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Supreme Court No.: 90851-6

Court of Appeals No.: 44328-7-ii

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellant/Petitioner,

v.

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

Respondents.

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ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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**A. COURT OF APPEALS DECISION**

Earl Vernon, as Personal Representative of the Estate of Henry David Vernon (“Petitioner”) has requested review of the Court of Appeals published opinion *Vernon v. Acres Allvest, LLC*, No. 12-2-10662-8, 2014 Wash. App., at \*7-9 (Div. II. Sept. 3, 2014). A copy of the decision is in the Appendix at Exhibit A.

**B. IDENTITY OF RESPONDENT**

Respondents Acres Allvest, LLC, Acres Landing, Inc., Acres WA LLC, and AALAN Holdings, Inc., (collectively, “Respondents”) ask this Court to deny review of the Court of Appeals decision affirming the Superior Court’s dismissal of Petitioner’s noneconomic damages claim.

**C. INTRODUCTION**

Petitioner seeks discretionary review of the decision of the Court of Appeals on the grounds that this case involves a substantial public interest and a significant question under the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3) and (4). However, Petitioner has failed to show why the Court of Appeals erred in affirming the Superior Court’s dismissal of Petitioner’s noneconomic damages claim under the wrongful death statute because he lacks standing as a statutory beneficiary.

The Court of Appeals confirmed that it cannot recognize a wrongful death common law cause of action which conflicts with the existing statutory framework. In addition, the Court of Appeals held that the wrongful death statute is not unconstitutional because the statute does

not create a cause of action for deceased persons. As the Court of Appeals confirmed, it is not the function of the courts to modify legislative enactments. Therefore, this Court should deny review.

**D. STATEMENT OF THE CASE**

Henry David Vernon was born with certain disabilities. Despite his challenges, David Vernon was able to communicate through sign language, write simple sentences, and speak in a limited manner. (CP at 45, 116). David Vernon also held a job and lived in his own residence. (CP at 45, 116).

Aacres Allvest, LLC (“Aacres”) provided in-home support to David Vernon from October of 2005 until his death on July 29, 2009. CP at 45. Aacres provided a written individual service plan for his residence because of his hearing impairment, providing door and window alarms in his room to alert staff if they were opened, and a lighted smoke detector in the bedroom to alert him in the event of a fire. CP at 105. The decedent received mental health oversight and medication management from an ARNP employed by Mountainside Mental Health, not named in this action. CP at 44, 104.

On July 29, 2009, David Vernon was found unresponsive at his residence by Aacres staff. CP at 44. Attempts to revive him were unsuccessful and he was pronounced dead shortly thereafter. CP at 44. At the time of his death, David Vernon was 55-years-old. CP at 44. His death was caused by hyperthermia, the manner of death accidental. CP at 77, 93. David Vernon died alone, with no surviving dependents.

Despite the fact that David Vernon did not have any surviving dependents, Petitioner (the decedent's adult brother) filed a Complaint against Respondents on or about July 10, 2012, alleging negligence and violation of RCW 74.34. CP at 1-6. Petitioner did not allege that he was dependent on the decedent for any reason.

Shortly thereafter, Petitioner affirmatively admitted that he was not financially dependent on decedent at the time of death. CP at 40. Specifically, Petitioner answered Respondent's Requests for Admission as follows:

**REQUEST FOR ADMISSION 1:** Admit that you were not dependent on your brother (David Vernon) for support at the time of Henry David Vernon's death.

**RESPONSE:** Admit

\*\*\*

**REQUEST FOR ADMISSION 4:** Admit that Henry David Vernon does not have any statutory beneficiaries pursuant to 4.20 RCW.

**RESPONSE:** Admit

CP at 40. Because Petitioner admittedly does not qualify as a beneficiary that can bring a private cause of action pursuant to RCW 4.20, and because Petitioner's claim for damages has never been recognized in Washington and is not supported by statute or precedent, Respondents filed their Motion for Summary Judgment. (CP at 19). The trial court granted Respondents' motion and dismissed the case. (CP at 225-227). Petitioner appealed.

**E. ARGUMENT WHY REVIEW SHOULD BE DENIED**

**1. WHILE THE FACTS OF THIS CASE ARE UNFORTUNATE, PETITIONER FAILS TO RAISE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST**

Petitioner relies on RAP 13.4(b)(4), which states that the Court will accept review only “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). The Court should deny review as there is no discernible substantial public interest at issue here that requires the Court’s action.

The Court of Appeals held that it cannot recognize a common law wrongful death cause of action because doing so would conflict with the existing statutory framework and it is not the function of courts to modify legislative enactments. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7.

In arguing his theory that Washington’s statutory framework does not preclude a common law wrongful death claim, Petitioner asks the Court to ignore the fact that the Washington Supreme Court rejected an identical argument in *Philippides v. Bernard*. 151 Wn.2d 376, 88 P.3d 939 (2004). As the Court of Appeals confirmed, The Supreme Court in *Philippides* rejected adopting a common law cause of action for wrongful death because doing so would create a direct conflict with the existing statutory scheme. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7-9.

RCW 4.20.010 creates a right of action by the personal representative when a person's death is caused by a wrongful act, neglect, or default of another. However, RCW 4.20.020 specifically provides that only certain persons may maintain a wrongful death action.

RCW 4.20.020 provides in pertinent 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 death.

In Washington, 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. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7-9, citing *Philippides*, 151 Wn.2d at 385 – 386. 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 on the deceased for support. *Id.*

Accepting Petitioner's position would work a significant change in the law, would essentially amend RCW 4.20, *et seq.* by implication,

and would require an interpretation of the wrongful death statute that is inconsistent with RCW 4.20, *et seq.* Survival of the action to the benefit of siblings who are not dependent on the decedent is not necessary to the legislative purpose. *Schumacher v. Williams*, 107 Wn. App. 793, 802, 28 P.3d 792 (2001).

Petitioner relies on *Moragne v. States Marine Lines, Inc.* for his argument that this Court should recognize a common law wrongful death cause of action. (Petition for Review at 10-12); 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970). However, as Petitioner admits, *Moragne* focused on the right to sue for wrongful death under maritime law. (Petition for Review at 12). The Court in *Moragne* held that a widow had a common law right to damages for the wrongful death of her husband because maritime law did not afford a cause of action for wrongful death. *Moragne*, 398 U.S. at 376-378. Here, there are Washington statutes that explicitly provide for a cause of action for wrongful death. RCW 4.20, *et seq.*

At common law, no cause of action survived the death of an individual, nor was there a right of recovery for wrongful death. As the Court of Appeals decision confirms, Washington's courts have long and repeatedly held causes of action for wrongful death and survival are strictly a matter of legislative grace and are not recognized in the common law. *Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*7; *see also Tait v. Wahl*, 97 Wn. App. 769, 771, 987 P.2d 127 (1999). The Legislature has created a comprehensive set of statutes governing who

may recover for wrongful death and survival, and cases involving statutory interpretation require that the courts restrict themselves to a determination of the meaning of the statutory language in question. See *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. City of Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970).

In addition, courts are to extend the literal scope of such statutes only to protect beneficiaries clearly contemplated by the statute. *Id.* Absent ambiguity, a statute's meaning is derived from the language of the statute and the court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the meaning of a statute is plain on its face, the inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The court should "not assume that the Legislature intended to effect a significant change in the law by implication." *Schumacher*, 107 Wn. App. at 801.

The current wrongful death and survival statutes are modern versions of predecessor statutes, some of which date back over a hundred years. For example, RCW 4.20.010 and RCW 4.20.020 are traceable to Rem. Rev. Stats. §§ 183 and 183-1, respectively. See *Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949 (1935) (quoting and interpreting these statutes). Throughout the long history of these wrongful death and survival statutes, second tier beneficiaries have been required to prove

they were dependent on the decedent for support in order to qualify for relief.

A review of the history of the wrongful death and survival of action statutes reveals a consistent conservatism on the part of the Legislature with regard to the beneficiaries of those statutes. The beneficiaries under both the survival and the wrongful death statutes have never included siblings who are not dependent on the decedent for support. *Schumacher*, 107 Wn. App. at 802.

In *Schumacher*, Maria, who had Downs Syndrome, was a resident of an adult boarding home that was privately owned and operated by the Williams. The facility was licensed by the Washington State Department of Health. On May 31, 1997, Maria sustained a severe hot-water burn injury while taking a bath with the assistance of another resident. The facility failed to have staff members supervising the residents at the time of the incident. Maria died eight days later as a result of the burns. *Schumacher*, 107 Wn. App. at 796.

As a result of the injuries and death of Maria, Maria's brother, Charles Schumacher, filed an action as personal representative of Maria's estate, and individually, seeking recovery against the Williams, the boarding home, and the State. Schumacher based his claims upon the abuse of vulnerable adults statute, chapter 74.34 RCW; the Civil Rights Act, 42 U.S.C. § 1983 (1994); the Americans with Disabilities Act of

1990, 42 U.S.C. § 12132 (1995); and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1999). *Id.*

The Court of Appeals affirmed the trial court's holding that the estate had no recognized statutory beneficiaries under Washington's wrongful death and survival of action statutes which precluded recovery for the estate and Mr. Schumacher individually. *Schumacher*, 107 Wn. App. at 804-805. Thus, because the brother was not dependent on the deceased for support, he was not a statutory beneficiary and summary judgment was granted against the estate on all claims. *Id.*

Here, like the Plaintiff in *Schumacher*, Petitioner cannot establish any evidence that shows he had a substantial financial dependency on the decedent. Rather, the evidence clearly shows the opposite – that Petitioner did not rely on the deceased for any support. Although Petitioner is the surviving brother of the decedent, he admitted in his responses to Respondent's Requests for Admission that he was "not dependent on [his] brother (David Vernon) for support at the time of Henry David Vernon's death." CP at 40.

Washington case law and the unambiguous statutes clearly set forth the beneficiary requirements to bring suit. Petitioner admitted that he does not qualify as a beneficiary under the wrongful death and survival statutes and thus he does not qualify to bring a private action related to his brother's death. This Court may not amend an unambiguous statute merely because the Court may believe that the

Legislature intended something else, but failed to express it adequately. *Masunaga v. Gapasin*, 57 Wn. App. 624, 629-630, 790 P.2d 171 (1990), *review denied*, 115 Wn.2d 1012 (1990).

In sum, Petitioner has not explained why unambiguous statutory law confirmed by the Washington Supreme Court should be revisited by this Court. There is no public interest involved in needlessly engaging in settled (for decades) wrongful death and survival law in Washington where there is apparently no applicable authority for a similar theory as that espoused by Petitioner. Given the uniformity of the law, there is no need for the Supreme Court to use its limited resources in further considering the issue, and review should be denied.

**2. THERE IS NO QUESTION UNDER EITHER THE FEDERAL OR STATE CONSTITUTIONS FOR THIS COURT TO CONSIDER**

Petitioner argues that review is required under RAP 13.4(b)(3) because prohibiting the decedent's recovery violates his constitutional right of access to the courts. (Petition for Review at 16).

As the Court of Appeals confirmed, the decedent is not unconstitutionally denied a right of access to the courts because the decedent: (1) cannot pursue an action in the courts post mortem; (2) has no constitutional right of access to the judiciary post mortem; and (3) does not maintain any constitutional rights post mortem.

In arguing that RCW 4.20.020's limitation on beneficiaries unconstitutionally restricts a decedent's access to the courts, Petitioner repeats the arguments rejected by the Court of Appeals Division III in

*Triplett v. Dep't of Soc & Health Servs.*, 166 Wn. App. 423, 429, 268 P.3d 1027 (2012), *review denied*, 174 Wn.2d 1003, 278 P.3d 1111 (2012). (Petition for Review at 18). In rejecting Petitioner's arguments, the Court of Appeals adopted the reasoning in *Triplett. Vernon*, No. 12-2-10662-8, 2014 Wash. App., at \*11.

The appellate court held in *Triplett* the “access-to-courts argument has no merit...[s]ince a person who is dead cannot pursue an action, it is *absurd* to suggest that the wrongful death statute unlawfully restricts their access to the courts.” *Triplett*, 166 Wn. App. at 429. There, the mother and brother of the decedent argued that the applicable statutes limiting recovery to statutory beneficiaries unconstitutionally restricted the decedent's access to courts. *Triplett*, 166 Wn. App. at 429. The court disagreed and held that the statutory framework designated persons with standing to pursue a remedy on behalf of the deceased person. *Triplett*, 166 Wn. App. at 429. The statutory framework, as such, does not create a constitutional right. *Triplett*, 166 Wn. App. at 429. Accordingly, the access-to-courts argument failed.

The holding in *Triplett* 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 ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755-756, 92 P.3d 192 (2004). The general survival statute preserves all causes of action that a decedent could have brought had he or she survived. *Id.*

The statutory framework that provides the causes of action for wrongful death and survival actions does not create a constitutional right for the decedent to pursue a cause of action. The remedial framework requires that second tier beneficiaries demonstrate dependency on the decedent. RCW 4.20.020; .046; .060. Thus, Petitioner's argument has no merit as the decedent has no right to access to the court post mortem and therefore, there is no constitutional right to violate.

#### F. CONCLUSION

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

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of November, 2014.

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

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

DECLARATION OF SERVICE

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

On November 3, 2014 I caused to be served to the attorney for the Appellant, a copy of the **ANSWER TO PETITION FOR REVIEW**, and caused those same documents to be filed with the Clerk of the above-captioned Court.

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

Via Email to:

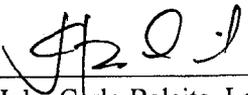
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DATED November 3<sup>rd</sup>, 2014, at Seattle, Washington.

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

# **APPENDIX**

## **Exhibit A**

**Vernon v. Aacres Allvest, LLC**

Court of Appeals of Washington, Division Two

September 3, 2014, Filed

No. 44328-7-II

**Reporter**

2014 Wash. App. LEXIS 2191

EARL **Vernon**, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE, APPELLANT, v. AACRES ALLVEST, LLC, ET AL., RESPONDENTS.

**PRIOR HISTORY:** [\*1] Appeal from Pierce County Superior Court. Docket No: 12-2-10662-8. Date filed: 12/14/2012. Judge signing: Honorable Ronald E Culpepper.

**Core Terms**

survival statute, wrongful death statute, economic damages, damages, superior court, cause of action, common law, courts, deceased, non economic damages, summary judgment, decedent's, disability, wrongful death, survived, constitutional right, argues, adult, funeral expenses, beneficiary, provides, tier, statutory framework, qualifying, manifest

**Case Summary**

**Overview**

**HOLDINGS:** [1]-The dismissal of the resident's brother's noneconomic damages claim under the wrongful death statute, Wash. Rev. Code § 4.20.020, was proper because the brother lacked standing as a statutory beneficiary and a wrongful death common law action would not be recognized that conflicted with the existing statutory framework. The brother admitted that he was not dependent on the decedent and the decedent was not survived by anyone who could satisfy the criteria to recover under the wrongful death statute as a designated beneficiary; [2]-The superior court erred in dismissing the brother's economic

damages claim because those damages were available under the general survival statute, Wash. Rev. Code § 4.20.046(1), notwithstanding the absence of qualifying statutory beneficiaries.

**Outcome**

Judgment affirmed in part and reversed in part.

**LexisNexis® Headnotes**

Torts > ... > Remedies > Damages > Types of Damages

Family Law > Family Protection & Welfare > Dependent & Disabled Adults > Abuse, Endangerment & Neglect

**HN1** Wash. Rev. Code § 74.34.210, unequivocally grants a decedent's estate the right to recover economic damages even absent qualifying statutory beneficiaries.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

**HN2** Appellate courts review summary judgment orders de novo, performing the same inquiry as the superior court. 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, Wash. Super. Ct. Civ. R. 56(c).

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Evidence > Inferences & Presumptions > Inferences

**HN3** When reviewing a summary judgment, appellate courts consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. Moreover, the courts consider solely the issues and evidence the parties called to the trial court's attention on the motion for summary judgment, Wash. R. App. P. 9.12. But they will consider an issue raised for the first time on appeal if the claimed error is a manifest error affecting a constitutional right, Wash. R. App. P. 2.5(a)(3).

Family Law > Family Protection & Welfare > Dependent & Disabled Adults > Abuse, Endangerment & Neglect

Torts > Wrongful Death & Survival Actions > Remedies > Damages

**HN4** See Wash. Rev. Code § 74.34.210.

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

**HN5** 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, Wash. Rev. Code § 4.20.010. But the statutory framework also places limitations on who may bring such an action, Wash. Rev. Code § 4.20.020.

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

**HN6** See Wash. Rev. Code § 4.20.020.

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

**HN7** 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. 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, Wash. Rev. Code § 4.20.020.

Torts > Wrongful Death & Survival Actions > General Overview

Governments > Legislation > General Overview

Governments > Courts > General Overview

**HN8** Causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law. The legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and there is no room for courts to act in that area. It is neither the function nor the prerogative of courts to modify legislative enactments.

Torts > Wrongful Death & Survival Actions > Survival Actions

**HN9** The general survival statute, Wash. Rev. Code § 4.20.046, preserves all causes of action that a decedent could have brought had he or she survived. 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.

Torts > Wrongful Death & Survival Actions > Survival Actions

**HN10** See Wash. Rev. Code § 4.20.046(1).

Torts > Wrongful Death & Survival Actions > Survival Actions

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

**HN11** The general survival statute, Wash. Rev. Code § 4.20.046, adopts the "two-tier" system of

beneficiaries featured in the wrongful death statute for noneconomic damages.

Torts > Wrongful Death & Survival Actions > Survival Actions

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

Torts > ... > Remedies > Damages > Types of Damages

**HN12** Nothing in the history of the general survival statute, Wash. Rev. Code § 4.20.046, demonstrates that the legislature intended to limit the traditional recovery of economic damages only to those who qualified as statutory beneficiaries under Wash. Rev. Code § 4.20.020. 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.

Torts > ... > Remedies > Damages > Types of Damages

Torts > Wrongful Death & Survival Actions > Survival Actions

**HN13** Although the general survival statute, Wash. Rev. Code § 4.20.046, allows only those who qualify as beneficiaries to pursue claims for certain enumerated damages, it does not exclude all other damages historically available.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

**HN14** A party may raise a manifest error affecting a constitutional right for the first time on appeal, Wash. R. App. P. 2.5(a)(3). This exception is construed narrowly by requiring the asserted error to be (1) manifest; and (2) truly of constitutional magnitude. 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.

Torts > Wrongful Death & Survival Actions > Definition of Person

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

**HN15** The wrongful death statutes, Wash. Rev. Code §§ 4.20.010, 4.20.020, cannot be considered unconstitutional by denying access to the courts to someone who is no longer living.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Public Health & Welfare Law > ... > Advocacy & Protection > Discrimination > Americans With Disabilities Act

**HN16** Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§ 12131-12165, is constitutionally valid and access to the courts is a fundamental right. Access to the civil justice system is founded upon the constitution, which mandates that justice in all cases shall be administered openly, and without unnecessary delay, Wash. Const. art. I, § 10.

Public Health & Welfare Law > ... > Advocacy & Protection > Discrimination > Americans With Disabilities Act

**HN17** See 42 U.S.C.S. § 12132.

Torts > ... > Remedies > Damages > Measurement of Damages

**HN18** "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.

Torts > Wrongful Death & Survival Actions > Potential Plaintiffs

**HN19** Washington's wrongful death statutes, Wash. Rev. Code §§ 4.20.010, 4.20.020, create causes of action only for specific surviving beneficiaries of the deceased and which only begin at the death of the decedent.

Civil Procedure > Appeals > Reviewability of  
Lower Court Decisions > Preservation for Review

Civil Procedure > Appeals > Summary Judgment  
Review > Appealability

**HN20** See Wash. R. App. P. 9.12.

Civil Procedure > Appeals > Summary Judgment  
Review > Appealability

Civil Procedure > Appeals > Reviewability of  
Lower Court Decisions > Preservation for Review

**HN21** The purpose of Wash. R. App. P. 9.12 is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.

Governments > State & Territorial Governments >  
Legislatures

Torts > Wrongful Death & Survival Actions >  
Potential Plaintiffs

Family Law > Family Protection & Welfare >  
Dependent & Disabled Adults > General Overview

**HN22** When the legislature intends to include mentally incompetent or disabled persons in the same category as minors, it has done so explicitly. 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.

## Headnotes/Syllabus

### Summary

WASHINGTON OFFICIAL REPORTS  
SUMMARY

**Nature of Action:** The brother and personal representative of a disabled adult who died while under the care and supervision of the operator of the home where the disabled adult lived sought relief under the Abuse of Vulnerable Adults Act on wrongful death and survival claims, alleging that the defendants negligently allowed the disabled adult to sleep in an upstairs bedroom

with closed windows and doors during a record heat wave knowing that the disabled adult's medication made it difficult for him to control his body temperature.

**Superior Court:** The Superior Court for Pierce County, No. 12-2-10662-8, Ronald E. Culpepper, J., on December 14, 2012, entered a summary judgment in favor of the defendants.

**Court of Appeals:** Holding that the trial court properly dismissed the claim for noneconomic damages under the wrongful death statute because the plaintiff lacked standing as a statutory beneficiary, that a common law cause of action for wrongful death that conflicts with the existing statutory framework could not be recognized, that the trial court erroneously dismissed the plaintiff's claim for economic damages because economic damages are available under the general survival statute notwithstanding the absence of qualifying statutory beneficiaries, that the wrongful death statute was not shown to be unconstitutional, and that the plaintiff failed to preserve a claim that his brother should be considered a minor for purposes of the wrongful death statute, the court *affirms in part* and *reverses in part* the judgment entered by the trial court.

### Headnotes

WASHINGTON OFFICIAL REPORTS  
HEADNOTES

#### WA[1] [1]

Death > Wrongful Death > Right of Action >  
Statutory Provisions > In General.

RCW 4.20.010, the wrongful death statute, creates a right of action to recover damages for the benefit solely of the individuals identified in RCW 4.20.020 when a person's death is caused by the wrongful act, neglect, or default of another.

#### WA[2] [2]

Death > Wrongful Death > Statutory Beneficiaries >  
Tiers > Differences.

RCW 4.20.020 establishes two tiers of beneficiaries of wrongful death actions: a decedent's spouse and children are first tier beneficiaries and a decedent's parents and siblings are second tier beneficiaries. A second tier beneficiary is entitled to recover only if there is no first tier beneficiary and the second tier beneficiary depended on the deceased for support.

**WA[3] [3]**

Death > Wrongful Death > Nature > Common Law or Statutory Action.

Wrongful death actions are not recognized at common law; such actions are strictly statutory, granted as a matter of legislative grace.

**WA[4] [4]**

Statutes > Construction > Amendment > Judicial Amendment > In General.

It is neither the function nor the prerogative of the courts to modify legislative enactments.

**WA[5] [5]**

Death > Wrongful Death > Nature > Extension of Remedy.

A court has no authority to expand the range of persons who may recover for the wrongful death of another beyond what the legislature has provided by statute.

**WA[6] [6]**

Death > Survival Action > Statutory Provisions > Purpose.

RCW 4.20.046(1), the general survival statute, preserves all causes of action that a decedent could have brought had the decedent survived. 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.

**WA[7] [7]**

Death > Survival Action > Beneficiaries > Limitation > Noneconomic Damages.

RCW 4.20.046(1), the general survival statute, adopts the "two tier" system of beneficiaries established by RCW 4.20.020 for the recovery only of noneconomic damages in a survival action.

**WA[8] [8]**

Death > Survival Action > Damages > General Survival Statute > Economic Damages > In General.

A decedent's personal representative may recover purely economic damages, including funeral costs, in a survival action under RCW 4.20.046(1), the general survival statute. The survival statute does not limit the recovery of economic damages to those who qualify as beneficiaries under RCW 4.20.020.

**WA[9] [9]**

Death > Wrongful Death > Statutory Provisions > Validity > Access to Courts > In General.

The wrongful death statutes, RCW 4.20.010 and .020, cannot be considered unconstitutional by denying access to the courts to someone who no longer is living.

**WA[10] [10]**

Civil Rights > Disability Discrimination > Access to Courts > Federal Protection.

The provision of 42 U.S.C. § 12132 that "no 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" creates a right of access to the courts.

**WA[11] [11]**

Courts > Access to Courts > Constitutional Right > In General.

Const. art. I, § 10, which mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay," creates a right of access to the civil justice system.

**WA[12] [12]**

Death > Wrongful Death > Statutory Provisions > Validity > Access to Courts > Decedent Without

Beneficiaries Whose Disability Prevented  
Accumulation of Property.

The wrongful death statutes (RCW 4.20.010 and .020)—which limit a decedent’s estate’s recovery to “net accumulations” when a decedent lacks statutory beneficiaries—do not violate the constitutional right of access to the courts for a decedent who has no statutory beneficiaries and whose disability prevented the decedent from acquiring net accumulations. Inasmuch as a dead person cannot pursue any action, the wrongful death statutes do not unlawfully restrict the decedent’s access to the courts.

WA[13] [13]

Judgment > Summary Judgment > Review > Issues Considered > Not Argued at Summary Judgment Hearing > In General.

Under RAP 9.12, an appellate court reviewing a summary judgment may decline to consider an argument or issue that was not called to the attention of the trial court in the summary judgment proceeding. RAP 9.12 effectuates the rule that an appellate court engages in the same inquiry as the trial court when reviewing a summary judgment.

JOHANSON, C.J., delivered the opinion for a unanimous court.

**Counsel:** *Darrell L. Cochran* and *Kevin M. Hastings* (of *Pfau Cochran Vertetis Amala PLLC*), for appellant.

*Charles P.E. Leitch* and *Andrew M. Weinberg* (of *Patterson Buchanan Fobes & Leitch, Inc., PS*), for respondents.

**Judges:** AUTHOR: Jill M Johanson, C.J. We concur: J. Robin Hunt, J., Thomas R Bjorgen, J.

**Opinion by:** Jill M Johanson

## Opinion

¶1 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<sup>1</sup> 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 violated David’s constitutional [\*2] right to access the court, and (4) David should be considered a minor for the purposes of the wrongful death statute.

¶2 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

¶3 David was born severely disabled. Because of his disabilities, David was completely dependent on others for his health and personal care needs.

<sup>1</sup> We refer to Henry David *Vernon* as David and his brother Earl *Vernon* by his first name for clarity.

[\*3] 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.

¶4 Earl, David's legal guardian, filed suit against Aacres under the "Abuse of Vulnerable Adults Act" (AVAA).<sup>2</sup> 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.

¶5 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 [\*4] death statute and the general survival statute.<sup>3</sup> 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.

## ANALYSIS [\*5]

### I. STANDARD OF REVIEW

¶6 *HN2* 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).

¶7 *HN3* 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

¶8 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

<sup>2</sup> Ch. 74.34 RCW.

<sup>3</sup> Earl filed suit alleging violations of AVAA. A provision of the AVAA, *HNI 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.

law cause of action to allow the estate to recover for David's wrongful death.<sup>4</sup> We hold that the comprehensive wrongful death [\*6] statutes preclude recognition of a wrongful death common law cause of action.

#### A. RULES OF LAW

**WA[1,2]** [1, 2] ¶9 **HN5** 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,

**HN6** 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 [\*7] resident within the United States at the time of his or her death

Accordingly, **HN7** 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.

#### B. APPLICATION OF WRONGFUL DEATH LAW

¶10 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.

¶11 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 [\*8] 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).

**WA[3-5]** [3-5] ¶12 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

<sup>4</sup> 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,

**HN4** 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.

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 [\*9] 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.

¶13 The *Philippides* court stated further,

The “courts of this state have long and repeatedly held, **HN8** 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. 1765, 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

¶14 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 [\*10] 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.

**WA[6-8]** [6-8] ¶15 **HN9** 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,

**HN10** 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 [\*11] 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, *HNI1* the general survival statute adopts the “two-tier” system of beneficiaries featured in the wrongful death statute for *noneconomic* damages.

¶16 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.

¶17 In *Wilson v. Grant*, Division Three of this court concluded that *HNI2* 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).

¶18 The *Wilson* court also scrutinized a 1993 amendment [\*12] 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.

¶19 Aacres contends that Division One of this court reached the [\*13] 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.<sup>5</sup> LAWS OF 2007, ch. 312, § 11; RCW 74.34.210.

¶20 Additionally, [\*14] Aacres relies on dicta from *Philippides* in support of its argument. The

<sup>5</sup> 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

*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.

¶21 Accordingly, **HN13** 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

**WA[9]** [9] ¶22 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 [\*15] Act (ADA), 42 U.S.C. §§ 12131-12165, and article 1, section 10 of the Washington Constitution. As a threshold matter, Earl did not present this to the superior court. But **HN14** a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).<sup>6</sup> 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 **HN15** the wrongful death statutes cannot be considered unconstitutional by denying access to the courts to someone who is no longer living.

**WA[10,11]** [10, 11] ¶23 The United States Supreme Court has held that **HN16** Title II of the ADA is constitutionally [\*16] 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, **HN17** “[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 without unnecessary delay.” WASH. CONST. art. 1, § 10; Lowy v. PeaceHealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012).

**WA[12]** [12] ¶24 Here, Earl argues that, absent beneficiaries, recovery under the wrongful death statute would be limited to David’s “net

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*losses sustained by the deceased person’s estate.*

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

<sup>6</sup> 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)).

accumulations.”<sup>7</sup> 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 [\*17] 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*.

¶25 Such a holding is consistent with the principle that *HN19* 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-mortem. Therefore, we follow *Triplett* to

hold that David was not denied access to the courts in violation of his constitutional rights.<sup>8</sup>

#### V. EQUIVALENCY TO MINOR

*WA[13]* [13] ¶26 Finally, Earl asserts that David should be considered a minor under Washington law because of his cognitive disabilities.<sup>9</sup> 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 [\*19] part, *HN20* “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.” *HN21* 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. Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993)*). Accordingly, because Earl did

<sup>7</sup> *HN18* “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)*.

<sup>8</sup> 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 [\*18] 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*.

<sup>9</sup> 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.

not bring this issue to the superior court's attention, we will not now consider it on appeal.<sup>10</sup>

## CONCLUSION

¶27 We reverse the superior court's grant of summary judgment in favor of Acres 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.<sup>11</sup>

HUNT and BJØRGEN, JJ., concur.

## References

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Washington Rules of Court Annotated (LexisNexis ed.) Annotated Revised Code of Washington by LexisNexis

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<sup>10</sup> 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, *HN22* when the legislature intends to include mentally incompetent or disabled persons in the same category as minors, it has done so [\*20] 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.

<sup>11</sup> We do not reach the issue of whether David should be considered a minor because this issue was not properly preserved for review.

## OFFICE RECEPTIONIST, CLERK

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**To:** John C. Balcita  
**Subject:** RE: Vernon v. Aacres Allvest, et al (Supreme Court No. 90851-6) "Answer to Petition for Review"

Received 11-3-14

**From:** John C. Balcita [mailto:jcb@pattersonbuchanan.com]  
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Please file attached:  
Answer to Petition for Review

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

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