

No. 44328-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

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

Respondents.

APPELLANTS' REPLY

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I. REPLY ARGUMENT

A. Washington's General Survival Statute, RCW 4.20.046 Allows Earl to Recover Economic Damages Like Funeral Expenses

As personal representative of David's estate, Earl first argues that Washington's general survival statute, RCW 4.20.046, allows him to recover economic damages like funeral expenses even though he was not dependent on David for support. Aacres misreads RCW 4.20.046 and misstates Washington law by countering that Earl cannot recover because he is not a beneficiary under RCW 4.20.020. Earl's beneficiary status does not apply for the recovery of economic damages under RCW 4.20.046.

It is well-settled in Washington that funeral expenses are recoverable as economic damages in a wrongful death action. *See, e.g. Castner v. Tacoma Gas & Fuel Co.*, 126 Wn. 657, 657, 219 P. 12 (1923) (funeral expenses are recoverable against one causing the death of another by wrongful act); *McMullen v. Warren Motor Co.*, 174 Wn. 454, 25 P.2d 99 (1933), *overruled on other grounds.*, 13 Wn.2d 28, 457, 123 P.2d 780 (1942) (funeral expenses are recoverable against defendant in unlawful death without showing of dependency on deceased persons); *Clancy v. Hawkins*, 53 Wn.2d 810, 812, 337 P.2d 714 (1959) (defendant who caused death in automobile collision required to pay reasonable cost of funeral, including shipping of casket to Ohio). Reflecting this well-settled principle, at least two courts have found that an estate that does not qualify as a statutory beneficiaries under the wrongful death statutes may still

recover economic damages. *Wilson v. Grant*, 162 Wn. App. 731, 740-41, 258 P.3d 689 (2011) (decendent's father could recover economic damages as personal representative of the estate even though the decedent had no statutory beneficiaries or other dependents at the time of a death); *Harms v. Lockheed Martin Corp.*, 2007 WL 2875024 (W.D. Wash.) (unpublished)¹ (father as personal representative could recover economic damages on behalf of his son who was of the age of majority, not married, and had no children).

Where the language of the statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *Dahl - Smyth, Inc. v. City of Walla Walla*, 110 Wn. App. 26, 32, 38 P.3d 366 (2002) (citing *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982)). Here, RCW 4.20.046 plainly states that all causes of action survive to the personal representative. The only exception is that the personal representative can only recover certain enumerated noneconomic damages (e.g., pain and suffering, anxiety, et cetera) on behalf of statutory beneficiaries. The statute does *not* require a beneficiary in order for a personal representative to recover damages that are not specifically enumerated. Therefore, because Earl is seeking to

¹ GR 14.1 permits a party to cite as authority an unpublished opinion that (1) has been issued by any court from a jurisdiction other than Washington state and (2) is permissible authority under the law of the jurisdiction of the issuing court. Here, the US District Court, Judge Robart, issued *Lockheed* in September 2007. The Ninth Circuit has permitted citation to unpublished federal opinions issued after January 1, 2007. FED. R.APP. P. 32.1. Therefore, David offers *Lockheed* as authority for the court to consider and cite. See, e.g., *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 165 n. 16, 189 P.3d 233 (2008) (citing an unpublished federal opinion issued after January 1, 2007). *Lockheed* is attached as Exhibit 1 to the Appendix.

recover damages that are not enumerated, namely, economic damages in the form of funeral expenses, the beneficiary requirement does not apply. *Harms.*, 2007 WL 2875024 (W.D. Wash.) (unpublished) (“The general survival statute is broad and preserves all claims on behalf of the estate (as to economic damages) and on behalf of statutory beneficiaries (as to certain non-economic damages).”; see also *Criscuola v. Andrews*, 82 Wn.2d 68, 69-70, 507 P.2d 149 (1973) (holding that the estate of person who died instantaneously and left no statutory beneficiaries could recover under general survival statute); *Warner v. McCaughan*, 77 Wn.2d 178, 184, 460 P.2d 272 (1969), *superseded by statute on other grounds* (holding that the estate could recover damages under the general survival statute for a decedent who left behind no statutory beneficiaries and died as the result of the complained of injuries).

Aacres’ reliance on *Schumacher v. Williams*, 107 Wn. App. 793, 795, 28 P.3d 792 (2001), is misplaced on the issue at hand. There, the issue pertained to reading RCW 74.34.210, a vulnerable adult abuse statute, with RCW 4.20.020, the *specific* survival statute. Division One held that RCW 73.34.210 was ambiguous by its reference to chapter 4.20 RCW. In the context of reviewing legislative intent, Division One commented,

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.

Here, the issue is whether the estate is entitled to economic damages for funeral expenses under the *general* survival statute, RCW 4.20.046, an issue that *Schumacher* does nothing to assist this court in analyzing. The general survival statute permits “*all claims*” to proceed and only tethers statutory beneficiaries to the recovery of non-economic damages. RCW 4.20.046. Under this interpretation, which both *Lockheed* and *Wilson* have recognized, Earl is entitled to recover economic damages on behalf of David’s estate. RCW 4.20.046.

Aacres also relies on *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 110 P.3d 796 (2005), to assert that Earl is not entitled to economic damages under RCW 4.20.046 because, again, Earl acting as personal representative does not qualify as a legal beneficiary under the survival statutes. As a threshold matter, it should be noted that *Cummings* is a Division One case and does not bind this court. On the merits, though, *Cummings* does not apply for two main reasons. First, the complaint giving rise to this action, despite AACRES’ characterization otherwise, includes actions for negligence and gross negligence under Washington common law. Therefore, to the extent that *Cummings* holds that RCW 74.34.210 precludes economic damages in a vulnerable adult cause of action, it cannot apply to Earl’s causes of action for negligence and gross negligence. On this ground alone, the court should reverse and remand for

a trial on economic damages.

Second, and perhaps more importantly, *Cummings* is incorrect and ignores well-settled canons of statutory interpretation. As stated, the primary duty of interpreting statutes is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Courts never read statutes to produce absurd results because “it will not be presumed that the legislature intended absurd results.” *Id.* Here, Washington law clearly allows non-beneficiaries to recover economic damages under the general survival statute. *Wilson*, 162 Wn. App. 731 (medical negligence case); *Lockheed*, 2007 WL 2875024 (negligent car crash). To deny our most vulnerable population the exact same remedy that is permitted for everyone else is an absurd result. By permitting such an absurd result, *Cummings*’ reasoning is not sound and it should not be followed. This court should instead hold that economic damages are available to causes of action under Chapter 74.34.210 for the wrongful death of a vulnerable adult by virtue of RCW 4.20.046. As stated below, the economic damages proviso is more specific and applies separate and above RCW 74.34.210.

Washington courts harmonize conflicting statutes dealing with the same subject matter by applying the more specific statute. *Washington State Dep’t of Labor and Indus. v. Kantor*, 94 Wn. App. 764, 781, 973 P.2d 30 (1999). Here, the general survival statute, RCW 4.20.046, and the vulnerable abuse statute, RCW 74.34.210, are in conflict: The former distinguishes between economic and non-economic damages, whereas the

latter does not. The two statutes also pertain to the same subject matter because, even though they are found in different chapters, at least one court has applied them together in a wrongful death action of a vulnerable adult. *Cummings*, 128 Wn. App. 742. To harmonize these statutes, this court should apply the more specific provisions of RCW 4.20.046 and allow vulnerable adults to recover economic damages.

B. The Court Should Expand Common Law and Recognize A Cause of Action For the Estate to Recover Noneconomic Damages

Despite a rich history of wrongful death actions existing at common law, Washington courts have adopted a flawed misconception that such claims were created only by Chapter 4.20 RCW. The mistaken belief that wrongful death is purely statutory in nature and beyond the scope of the courts has resulted in the courts' reluctant refusal to rectify the unreasonable inequity of RCW 4.20. *See, e.g. Bennett v. Seattle Mental Health*, 166 Wn. App. 477, 493, 269 P.3d 1079 (2012) (recognizing the unjust result and urging the legislature to act). *Aacres* cites to *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004) to contend that wrongful death causes of actions are creations of the legislature and not recognized at common law. But its reliance on *Philippides* is misplaced. There, the appellant was asking the Court to *adopt* a common law cause of action for wrongful death. *Id.* at 388-389. Here, Earl contends that the common law recognizes a cause of action for wrongful death, and asks the court to *expand* the common law to remedy

the great injustice that is allowing tortfeasors to escape liability if an individual dies (but not if they survive and are injured). *Id.*

The common law right to sue for wrongful death is evidenced by several early American decisions that allowed wrongful death actions. *See Cross v. Guthrey*, 2 Root 90, 92 (Conn. 1794); *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838); *James v. Christy*, 18 Mo. 162, 163-64 (1853); *Kake v. Horton*, 2 Haw. 209, 212-13 (1860); *Sullivan v. Union Pac. R.R. Co.*, 23 F. Cas. 368, 371 (Cir. Ct. Neb. 1874). Turning blind eye to wrongful death action existing at common law, Washington case law has been historically inaccurate in its analysis of the origin of wrongful death actions. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970). This court not only has the power under common law to remedy the extreme injustice incurred by individuals like David, but also the duty to mend outdated and illogical legal theories that stand in the way of justice. *Christen v. Lee*, 113 Wn.2d 479, 512, 780 P.2d 1307 (1989).

In *Moragne*, after overruling precedent that prevented a widow from recovering for the death of her husband and examining the long common law history of wrongful death claims, the Court expanded the common law by finding no justification to deny the action. *Moragne*, 398 U.S. 375. In noting the injustice of denying the wife's claim for the death of her husband, Justice Harlan notes:

Where the existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggest that a violation shall be

non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception and described in such terms as “barbarous.”

Id. at 381. Although *Moragne* focused on a right to sue under Maritime law, the analysis is intrinsically linked to the issues in front of the court today. Here, as in *Moragne*, Washington courts have incorrectly, yet continually, asserted that there is no common law remedy for wrongful death—an assertion originally based on the unsound, unsupported dicta in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). Recognizing this truism, many state courts have followed the *Moragne* Court’s analysis. See 65 *Am.Jur. Trials* § 7 at 289 (1997) (“Recognition of a common law action for wrongful death is increasingly being recognized in the United States.”). Most recently, in 2001, the New Jersey Supreme Court recognized that prior state precedent stating there was no common law wrongful death action was based on “**historical error of grave proportion.**” *LaFange v. Jani*, 166 N.J. 412, 439, 766 A.2d 1066, (N.J. 2001) (emphasis added). In *Lafange*, the court found that New Jersey’s wrongful death statutes are a codification of the state’s common law, thereby providing an independent basis despite no statutory basis for the court to allow equitable tolling of the state’s wrongful death statutes. *Id.* at 434.

Aacres dedicates countless pages in its response brief detailing the specific requirements of “dependency” under current Washington law. Earl does not contend that he, or any other beneficiary, was financially

dependent on David. Instead, Earl asks this court to recognize that Washington precedent is based on a misunderstanding of history that has been blindly followed for over a century, just as the Supreme Court did in *Moragne*, and the New Jersey Supreme Court did in *Lafange*. After recognizing the existence of a common law wrongful death claim and thus the independent basis to intervene, this court should act now to prevent the manifest injustice caused by Chapter 4.20 RCW that overwhelmingly impacts the severely disabled, like David. This is particularly true where the Legislature has refused, or has otherwise been unable to, act in the decades since attorneys representing those wrongfully killed have been fighting with the issue.

C. Prohibiting David's Recovery of Noneconomic Damages Violates his Constitutional Right to Access the Court

Aacres relies on *Triplet v. Washington State Dep't of Soc. and Health Servs.*, 166 Wn. App. 423, 268 P.3d 1027 (2012) to argue that this issue is already settled. But this court is not bound by *Triplet*, and for the reasons stated in Earl's opening brief, *Triplet* should not be followed.

D. The Court Should Review Whether David Should be Considered a Minor because This Claim of Error Affects Earl's Right to Maintain His Action

Aacres urges the court to ignore whether David is a minor as a matter of law under RCW 4.20.020 because it was not previously raised. RAP 2.5(a) states that "The appellate court *may* refuse to review any claim of error which is not raised in the trial court." (Emphasis added). Further, this rule "*does not* apply when the question raised affects the right to

maintain the action.” *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993) (quoting *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)) (emphasis added). Because the issue of whether David should be considered a minor will affect Earl’s right to maintain his action, it should be considered on appeal.

Aacres cites *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 253 P.3d 470 (2011) to argue that it will suffer “manifest injustice” if the court considers whether or not David should be considered a minor. The *Wilson* case, however, involved a factual issue that the appellant stipulated to at trial. The court noted that because the appellant had previously stipulated to the factual issue, it would be unfair to allow appellant to argue contrary to their previous stipulation on appeal as no record was created on the *factual* issue. *Id.* Unlike *Wilson*, whether David is minor under RCW4.20.020 is an issue of law. There is no dispute about David’s age, that since birth he has suffered from a cognitive disability, or that he was never employable. There will be no “manifest injustice” to AACRES for the court to review an issue of law. Also, unlike this case, the newly raised issue in *Wilson* did not involve an issue affecting the appellant’s right to maintain their action.

II. CONCLUSION

For the foregoing reasons, Earl respectfully requests the court to grant the relief requested in his opening brief.

RESPECTFULLY SUBMITTED this 9th day of December, 2013.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 9, 2013, I sent for delivery via ABC Legal Messengers, a true and correct copy of the above document, directed to:

Charles Philip Edward Leitch
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2112 3rd Ave. Ste. 500
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DATED this 9th day of December, 2013.



Laura Neal
Legal Assistant to Darrell Cochran

4812-5150-7223, v. 2