No. 44328-7-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner,

vs.

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

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Earl Vernon, individually and as Personal Representative of the Estate of Henry David Vernon, asks this Court to accept review of the decision designated in Part II below.

II. THE DECISION OF THE COURT OF APPEALS

The petitioner before this Court, Earl Vernon, filed a lawsuit in Pierce County Superior Court to recover economic and non-economic damages for the wrongful death of his disabled brother Henry David Vernon.[1] The defendant, Aacres Allvest, LLC ("Aacres"), who operated an assisted living facility, recklessly caused the death of David by locking him in a bedroom during the massive heat wave of 2009 without any fresh air circulation. The defendant successfully moved to dismiss, arguing that David could not recover for his damages because he had no statutory beneficiaries.

On appeal, Division Two reversed dismissal of the economic damages and affirmed dismissal of the noneconomic damages.[2] Earl now petitions this court to review the latter.

Division Two held that the noneconomic damages were properly dismissed because (1) Earl lacked standing as a beneficiary under the wrongful death statutes, (2) Earl's claim that the wrongful death statute is unconstitutional fails because the statute does not create a cause of action for deceased persons, and (3) Earl failed to preserve the claim that David

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[1] This brief refers to David and his brother Earl by their first names to avoid confusion.

[2] *Vernon v. Aacres Allvest, LLC*, No. 44328-7-II, at 14 (Sept. 3, 2014).

should be considered a minor for the purpose of the wrongful death statute.[3]

III. ISSUES PRESENTED FOR REVIEW

A. Should review be granted under RAP 13.4(b)(4) because this case presents an issue of substantial public interest that should be determined by the Supreme Court?

B. Should review be granted under RAP 13.4(b)(3) because a significant question under the Federal and Washington State Constitutions is involved?

IV. STATEMENT OF THE CASE

A. Underlying Facts.

On July 29, 2009, Henry David Vernon, a 55 year-old deaf, mute, and cognitively disabled man under the care of Aacres, was found unresponsive in his room by members of Aacres' staff during one of the worst recorded heat waves.[4] Attempts to resuscitate him were unsuccessful, and David was later pronounced dead at the hospital.[5] His body temperature had risen to 107 degrees Fahrenheit, causing his vital organs to shut down and stop working.

David was born disabled and had severe cognitive disabilities.[6] He suffered from aphasia, mild mental retardation, and schizophrenia.[7] Even the simplest tasks were difficult for him, and he lacked the ability to appreciate the consequences of his actions and decisions.[8] David was

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[3] *Id.* at 6-7, 10-14.

[4] CP at 205.

[5] CP at 205.

[6] CP at 200-201.

[7] CP at 3.

[8] CP at 203.

never able to live independently, and his disabilities required him to have special care from the beginning of his life.[9]

David was completely dependent on Aacres for his health and safety needs.[10] He did not have the capability to understand how to care for himself, or to understand situations that were unsafe.[11] David could not take his own medicine, did not understand money, and needed reminders and prompts to complete the most basic daily tasks, such as shaving or taking a shower.[12] He could not ride the bus, go on a walk, or go anywhere on his own because he had little sense of direction or personal safety.[13] He needed people to help him make all kinds of decisions.[14] For example, when his brother Earl took David out to eat, Earl would have to remind him to stop eating because he was incapable of realizing he should stop eating when he became full.[15] David's yearly support plan noted that David was not always aware of his health and safety needs and that he could make choices but lacked any awareness of consequences to those choices.[16] His disabilities limited him in such a way that he was determined to be legally incapacitated.[17] This meant David lacked the ability to give informed consent and was legally unable

[9] CP at 201.
[10] CP at 203.
[11] CP at 203.
[12] CP at 203.
[13] CP at 203.
[14] CP at 203.
[15] CP at 203.
[16] CP at 202.
[17] CP at 142.

to do things like enter into contracts, buy or sell property, and get married.[18]

Aacres staffed the home where David lived full time, which provided general supervision, administered medications, and assisted with daily tasks such as washing and eating meals. As a facility that received state funding, Aacres was provided with literature that set forth objectives and instructions for how to properly care for disabled adults in home settings.[19] With this aid and supervision, David was able to enjoy life, hold a job, go out with friends, go to church, and be active in his community.[20]

In the days leading up to David's death, the Pacific Northwest was on the brink of an unprecedented heat wave.[21] This was well known from extensive media coverage in the area, and warnings were issued by local health officials. The National Weather Service issued warnings for the "hazardous" weather conditions throughout the week, culminating with its "PRECAUTIONARY/PREPAREDNESS ACTIONS" alert issued on July 29, 2009, the day David tragically died.[22] This alert read as follows:

> AN EXCESSIVE HEAT WARNING MEANS THAT A PROLONGED PERIOD OF DANGEROUSLY HOT TEMPERATURES WILL OCCUR. THE COMBINATION OF HOT TEMPERATURES AND HIGH HUMIDITY WILL COMBINE TO CREATE A DANGEROUS SITUATION IN WHICH HEAT ILLNESSES ARE LIKELY. DRINK

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[18] CP at 142.
[19] CP at 149-162.
[20] CP at 4.
[21] CP at 205, 164-185.
[22] CP at 171.

> PLENTY OF FLUIDS...STAY IN AN AIR-CONDITIONED ROOM . . . STAY OUT OF THE SUN . . . AND CHECK UP ON RELATIVES AND NEIGHBORS.[23]

(Capitalization in original). As predicted, temperatures reached the upper 90s for days in a row and exceeded 100 degrees Fahrenheit in some parts.[24] Record highs were reached in multiple towns throughout Western Washington, and the temperature in Tacoma swelled to as high as 104 degrees Fahrenheit.[25]

David was particularly vulnerable to severe weather because one of his daily medications, Paxil, has the known side effect of inhibiting one's ability to keep their core temperature down.[26] Despite ample warning of the impending heat wave and knowledge of David's medications, Defendant Aacres did next to nothing to protect David.[27] David's room was in the second story and was not air conditioned.[28] He had a fan but the windows were painted shut and could not be opened.[29] On the night when David passed, Aacres failed to check on his well-being.[30] Only in the morning did Aacres discover that David was unresponsive and unable to be resuscitated.[31] The emergency personnel who responded reported that David's room was "very hot."[32] During the subsequent medical examination, David's body was found to have 16

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[23] CP at 171.
[24] CP at 182-185.
[25] CP at 182-185.
[26] CP at 205, 188.
[27] CP at 3-6, 205-207.
[28] CP at 205.
[29] CP at 206.
[30] CP at 206.
[31] CP at 188, 205.
[32] CP at 188, 205.

times the therapeutic dosage of Paxil.[33] At his time of death, David's core body temperature was 107 degrees Fahrenheit, caused by the excessive heat and the overdose of his medication.[34] His cause of death was exogenous hyperthermia.[35]

Aacres failed to properly supervise, protect, and ensure the safety of David. David does not leave behind a spouse, children, or any dependents. As his closest surviving relative, Earl brought a lawsuit to hold Aacres responsible for negligently causing the death of David.

B. Procedural History.

Earl, individually and as the personal representative of the Estate, filed a complaint on July 10, 2012, in Pierce County Superior Court.[36] The complaint alleged that David's death and the pain and suffering he experienced was the direct and proximate result of Aacres' gross negligence in its care, supervision, and treatment.[37] The complaint further alleged that Aacres' neglect violated the Vulnerable Adult Statute, Chapter 74.34 RCW. The complaint sought both economic and noneconomic damages.[38]

Soon after filing, Aacres propounded Requests for Admission.[39] Earl admitted that (1) he was not dependent on David for support at the time of his death; (2) David is not survived by a spouse, a child, or

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[33] CP at 188, 195.
[34] CP at 188, 195.
[35] CP at 189.
[36] CP at 1.
[37] CP at 5.
[38] CP at 5-6.
[39] CP at 38-41.

children; (3) David was not survived by parents, sisters, or brothers who were dependent on David for support at the time of his death; and (4) David does not have any statutory beneficiaries under Chapter 4.20 RCW.[40]

On November 16, Aacres moved for summary judgment.[41] Aacres argued that Earl could not maintain either a wrongful death or survival action because he was not an eligible beneficiary under Chapter 4.20 RCW.[42] Earl responded by arguing that Aacres was negligent as a matter of law for failing to properly supervise, protect, and ensure David's safety.[43] Earl also argued that the court should reject Aacres' beneficiary arguments and allow the recovery of economic and noneconomic damages.[44]

On December 14, 2012, the Pierce County Superior Court heard Aacres' motion for summary judgment.[45] After hearing arguments, the trial court stated:

> And I think the facts here are pretty compelling. At least on the face of it, there's some severe negligence. This guy died for no good reason I can see. However, I have to agree with Mr. Leitch that the law, good, bad, or indifferent, isn't really unclear here. There are certain categories of beneficiaries and Mr. Vernon is not one of them. I don't think there's too much dispute that he wasn't dependent, not a child, not a parent.

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[40] CP at 39.
[41] CP at 19.
[42] CP at 22-26.
[43] CP at 58-60
[44] CP at 60-68.
[45] RP (December 14, 2012) at 3.

> So I'm going to reluctantly grant the motion for summary judgment. This will be a great case, I think, for the Supreme Court to maybe expand the purview of the statute.
>
> . . .
>
> I hope the plaintiff appeals and if I get reversed on this, it won't bother me in the slightest.[46]

As a result, the trial court dismissed the lawsuit, and Earl filed his timely notice of appeal on December 19, 2012.

On September 3, 2014, Division Two reversed dismissal of Earl's claims for economic damages but affirmed dismissal of his claims for noneconomic damages. Earl submits this timely petition for review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b)(4) provides that review will be accepted where the petition involves an issue of substantial public interest that the Court should determine. Here, this petition involves Division Two's refusal to expand the common law to allow David's estate to recover noneconomic damages, such as pain and suffering, based on this Court's refusal in *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004), to recognize the existence of a wrongful death cause of action at common law. *Philippides* was based on a historical misconception and wrongfully decided, and the resulting rule—as evidence by Division Two's decision—has caused untold harm to severely disabled individuals like David.

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[46] RP (December 14, 2012) at 8:9-13, 13:25-15:12.

In a similar vein, RAP 13.4(b)(3) provides that review will be accepted where a significant question of law under the Washington State Constitution is involved. Here, Division Two's decision also involves a significant constitutional question regarding access to the courts.

A. Review is warranted under RAP 13.4(b)(4) because Earl's petition involves an issue of substantial public interest that the Supreme Court should determine.

In this case, Earl asked Division Two to recognize a common law cause of action allowing the estate to recover noneconomic damages. In rejecting Earl's request, Division Two acknowledged that this Court rejected a similar argument "regarding *a different* but rather similar statute" in *Philippides*, 151 Wn.2d at 376. *Vernon*, slip. Op. at 6 (emphasis added). There, this Court declined to adopt "a common law cause of action for loss of consortium for parents of adult children" [under RCW 4.24.010]. 151 Wn.2d at 390. Accordingly, this case presents an issue of first impression: Whether the Court should recognize a common law cause of action for recovery of noneconomic damages despite the absence of a statutory beneficiary under RCW 4.20.020, Washington's wrongful death statute.

Petitioner recognizes, however, that this Court will likely look to *Philippides* for guidance. Indeed, Petitioner implores this Court to revisit *Philippides*, given that its reasoning flows from erroneous underpinnings and its result has resulted in significant harm to Washington citizens—particularly the disabled—giving rise to an issue of substantial public interest.

Philippides rejected the call to adopt a "common law course of action for loss of consortium for parents of adult children" based on its observation that "'causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.'" 151 Wn.2d at 390. Thus, the court reasoned that—with wrongful death actions rooted only in statutory, not common, law—it was without authority to adopt such a cause of action. *Id.*

However, the *Philippides* court's reasoning only compounded a historical misconception under which Washington courts have labored: That wrongful death claims are purely statutory in nature and were not recognized at common law. Even the United States Supreme Court has rejected this very proposition. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970), the Supreme Court examined the origins of the so-called "common-law rule against recovery for wrongful death," observing that it was first explicitly pronounced—without any citation to authority or supporting reasoning—by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808): "("[I]n a civil court the death of a human being could not be complained of as an injury."[47] *Moragne*, 398 U.S. at 382.

After examining English law, the Supreme Court observed that the "sole substantial basis" for the English rule was the English "felony-

[47] This unsupported assertion, in turn, became the basis for the pronouncement in many later American cases that there could be no recovery for wrongful death in the absence of a statute. *See Lafage v. Jani*, 766 A.2d 1066, 1076, 166 N.J. 412 (2001). .

merger" doctrine.[48] *Id.* After surveying both American and English law, the Supreme Court further observed that "the historical justification marshaled for the [felony-merger] rule in England *never existed in this country at all.*" 398 U.S. at 384 (emphasis added).[49]

Indeed, several early American decisions rejected the English rule against wrongful death claims and evidence a common law right to sue for wrongful death in this country. *See Cross v. Guthery*, 2 Root 90 (Conn. 1794); *Piscatauqua Bank v. Turnley*, 1 Miles 312 (Phila. Dist. Ct. 1836); *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838); *James v. Christy*, 18 Mo. 162 (1853); *Kate v. Horton*, 2 Haw. 209 (1860); *Sullivan v. Union Pac. R.R. Co.*, 23 F. Cas. 368, 371 (Cir. Ct. Neb. 1874); *see also* Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1055 (1965). As for the American courts that applied the rule "without much question," the *Moragne* court observed that those courts' reason for doing so was "simply that [the English rule] had the blessing of age." 398 U.S. at 386. Accordingly, the *Moragne* court held that a widow had a common law right to damages for the wrongful death of her husband. 398 U.S. at 376-378.

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[48] Under this doctrine, English courts held that, because a tort against a private person was less important than a criminal offense against the Crown, private suits for damages arising from an act that also constituted a crime were preempted by the criminal action. *Moragne*, 398 U.S. at 382. The practical effect of the felony-merger doctrine was that civil wrongful death actions simply were not filed because all felons were subject to the death penalty, and their property was forfeited to the Crown; nothing remained for a civil litigant to recover as damages. *Id.*

[49] Indeed, 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).

Although *Moragne* focused on the right to sue for wrongful death under maritime law, numerous state courts have followed its lead; rejected the blind recitation of the unsound, unsupported English rule; and recognized the existence of a wrongful death cause of action at common law. 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***." *Lafage v. Jani*, 166 N.J. 412, 439, 766 A.2d 1066, (N.J. 2001) (emphasis added). In *Lafage*, the court found that New Jersey's wrongful death statutes are a codification of a common law wrongful death cause of action, thereby providing an independent basis despite no statutory basis for the court to allow equitable tolling of the state's wrongful death statutes.[50] *Id.* at 434.

Accordingly, Washington's erroneous refusal to recognize a cause of action for wrongful death at common law based on a decades-long historical misconception raises an issue of substantial public importance. The public importance of this issue is only heightened when considering its negative impact on some of Washington's most vulnerable citizen,

[50] The *Lafage* court is far from alone in its holding. *See Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972) ([T]he law in this Commonwealth has also evolved to the point where it may now be held that the right to recover for wrongful death is of common law origin, and we so hold. Consequently, our wrongful death statutes will no longer be regarded as "creating the right" to recover for wrongful death.); *see also, Summerfield v. Maricopa County Superior Court*, 698 P.2d 712, 716 (Ariz. 1985) (a common law wrongful death claim is not necessarily precluded by Arizona's wrongful death statutes in light of doubtful validity of *Baker*); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. App. 1980) (noting existence of common law right to recover for wrongful death in New Mexico); *Haakanson v. Wakesfield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979) (finding that Alaska's wrongful death statue is not in derogation of its common law, but stating that if there were no statute, the court would follow the lead of *Moragne*); *Wilbon v. D.F. Bast Co., Inc.*, 382 N.E.2d 784, 785 (Ill. 1978) (*Baker v. Bolton* rule was "obviously unjust, . . . technically unsound . . . and based upon a misreading of legal history.")

namely, those like David who are severely developmentally disabled. Washington's wrongful death statutes grant a cause of action encompassing noneconomic damages, such as pain and suffering, only to "tier one beneficiaries" (spouses and children) or "tier two beneficiaries" (parents or siblings financial dependent on the decedent). RCW 4.20.020. Washington's survival statutes and even Washington's Vulnerable Adult Statute, chapter 74.34 RCW, incorporate RCW 4.20.020's "tiered beneficiaries only" approach to noneconomic damages. RCW 4.20.046(1) (general survival statute); RCW 4.20.060 (special survival statute); RCW 74.34.210 (Vulnerable Adult Statute).

The *de facto* effect of these statutory provisions and Washington courts' refusal to recognize a common law wrongful death cause of action is to deprive developmentally disabled citizens like David of the protections of Washington law. Severely disabled adults like David generally do not marry or have children; in fact, David was legally prohibited from marrying due to his cognitive disabilities. Likewise, David's profound cognitive disabilities rendered him incapable of employment, making it axiomatic that he could have ***any*** financial dependents, let along dependent parents or siblings, or economic losses, such as lost future earnings. The end result of this status quo is that tortfeasors responsible for the deaths of highly vulnerable individuals like David are largely immune from liability, and there is no mechanism to hold them truly accountable their negligence and the resulting horrific deaths of individuals like David. *See, e.g. Bennett v. Seattle Mental*

Health, 166 Wn. App. 477, 492, 269 P.3d 1079 (2012) (plaintiff was developmentally disabled adult with no wrongful death beneficiaries).

Indeed, the Court of Appeals has expressly recognized this exact injustice. In *Schumacher v. Williams*, 107 Wn. App. 793, 805, 28 P.3d 792 (2001), the Court of Appeals dismissed claims based on the death of Schumacher—an adult woman with Downs Syndrome who was scalded to death by a fellow resident of her boarding home—due to her lack of statutory beneficiaries. As Judge Ellington observed in a reluctant concurrence:

> Once again we confront the flaws in the statutory scheme for survival of actions. Maria Schumacher is exactly the person the legislature set out to protect in enacting the vulnerable adults statute. But the statute did not protect her, because of the limitations of the survival statute.
>
> 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.
>
> . . . . 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.

Schumacher, 107 Wn. App. at 805 (Ellington, J., concurring). In the decade since *Philippides* was decided, and despite these explicit concerns

raised by the judiciary, however, the legislature has continued to ignore the needs of the disabled community, considering and failing to pass bills that would eliminate the financial dependence requirement for tier two beneficiaries. *See, e.g.*, H.B. Rep. on Engrossed Substitute H.B. 1873, 60th Leg. Sess. (Wash. 2008) (noting also that the legislature heard public testimony that the amendments were "important for people with disabilities").

In sum, the time is ripe for this Court to step in and restore justice. The legislature has done nothing to fix the problem. And the lower courts have explicitly recognized the injustice inherent in Washington law as applied to the deaths of several disabled adults like David. But only this Court can revisit *Philippides*' erroneous holding—based on a historical misconception—that no common law cause of action for wrongful death exists to be expanded by the courts. And this issue is one of substantial importance due to the injustice it wreaks on severely disabled and vulnerable adults like David, imposing little-to-no accountability for their deaths, no matter how painful and horrific. Accordingly, the Court should accept review of this case, overturn *Philippides*, and expand the common law to recognize a cause of action allowing the estate to recover noneconomic damages.[51]

[51] Doing so would not raise concerns of statutory preemption. "Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent," *In re Parentage of L.B.*, 155 Wn.2d 679, 695 n. 11, 122 P.3d 161 (2005), and "it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent." *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960). But the prevailing—and erroneous—notion in Washington has been that no common law wrongful death action

B. Review is warranted under RAP 13.4(b)(3) because Earl's petition involves a significant question of law under both the federal and state Constitutions.

Review is also warranted under RAP 13.4(b)(3) because Earl's petition involves a significant question of law under both the federal and state constitutions—namely, denial of his fundamental right to access the courts.

Title II of the ADA provides, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. The United States Supreme Court has held that Title II of the American with Disabilities Act is constitutionally valid and that access to the Courts is a protected fundamental right. *Tennessee v Lane*, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). Similarly, Article I, Section 10 of our State Constitution mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This Court has held that access to the judicial system is a "preservative . . . and fundamental right." *Carter v. University of Washington*, 85 Wn.2d 391, 398, 536 P.2d 618, 623 (1975).

As discussed above, Washington's wrongful death and survival statutes limit recovery to "tier one" beneficiaries (spouses or children) and "tier two" beneficiaries (parents or siblings that were dependent on the

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exists, it cannot be said that the legislature intended to preempt or diminish a right of which it was unaware.

decedent).[52] The decedent's estate may also recover under the general RCW 4.20.046, the general survival statute, but estate's recovery is limited to "the lost net accumulations of the decedent," *Tait v. Wahl*, 162 Wn. App. 765, 774, 987 P.2d 127 (199), which "the estate would have acquired if the decedent had survived to the expected lifetime." *Federated Servs. Ins. Co. v. Personal Representatives of the Estate of Norberg*, 101 Wn. App. 119, 126, 4 P.3d 844 (2000). Net accumulations are the "decedent's net earnings over a normal life-span, calculated by determining the decedent's probably gross earnings subtracting personal and family support expenditures, and then reducing the figure to present value." *Federated Services*, 101 Wn. App. at 126 (citing *Bingaman v. Grays Harbor Community Hosp.*, 37 Wn. App. 825, 685 P.2d 1090 (1984), *rev'd in part on other grounds*, 103 Wn.2d 831, 699 P.2d 1230 (1985)). RCW 4.20.046 does allow the decedent's personal representative to recover damages for the decedent's predeath pain and suffering, but only on behalf of the "tiered beneficiaries" of RCW 4.20.020—spouses and children and, in their absence, financially dependent parents and siblings.

Thus, the phrase "net accumulations" presumes that the decedent had the ability over a normal life span to earn an income. This is the only reasonable conclusion one can draw. If RCW 4.20.020 is applied to David, because he was not capable of working and thus, would have

[52] *Supra*, at 13.

acquired no net accumulations to claim, David could not bring a lawsuit in the first instance as he would have no damages available to her. Therefore, he would effectively be denied his constitutional right of access to the court.

The Court of Appeals, in rejecting this argument, relied on Division Three's reasoning in *Triplett v. Washington State Dep't of Soc. and Health Servs.*, 166 Wn. App. 423, 268 P.3d 1027 (2012), that, because Washington's wrongful death statutes "do not purport to provide . . . access to the courts to a deceased person," it is "'absurd to suggest that the wrongful death statute unlawfully restricts their access to the courts.'" *Vernon*, slip. op. at 12 (quoting *Triplett*, 166 Wn. App. at 429). Respectfully, this reasoning misses the mark. "A survival action in Washington is brought by the personal representative solely ***on behalf of the decedent*** and for the sole benefit of his or her estate." *Bankhead v. Aztec Const. Co.*, 48 Wn. App. 102, 109, 737 P.2d 1291, 1295 (1987) (emphasis added) (citing RCW 4.20.046; *Criscoula v. Andrews*, 82 Wn.2d 68, 69, 507 P.2d 149 (1973); *Wagner v. Flightcraft, Inc.*, 31 Wn. App. 558, 567, 643 P.2d 906 (1982)). Thus, Washington's general survival statute ***does*** create access to the courts for a deceased person. However, Washington courts have limited that access to recovery of net accumulations.

And the "tiered beneficiary" scheme of RCW 4.20.020—through its incorporation into RCW 4.20.046—serves to slam the door on access to the courts by severely disabled individuals like David. In David's case, it

is indisputable that he had significant cognitive disabilities and has required full-time care his entire life. It is further indisputable that given the level of profound cognitive disability, David was incapable of employment and further, incapable of providing services that would have economic value. At the very least, the courts would normally allow David access to seek compensation for the horrific suffering he endured; however, because David was also indisputably unable to marry, was highly unlikely to have children, and was incapable of work, much less having dependents—RCW 4.20.020 prevents any recovery simply because he died from his horrific suffering. Frankly, this turns the entire notion of justice on its head.

Accordingly, because his disabilities rendered him incapable of having a spouse, children, work (and corresponding net accumulations), or dependent parents or siblings, application of RCW 4.20.020 and the holding in *Philippides*, 151 Wn.2d at 376, would deny David his fundamental and constitutional right of access to the court guaranteed by both the Federal and Washington State Constitutions. Given society's, the Legislature's, and the Judiciary's commitment to eradicating discrimination against the disabled and providing parity to the same, it defies rational and meaningful interpretation to conclude that the Legislature intended to bar profoundly cognitively disabled individuals from the court system under RCW 4.20.020.

VI. SUMMARY AND CONCLUSION

As stated by Mahatma Ghandi, "A nation's greatness is measured by how it treats its weakest members: the elderly, the infirm, the handicapped, the underprivileged, the unborn." Washington State fares poorly under this standard, given its virtually complete failure to hold anyone accountable for the deaths of our most severely disabled citizens. However, this case present this Court with the opportunity to right the wrongs of the past—*Philippides*—and the injustices of the present—the slamming of the courthouse doors on severely disabled individuals like David and their surviving loved ones. The trial court boldly spoke out about the injustice present in this case. The Court of Appeals has candidly recognized the same injustice. But only this Court has the authority to give David's death the full accounting that it deserves. Accordingly, Petitioner respectfully requests that the Court accept reviews of the issues presented in this petition.

RESPECTFULLY SUBMITTED this 2nd day of October, 2014

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Kevin M. Hastings, WSBA No. 42316

STATE OF WASHINGTON)
)ss
COUNTY OF KING)

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 October 2, 2014, I placed for delivery with Legal Messengers, Inc., a true and correct copy of the above, directed to:

Charles Leitch
Patterson Buchanan Fobes Leitch & Kalzer
2112 Third Ave. Ste. 500
Seattle, WA 98121
Attorney for: Aacres Allvest, LLC

DATED this 2nd day of October, 2014.

Laura Neal
Legal Assistant to
Darrell L. Cochran

4844-0292-0478, v. 2

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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.	No. 44328-7-II PUBLISHED OPINION

JOHANSON, C.J. — Earl Vernon, on behalf of his brother Henry David Vernon's estate, appeals the superior court's order granting summary judgment in favor of Aacres Allvest, LLC, Aacres Landing, Inc., Aacres WA, LLC, and Aalan Holdings, Inc. (Aacres). Earl[1] argues that (1) the superior court erred in dismissing his noneconomic damages claim under the wrongful death statute (RCW 4.20.020) because the court should have recognized a common law wrongful death cause of action, (2) the superior court erred in dismissing his economic damages claim under the general survival statute (RCW 4.20.046), (3) the superior court's dismissal of Earl's claims

[1] We refer to Henry David Vernon as David and his brother Earl Vernon by his first name for clarity.

violated David's constitutional right to access the court, and (4) David should be considered a minor for the purposes of the wrongful death statute.

We hold that (1) the superior court properly dismissed Earl's noneconomic damages claim under the wrongful death statute because he lacks standing as a statutory beneficiary and we cannot recognize a wrongful death common law cause of action which conflicts with the existing statutory framework, (2) the superior court erred in dismissing Earl's economic damages claim because these damages are available under the general survival statute notwithstanding the absence of qualifying statutory beneficiaries, (3) Earl's claim that the wrongful death statute is unconstitutional fails because the statute does not create a cause of action for deceased persons, and (4) Earl failed to preserve the claim that David should be considered a minor for the purposes of the wrongful death statute. Accordingly, we affirm in part and reverse in part.

FACTS

David was born severely disabled. Because of his disabilities, David was completely dependent on others for his health and personal care needs. In 2009, David lived in a home under the care and supervision of Aacres. In late July, western Washington experienced a record-breaking heat wave. On the morning of July 29, Aacres staff member Francis Muraya found David lying unresponsive on his bedroom floor. Emergency personnel transported David to the hospital where he was pronounced dead. The cause of David's death was "exogenous hyperthermia" consistent with high core body temperature. Clerk's Papers at 188.

Earl, David's legal guardian, filed suit against Aacres under the "Abuse of Vulnerable Adults Act" (AVAA).[2] Earl alleged that Aacres should be responsible for David's death because Aacres negligently allowed him to sleep in an upstairs bedroom with closed windows and doors during a record heat wave knowing that David's medication made it difficult for him to control his body temperature. Aacres moved for summary judgment, asserting that Earl's claims must be dismissed because he lacked standing to bring suit under both the wrongful death statute and the general survival statute.

In response to Aacres' motion for summary judgment, Earl argued that damages for David's pain and suffering and for funeral expenses should be available under the wrongful death statute and the general survival statute.[3] In the alternative, Earl argued that the superior court should recognize a common law wrongful death cause of action which would allow him to recover both economic and noneconomic damages. But the superior court agreed with Aacres and summarily dismissed each of Earl's claims because it found that he lacked standing as a beneficiary under the statutory framework that governs wrongful death actions in Washington. The superior court did not specifically address the claim for funeral expenses. Earl appeals on behalf of David and his estate.

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[2] Ch. 74.34 RCW.

[3] Earl filed suit alleging violations of AVAA. A provision of the AVAA, RCW 74.34.210, unequivocally grants a decedent's estate the right to recover economic damages even absent qualifying statutory beneficiaries. Therefore, the AVAA controls and could resolve this issue. But both on appeal and in the superior court, Earl relies entirely on the general survival statute to support his contention that David's estate is entitled to recover funeral expenses as economic damages. Therefore, in response to Earl's specific arguments, we analyze his claim in terms of the general survival statute as raised and briefed.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

When reviewing a summary judgment, we consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wn.2d at 26; *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). Moreover, we consider solely the issues and evidence the parties called to the trial court's attention on the motion for summary judgment. RAP 9.12. But we will consider an issue raised for the first time on appeal if the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

II. NONECONOMIC DAMAGES

Earl argues that despite his apparent lack of standing under the wrongful death statute, the superior court nonetheless erred in dismissing his noneconomic damages claims on summary judgment because we should recognize a common law cause of action to allow the estate to

recover for David's wrongful death.[4] We hold that the comprehensive wrongful death statutes preclude recognition of a wrongful death common law cause of action.

A. RULES OF LAW

Washington's wrongful death statutes create a right of action to recover damages when a person's death is caused by the wrongful act, neglect, or default of another. RCW 4.20.010. But the statutory framework also places limitations on who may bring such an action. RCW 4.20.020. RCW 4.20.020 provides in part,

> Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death

Accordingly, the legislature has created a two-tier system of beneficiaries for purposes of a wrongful death action. Spouses and children of the decedent are the "first tier" beneficiaries while the decedent's parents and siblings constitute "second tier" beneficiaries. *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004). Second tier beneficiaries are entitled to recover for the decedent's wrongful death only if there are no first tier beneficiaries *and* if the second tier beneficiary can demonstrate that he or she was dependent upon the deceased for support. RCW 4.20.020; *Philippides*, 151 Wn.2d at 386.

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[4] Earl brought this action under the AVAA, yet our focus here remains on the wrongful death statutes because RCW 74.34.210 provides in part,

> Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in chapter 4.20 RCW.

B. APPLICATION OF WRONGFUL DEATH LAW

Here, Earl admits that he was not dependent on David. Earl further admits that David was not survived by anyone who could satisfy the criteria to recover under the wrongful death statute as a designated beneficiary. Therefore, the superior court did not err in granting summary judgment in Aacres' favor because Earl lacked standing under the wrongful death statute. RCW 4.20.020.

Nevertheless, Earl argues that Washington courts have labored under a historical misconception that wrongful death claims never existed at common law. Earl argues that several other jurisdictions have held that their wrongful death statutes do not necessarily preclude a common law wrongful death claim. He supports his position with language from *Ueland v. Reynolds Metals Co.*, in which our Supreme Court said, "When justice requires, this court does not hesitate to expand the common law and recognize a cause of action." 103 Wn.2d 131, 136, 691 P.2d 190 (1984).

But Earl ignores the fact that our Supreme Court has rejected an identical argument regarding a different but rather similar statute. In *Philippides*, the court was asked to interpret RCW 4.24.010, which governs actions for injury or death of children and which also contains a requirement that parents who bring an action on behalf of an adult child show that they are dependent on that child for support. 151 Wn.2d at 387. The *Philippides* court was asked to adopt a common law loss of consortium cause of action on behalf of parents of adult children injured or killed by a negligent defendant. 151 Wn.2d at 388. The Supreme Court considered the same language from *Ueland* that Earl cites here and noted that while it does not hesitate to *expand* the common law, the case before it was governed entirely by statute whereas the *Ueland* court was

asked to expand allowable damages within an existing common law framework. *Philippides*, 151 Wn.2d at 390. The Supreme Court concluded that adopting a common law cause of action would create a direct conflict with the existing statutory scheme. *Philippides*, 151 Wn.2d at 390.

The *Philippides* court stated further,

> 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." *Tait v. Wahl*, 97 Wn. App. [765, 771, 987 P.2d 127 (1999), *review denied*, 140 Wn.2d 1015 (2000)]. 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 Wn.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 Wn.2d 201, 202, 471 P.2d 87 (1970).

151 Wn.2d at 390. Accordingly, we hold that we 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.

III. ECONOMIC DAMAGES

Earl next contends that David's estate should be able to recover economic damages under the general survival statute, RCW 4.20.046(1), despite the lack of beneficiaries under RCW 4.20.020. Aacres responds that the general survival statute only allows recovery on behalf of the same beneficiaries enumerated in the wrongful death statute. We agree with Earl and hold that the superior court erred in failing to award funeral expenses to Earl because, contrary to Aacres' assertion, David's estate may recover economic damages under the general survival statute.

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, 755-56, 92 P.3d 192 (2004). The purpose of awarding damages under the survival statute is to remedy the common

law anomaly that allowed tort victims to sue if they survived, but barred their claims if they died. *Otani*, 151 Wn.2d at 755. The general survival statute provides in part,

> All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, *That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020*, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action.

RCW 4.20.046(1) (emphasis added). By its language, the general survival statute adopts the "two-tier" system of beneficiaries featured in the wrongful death statute for *noneconomic* damages.

But the statute's plain language does not preclude David's estate from recovering purely economic damages despite the fact that Earl is not a statutory beneficiary. Accordingly, we agree that the superior court erred when it dismissed Earl's claim for economic damages.

In *Wilson v. Grant*, Division Three of this court concluded that nothing in the general survival statute's history demonstrated that the legislature intended to limit the traditional recovery of economic damages only to those who qualified as statutory beneficiaries under RCW 4.20.020. 162 Wn. App. 731, 741-42, 258 P.3d 689 (2011); *see also Cavazos v. Franklin*, 73 Wn. App. 116, 121, 867 P.2d 674 (1994) (holding that under the general survival statute, the decedent's administrator is entitled to maintain an action for the following damages: disability with its attendant permanent loss of earning power, burial and funeral expenses, medical and hospital expenses, and general damages to the decedent's estate).

The *Wilson* court also scrutinized a 1993 amendment to the general survival statute, which amendment added the language giving rise to statutory beneficiaries' right to recover noneconomic

damages (such as pain and suffering). 162 Wn. App. at 741. The court concluded that the amendment was intended to address only concerns that noneconomic damages were available to statutory beneficiaries under the "special survival statute" (RCW 4.20.060), while the same damages were simultaneously unavailable under the general survival statute. *Wilson*, 162 Wn. App. at 741. The legislature voiced its concern that an earlier version of the statute had created a loophole that functioned to reward those who delayed settlements because a person who survived a tortious act, but later died, was precluded from recovery. *See* H.B. REP. ON S.B. 5077, at 2, 53rd Leg., Reg. Sess. (Wash. 1993). In the *Wilson* court's view, the amended language was not intended to apply to the entire paragraph of the statute to preclude recovery of historically available economic damages even when there are no qualifying beneficiaries. 162 Wn. App. at 742. The *Wilson* court then cited several cases where economic damages have been awarded absent statutory beneficiaries or showings of dependency. 162 Wn. App. at 742-43.

Aacres contends that Division One of this court reached the opposite conclusion in *Cummings v. Guardianship Services of Seattle*, 128 Wn. App. 742, 110 P.3d 796 (2005), *review denied*, 157 Wn.2d 1006 (2006). But that case is distinguishable because the court in *Cummings* interpreted a former provision of the AVAA that it deemed controlling instead of the general survival statute. 128 Wn. App. at 752. There, the court held that no economic damages were recoverable because an AVAA provision restricted the right to seek *all* damages except damages for the benefit of the statutory beneficiaries "'set forth in chapter 4.20 RCW'" and Cummings had no qualifying beneficiaries. *Cummings*, 128 Wn. App. at 752 (emphasis omitted) (quoting RCW 74.34.210). Furthermore, the legislature later amended the dispositive provision in *Cummings*

with language unequivocally permitting recovery of economic damages in the absence of statutory beneficiaries.[5] LAWS OF 2007, ch. 312, § 11; RCW 74.34.210.

Additionally, Aacres relies on dicta from *Philippides* in support of its argument. The *Philippides* court made the broad statement that "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. *See* RCW 4.24.010 (child injury/death); RCW 4.20.020 (wrongful death); RCW 4.20.046 (general survival statute); RCW 4.20.060 (special survival statute)." 151 Wn.2d at 386. This is true, but only to the extent a party is seeking to recover for noneconomic damages. The *Wilson* court also considered this statement and concluded that it was not meant to preclude an award of economic damages.

Accordingly, although the general survival statute allows only those who qualify as beneficiaries to pursue claims for certain enumerated damages, it does not exclude all other damages historically available. Therefore, we follow *Wilson* and hold that economic damages, including funeral costs are available to David's estate under the general survival statute.

IV. ACCESS TO THE COURT

Earl contends that prohibiting David's recovery of noneconomic damages violates David's constitutional right of access to the courts under both Title II of the Americans with Disabilities

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[5] RCW 74.34.210 now provides in part,

> Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in chapter 4.20 RCW *or if there are no beneficiaries, then for the recovery of all economic losses sustained by the deceased person's estate.*

(Emphasis added.) Neither party argues that amended RCW 74.34.210 applies.

Act (ADA), 42 U.S.C. §§ 12131-12165, and article I, section 10 of the Washington Constitution. As a threshold matter, Earl did not present this to the superior court. But a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).[6] Assuming without deciding that the alleged error is a manifest error of constitutional magnitude, we reach but reject the merits of this claim. In doing so, we adopt Division Three's reasoning in *Triplett v. Department of Social & Health Services*, 166 Wn. App. 423, 429, 268 P.3d 1027, *review denied*, 174 Wn.2d 1003 (2012), and hold that Earl's claim fails because the wrongful death statutes cannot be considered unconstitutional by denying access to the courts to someone who is no longer living.

The United States Supreme Court has held that Title II of the ADA is constitutionally valid and that access to the courts is a fundamental right. *Tennessee v. Lane*, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). Title II of the ADA provides, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Additionally, our Supreme Court has held that access to the civil justice system is founded upon our constitution which mandates that "[j]ustice in all cases shall be administered openly, and

[6] This exception is construed narrowly by requiring the asserted error to be (1) manifest and (2) "truly of constitutional magnitude." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Error is manifest if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Because Earl argues that the statute under which the entirety of his case was dismissed is unconstitutional as applied to David, Earl can show "'practical and identifiable consequences'" of the asserted error. *WWJ Corp.*, 138 Wn.2d at 603 (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

without unnecessary delay." WASH. CONST. art. I, § 10; *Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012).

Here, Earl argues that, absent beneficiaries, recovery under the wrongful death statute would be limited to David's "net accumulations."[7] Accordingly, in Earl's view, the fact that David's disability precluded him from garnering such "accumulations" effectively denies David his constitutional right of access to the court. Division Three of this court previously considered and rejected this argument. In *Triplett*, Division Three held that this "access to the courts" argument lacked merit because Washington's wrongful death statutes do not purport to provide a cause of action or access to the courts to a deceased person. 166 Wn. App. at 429. The *Triplett* court was persuaded by the argument that because a person who is dead cannot pursue any action, it is "'absurd to suggest that the wrongful death statute unlawfully restricts their access to the courts.'" 166 Wn. App. at 429.

Such a holding is consistent with the principle that Washington's wrongful death statutes create causes of action only for specific surviving beneficiaries of the deceased and which only begin at the death of the decedent. *Otani*, 151 Wn.2d at 755. Accordingly, as the *Triplett* court concluded, RCW 4.20.020 does not violate *David's* constitutional rights to access the courts post-

[7] "Net accumulations" are the decedent's 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. *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 126, 4 P.3d 844 (2000), *review denied*, 142 Wn.2d 1025 (2001).

mortem. Therefore, we follow *Triplett* to hold that David was not denied access to the courts in violation of his constitutional rights.[8]

V. EQUIVALENCY TO MINOR

Finally, Earl asserts that David should be considered a minor under Washington law because of his cognitive disabilities.[9] Aacres argues that consideration of this argument is improper because Earl raises it for the first time on appeal. We agree with Aacres. RAP 9.12 provides, in pertinent part, "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." The purpose of RAP 9.12 "'is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.'" *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (quoting *Wash. Fed'n of State Empls. Council 28 AFL-CIO v. Office of Fin.*

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[8] Earl filed *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014), as supplementary authority. In *Schroeder*, our Supreme Court held that a statute that eliminated tolling of the statute of limitations for minors in medical malpractice cases was unconstitutional under the privileges and immunities clause of the Washington Constitution. 179 Wn.2d at 577. The court found that there was no rational explanation for the legislature's failure to eliminate tolling only for this group of plaintiffs. *Schroeder*, 179 Wn.2d at 577.

To the extent that Earl wishes to make a similar argument, he cannot show, as he must, that there is no reasonable ground to distinguish between the tiers of beneficiaries. The legislature has ostensibly determined that the degree to which a spouse or child typically depends on a decedent is sufficiently different from that which a parent or sibling does. A child would frequently be able to establish dependence on a parent, but the inverse is likely rare. The same can be said in comparing spouses with siblings. The *Philippides* court rejected a similar argument based on the privileges and immunities clause. 151 Wn.2d at 392-93. There, the court concluded that there was no violation of the privileges and immunities clause because legitimate differences between classes provided a reasonable basis to treat them differently. *Philippides*, 151 Wn.2d at 393.

[9] It is not clear from Earl's briefing how he would be entitled to recover in the event that David was considered a minor. Recovery is arguably broader under RCW 4.24.010, the statute that govern actions for injury or death of children, but that statute allows either a mother, a father, or both parents to bring an action. It does not entitle a sibling to do so.

Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993)). Accordingly, because Earl did not bring this issue to the superior court's attention, we will not now consider it on appeal.[10]

CONCLUSION

We reverse the superior court's grant of summary judgment in favor of Aacres on the issue of economic damages and remand for a determination of David's funeral expenses. We decline to recognize a common law wrongful death cause of action that would conflict with the existing statutory framework and, therefore, we affirm the superior court's order granting summary judgment on the noneconomic damages claim. We hold further that the wrongful death statute does not unconstitutionally deny David access to the courts.[11]

Johanson, C.J.
JOHANSON, C.J.

We concur:

Hunt, J.
HUNT, J.

Bjorgen, J.
BJORGEN, J.

[10] We note that even were we to consider Earl's argument, it would likely fail because Earl points to no authority in support of his argument that a developmentally disabled and legally incapacitated adult is a minor for the purpose of the wrongful death or survival statutes. Furthermore, when the legislature intends to include mentally incompetent or disabled persons in the same category as minors, it has done so explicitly. *Bennett v. Seattle Mental Health*, 166 Wn. App. 477, 487, 269 P.3d 1079, *review denied*, 174 Wn.2d 1009 (2012). To treat developmentally disabled adults the same as minor children would greatly expand the statutory beneficiaries entitled to bring a wrongful death action and such a significant change must come from the legislature. *Bennett*, 166 Wn. App. at 487; *Triplett*, 166 Wn. App. at 432-33.

[11] We do not reach the issue of whether David should be considered a minor because this issue was not properly preserved for review.

RCW 4.20.020
Wrongful death — Beneficiaries of action.

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

[2011 c 336 § 90; 2007 c 156 § 29; 1985 c 139 § 1; 1973 1st ex.s. c 154 § 2; 1917 c 123 § 2; RRS § 183-1.]

Notes:

Severability -- 1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 4.20.046
Survival of actions.

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action. The liability of property of spouses or domestic partners held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his or her death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

[2008 c 6 § 409; 1993 c 44 § 1; 1961 c 137 § 1.]

Notes:

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

RCW 4.20.060
Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs.

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has 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; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no surviving spouse, state registered domestic partner, or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

[2007 c 156 § 30; 1985 c 139 § 2; 1973 1st ex.s. c 154 § 3; 1927 c 156 § 1; 1909 c 144 § 1; Code 1881 § 18; 1854 p 220 § 495; RRS § 194.]

Notes:

Severability -- 1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 74.34.210
Order for protection or action for damages — Standing — Jurisdiction.

A petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian or legal fiduciary, the department, or any interested person as defined in RCW 74.34.020. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in chapter 4.20 RCW or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

[2007 c 312 § 11; 1995 1st sp.s. c 18 § 86.]

Notes:

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.