult child, and different considerations applied to adult children. *Id.* The reasonable basis for the legislative distinction recognized by the *Masunaga* and *Philippedes* courts applies whether the adult child is disabled or not. As the court recognized in *Philippedes*, 151 Wn.2d at 392-93:

[I]egitimate differences between groups provide a reasonable basis for treating the groups differently. The legislature does not require parents to support their adult children financially, or in any other way. Society does not hold parents responsible for the actions of their adult children. Many of the strictures binding children to their parents are released when the child reaches the age of majority.

Ms. Triplett has not argued or demonstrated that she had any different legal obligation to support Ms. Smith or be responsible for her actions or that the legislature ever intended that adults with mental disability or incapacity be treated differently under RCW 4.24.010. Whether the child is disabled or not, "there is a reasonable basis for treating the parents of adult children differently from parents of minor children." *Id.*

The third prong of the rational basis test is whether the challenged classification has a reasonable relationship to the purpose of the legislation and “a challenger must do more than merely question the wisdom and expediency of the statute.” *Masunaga*, 57 Wn. App. at 633. The party challenging the statute must “show conclusively that the classification is contrary to the legislation’s purpose. *Philippedes*, 151 Wn.2d at 392. The court in *Philippides* went on to point out that the purpose of RCW 4.24.010 is to compensate parents for the loss of a child. Finding the limitations reasonably related to the purpose of the statute, the court stated:

The limitations placed on parents relate to the statute's attempt to compensate those parties most directly and significantly affected. While the lines drawn in RCW 4.24.010 will obviously preclude recovery for many parents devastated by the loss of an adult child, a statute is not unconstitutional for failing to "attack every aspect of a problem." (citing *Masunaga*). The lines drawn by RCW 4.24.010 bear a rational relationship to the purpose of the statute. We hold the statute does not violate the constitutional guaranty of equal protection.

Philippedes, 151 Wn.2d at 392.

The purpose of the wrongful death and survival statutes is to provide compensation to specified beneficiaries for injuries to their pecuniary interests. *Beggs*, No. 84098-9, slip op. at 13-14; *Bowers v. Fiberboard Corp.*, 66 Wn. App. 454, 460, 832 P.2d 523 (1992). As the

courts in *Masunaga* and *Philippedes* indicated, the legislature has good reason to define beneficiaries and distinguish between parents of minors/parents dependent on adult children and non-dependent parents of adult children and the distinction is in furtherance of and does not offend the purpose of the statute. *See for example Philippedes*, 151 Wn.2d at 390 (While the value parents place on children in modern society is not associated with a child's ability to provide income to the parents, it is up to the legislature, not the court to make the changes the Plaintiffs seek), and *Masunaga*, 57 Wn. App. at 633-34:

Both RCW 4.20.020 and RCW 4.24.010 rectify a common law injustice, albeit in a carefully circumscribed manner, for those who will generally be most directly affected by a wrongful death. (citation omitted). In addition to the spouse and children of the decedent, the statutes also recognize the special hardships of certain specified relatives who were financially dependent on the decedent. It is therefore reasonable to assume that the classes of beneficiaries established in RCW 4.24.010 reflect the Legislature's attempt to balance a recognition of the harsh common law rule with a concern for judicial efficiency.

Under RCW 4.20.020, 4.20.046 and 4.24.010 parents of disabled children and non-disabled children have equal access to the courts and are treated the same. Both may recover for the loss of a minor child and both are precluded from recovering for the loss of an adult child, barring substantial financial dependence upon the child. Whether there is net economic loss to an estate or parents or siblings may be dependent on their

adult child, brother or sister for support will vary from case to case depending on the unique circumstances confronting each family. The age of majority and financial dependence are reasonable bright-line tests for determining how to compensate those parents most severely affected by the loss of a child while also protecting the State's resources. If the legislature had seen fit to make the mental capacity of a deceased a criteria for beneficiaries, it would have done so. Its failure to do so does not constitute unlawful discrimination rendering the statute "inapplicable" to this case as the trial court appears to have concluded. Accordingly, this court should correct the obvious error committed by the trial court and decline to find that RCW 4.20.020, 4.20.046 and/or 4.24.010 are unconstitutional as applied to Ms. Smith and other parents of adult children with developmental disabilities.

VI. THE TRIAL COURT ERRED BY "REWRITING" WASHINGTON WRONGFUL DEATH LAW

In Washington, wrongful death and survival causes of action are strictly a matter of statute and no common law causes of action for wrongful death are recognized. *Philippedes*, 151 Wn.2d at 390. "[F]ormulation of a new policy with regard to this statutory cause of action is the responsibility of the Legislature, not a task for this court." *Atchison*, 161 Wn.2d at 381. As indicated above, Washington law

provides no cause of action for the wrongful death of an adult child or sibling unless the parent or sibling was dependent on the deceased for financial support: "Washington's four interrelated statutory causes of action for wrongful death and survival each require that parents be 'dependent for support' on a deceased adult child in order to recover." *Philippedes*, 151 Wn.2d at 386. Despite the clear language of Washington's wrongful death and survival statutes, the trial court, in effect, amended the statutes to include parents and siblings of mentally disabled children (of any age) as beneficiaries. In addition, while RCW 26.28.010 clearly and unequivocally establishes the age of majority at 18 years for all persons, here, the trial court rewrote the section to include an exception that would make incapacitated persons who are 18 and older minors, not adults. These far reaching acts by the trial court were legislative acts and obviously impermissible. In *Schumacher*, 107 Wn. App. 793, the deceased was an vulnerable adult with Downs Syndrome who died from burns received in a scalding bath in a state licensed facility. In rejecting wrongful death and survival claims brought by the deceased's non-dependent brother, the court clearly stated the consistent position of Washington courts on expansion of wrongful death beneficiaries, at pages 801-802 of the opinion:

A review of the history of the wrongful death and survival of action statutes reflects a consistent conservatism on the part of the Legislature with regard to the beneficiaries of those statutes. Despite changes over the years broadening the basic concept of restricting survival of actions to economic damages, first excluding any damages for pain and suffering, but then in 1993 electing to include them by amending RCW 4.20.046, the beneficiaries under both the survival of action provisions and the wrongful death statute have not included siblings or parents who are not dependent on the decedent for support.

Washington courts have “extended the literal scope of the wrongful death statutes only to protect beneficiaries *clearly contemplated* by the statute.”

Tait, 97 Wn. App. at 770. *See also Philippides*, 151 Wn. 2d at 390, where the court stated:

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.” Citing *Tait*, 771. 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. *Windust v. Dep't. of Labor & Indus.*, 52 Wash.2d 33, 36, 323 P.2d 241 (1958). “It is neither the function nor the prerogative of courts to modify legislative enactments.” *Anderson v. Seattle*, 78 Wash.2d 201, 202, 471 P.2d 87 (1970).

As succinctly stated in the concurring opinion in *Schumacher*, adherence to the rule is necessary even when a factually harsh result is caused by its application as:

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.

Schumacher. 107 Wn. App. at 805.

The Washington legislature has taken up the issue of wrongful death beneficiaries on many occasions. It appears from legislative materials prepared during proposed amendments to the statute before the legislature in the '08-'09 session, which did not pass, that the legislature considered the significant cost of expanding the range of potential beneficiaries to include parents who were not financially dependent on their adult children. *See, e.g.*, Appendix I., H.B. Rep. on Engrossed Substitute H.B. 1873, 60th Leg. Sess. (Wash. 2008) (noting also that the legislature heard public testimony that “people with disabilities are

disproportionately impacted” by the current law). Again in the 2009-2010 session, legislation seeking to amend the statute and address issues raised here by Ms. Triplett and by other plaintiffs in the cited cases was before the legislature but did not pass. See S.B. 6508 – 2009-10 and SESSB 6508, which may be viewed at www.leg.wa.gov by clicking on Bill Information. While aware of the decisions in *Masunaga*, *Phillipedes*, *Schumacher* and other cases where courts have refused to expand coverage of the wrongful death and survival statutes, the Washington legislature has consistently chosen **not** to expand the list of beneficiaries.

Here, even though it is undisputed that the deceased was 52 years old, with no spouse or children and that neither her mother, Ms. Triplett, nor her brother, Mr. Smith, were dependent on her for support, the trial court erroneously and impermissibly expanded the scope of the statutes when the court denied dismissal of the wrongful death and survival causes of action.

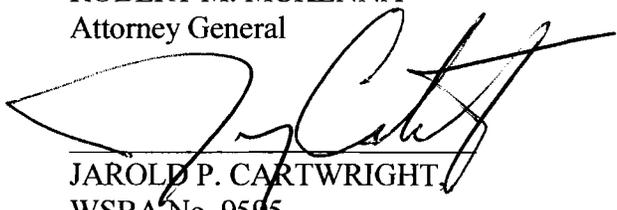
VI. CONCLUSION

Washington wrongful death and survival statutes are clear: When the deceased is an adult, claims, other than the Estate’s survival claim for net economic loss (projected income minus projected personal and family expenditures), are not available to parents or siblings unless they were dependent on the deceased for financial support. It is undisputed here that

the deceased was 52 years old at the time of death and that the claimants, her mother and brother, were not dependent on the deceased for financial support. In denying the motion to dismiss, the trial court has significantly rewritten RCW 4.20.020, .046 and RCW 4.24.010 to provide causes of action for the mother and brother for wrongful death of their mentally disabled adult daughter and sister. The trial court's decision dramatically changes Washington wrongful death and survival law and reversal is necessary in order to restore the legal status quo and terminate the impermissible causes of action the trial court has created.

RESPECTFULLY SUBMITTED this 17 day of February, 2011.

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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:

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

DATED this 16th day of February, 2011, at Spokane, Washington.



NIKKI GAMON