

No. 44328-7-II

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

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

Appellant,

vs.

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

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

A nation's greatness is measured by how it treats its weakest members: the elderly, the infirm, the handicapped, the underprivileged, the unborn.

~ Mahatma Ghandi

Henry David Vernon was born with severe cognitive disabilities and has always required full-time care. During the summer of 2009, when Washington had a week of temperatures exceeding 100 degrees, David¹ died in his room while under the care of Defendant Aacres Landing. On the night of his death, Aacres locked David in his room without a fan and without any fresh air because his windows were painted shut. Aacres had also been administering David Paxil, a psychotropic medication that interferes with a body's ability to regulate core temperature. Aacres found David the next morning unresponsive: his core body temperature had reached 107 degrees, causing his vital organs to shut down and stop working, and his body had 16 times the therapeutic dosage of Paxil.

David's brother, Earl Vernon, tried everything to vindicate his brother's senseless death. He visited with prosecutors, made complaints with the Department of Health and Social Services, and reached out to the media. Nothing happened to hold Aacres or its staff accountable. Earl filed this lawsuit knowing the status of the law but still in an effort to hold Aacres accountable. Earl sought to recover funeral costs and to compensate David's estate (the "Estate") for the pain and suffering he

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

endured while literally cooking to death.

Soon after filing, Aacres moved for summary judgment, arguing that RCW 4.20.020 bared all recovery for Earl's economic and David's noneconomic damages. The trial court, Judge Ronald Culpepper, remarked that the facts "sound to me like egregious negligence." Reluctantly, however, the trial court felt restrained to find that RCW 4.20.020's definition of beneficiaries barred the sought relief, and it granted summary judgment. In closing, court stated, "I hope the plaintiff appeals and if I get reversed on this, it won't bother me in the slightest."

Earl now appeals, praying that this court will reverse so that Aacres can be held accountable for its negligence. Earl has sought and never waived his right to recover economic damages. He also maintains that justice demands the common law to allow recovery of noneconomic damages, as well as economic damages (to the extent that our legislature has tied them to RCW 4.20.020). Earl respectfully asks the court to reverse and remand to allow both economic and noneconomic damages.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1: The trial court erred in summarily dismissing this lawsuit.
- No. 2: The trial court erred in summarily dismissing Earl Vernon's claim for damages.
- No. 3: The trial court erred in summarily dismissing the Estate's claim for damages.

Issues Pertaining to Assignments of Error

- No. 1: Is Earl Vernon entitled to economic damages under the general survival statute? (*Assignment of Error Nos. 1 & 2*).
- No. 2: Does justice require the Court expand the common law so that the Estate can recover noneconomic damages? (*Assignment of Error Nos. 1 & 3*).
- No. 3: Does RCW 4.20.020 deny David Vernon's constitutional right of access to the court? (*Assignment of Error Nos. 1 & 3*).
- No. 4: If RCW 4.20.020 applies to bar either Earl or the Estate from damages, should David be considered a minor under Washington law? (*Assignment of Error No. 1, 2, & 3*).

III. STATEMENT OF 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.² Attempts to resuscitate him were unsuccessful, and David was later pronounced dead at the hospital.³ His body temperature had risen to 107 degrees Fahrenheit, causing his vital organs to shut down and stop working.⁴

David was born disabled and had severe cognitive disabilities.⁵ He suffered from aphasia, mild mental retardation, and schizophrenia.⁶ Even the simplest tasks were difficult for him, and he lacked the ability to appreciate the consequences of his actions and decisions.⁷ David was never able to live independently, and his disabilities required him to have special care from the beginning of his life.⁸

At age four, David's parents relocated the family from Pennsylvania to Washington so that David could attend the Vancouver School for the Deaf, a school specifically designed to give him the special medical care, help, and treatment that he needed.⁹ David would come home on the weekends to visit his family, and he remained at the school for the deaf until he was twelve.¹⁰ Tragically, and unbeknownst to the family, the Vancouver School for the Deaf had serious problems, and

² CP at 205.

³ CP at 205.

⁴ CP at 205; CP at 91.

⁵ CP at 200-201.

⁶ CP at 3.

⁷ CP at 203.

⁸ CP at 201.

⁹ CP at 201.

¹⁰ CP at 201.

David was sexually abused by older male students and staff during his time there.¹¹

After leaving the school for the deaf, David lived in various medical facilities until he finally found a placement at L'Arche, Tahoma Hope, through the Catholic Community Services.¹² David lived there safely for sixteen years, and his brother Earl Vernon would visit him regularly.¹³ Unfortunately, around the end of 2006, David lost his placement at Tahoma Hope because of circumstances surrounding a consensual relationship that he had with another male patient.¹⁴

As David's legal guardian, Earl toured different homes to make sure that David would be able to live in a good environment.¹⁵ Ultimately, Earl found Aacres, where he was given assurances, promises, and guarantees that Aacres would provide for David's health, safety, and welfare.¹⁶ Earl would regularly visit David on his birthday and holidays, as well as take him out to eat and attend Synagogue with him.¹⁷

David was completely dependent on Aacres for his health and safety needs.¹⁸ He did not have the capability to understand how to care for himself, or to understand situations that were unsafe.¹⁹ David could not take his own medicine, did not understand money, and needed

¹¹ CP at 201.

¹² CP at 202.

¹³ CP at 202.

¹⁴ CP at 203.

¹⁵ CP at 202-03.

¹⁶ CP at 203.

¹⁷ CP at 204.

¹⁸ CP at 203.

¹⁹ CP at 203.

reminders and prompts to complete the most basic daily tasks, such as shaving or taking a shower.²⁰ 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.²¹ He needed people to help him make all kinds of decisions.²² 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.²³ 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.²⁴ His disabilities limited him in such a way that he was determined to be legally incapacitated.²⁵ This meant David lacked the ability to give informed consent and was legally unable to do things like enter into contracts, buy or sell property, and get married.²⁶

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

²⁰ CP at 203.

²¹ CP at 203.

²² CP at 203.

²³ CP at 203.

²⁴ CP at 202.

²⁵ CP at 142.

²⁶ CP at 142.

settings.²⁷ 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.²⁸

In the days leading up to David's death, the Pacific Northwest was on the brink of an unprecedented heat wave.²⁹ 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.³⁰ 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 PLENTY OF FLUIDS...STAY IN AN AIR-CONDITIONED ROOM . . . STAY OUT OF THE SUN . . . AND CHECK UP ON RELATIVES AND NEIGHBORS.³¹

(Capitalization in original). As predicted, temperatures reached the upper 90s for days in a row and exceeded 100 degrees Fahrenheit in some parts.³² Record highs were reached in multiple towns throughout Western

²⁷ CP at 149-162.

²⁸ CP at 4.

²⁹ CP at 205, 164-185.

³⁰ CP at 171.

³¹ CP at 171.

³² CP at 182-185.

Washington, and the temperature in Tacoma swelled to as high as 104 degrees Fahrenheit.³³

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.³⁴ Despite ample warning of the impending heat wave and knowledge of David's medications, Defendant Aacres did next to nothing to protect David.³⁵ David's room was in the second story and was not air conditioned.³⁶ He had a fan but the windows were painted shut and could not be opened.³⁷ On the night when David passed, Aacres failed to check on his well-being.³⁸ Only in the morning did Aacres discover that David was unresponsive and unable to be resuscitated.³⁹ The emergency personnel who responded reported that David's room was "very hot."⁴⁰ During the subsequent medical examination, David's body was found to have 16 times the therapeutic dosage of Paxil.⁴¹ 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.⁴² His cause of death was exogenous hyperthermia.⁴³

³³ CP at 182-185.

³⁴ CP at 205, 188.

³⁵ CP at 3-6, 205-207.

³⁶ CP at 205.

³⁷ CP at 206.

³⁸ CP at 206.

³⁹ CP at 188, 205.

⁴⁰ CP at 188, 205.

⁴¹ CP at 188, 195.

⁴² CP at 188, 195.

⁴³ CP at 189.

Following David's passing, Earl arranged and paid for David's funeral and burial.⁴⁴ David's funeral was carried out by the Seattle Jewish Chapel funeral home and he was buried at Home of Peace cemetery in Tacoma.⁴⁵ The costs Earl incurred for David's funeral ceremony, coffin, headstone, and burial totaled approximately \$15,000.⁴⁶

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.⁴⁷ 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.⁴⁸ The complaint further alleged that AACRES' neglect violated the Vulnerable Adult Statute, Chapter 74.34 RCW. The complaint sought both economic and noneconomic damages.⁴⁹

Soon after filing, AACRES propounded Requests for Admission.⁵⁰ Earl admitted that (1) he was not dependent on David for support at the

⁴⁴ CP at 199.

⁴⁵ CP at 199.

⁴⁶ CP at 199.

⁴⁷ CP at 1.

⁴⁸ CP at 5.

⁴⁹ CP at 5-6.

⁵⁰ CP at 38-41.

time of his death; (2) David is not survived by a spouse, a child, or 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.⁵¹

On November 16, Aacres moved for summary judgment.⁵² 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.⁵³ Earl responded by arguing that Aacres was negligent as a matter of law for failing to properly supervise, protect, and ensure David's safety.⁵⁴ Earl also argued that the court should reject Aacres' beneficiary arguments and allow the recovery of economic and noneconomic damages.⁵⁵

On December 14, 2012, Judge Culpepper heard Aacres motion on behalf of Judge Hickman due to a busy calendar.⁵⁶ After hearing arguments, Judge Culpepper ruled:

Somebody's negligence resulted in this disabled person's death. Clearly, to me – again, I know there hasn't been a lot of discovery on negligence, but this is as close to *res ipsa loquitur* from my view, from what little I know of it.

...

⁵¹ CP at 39.

⁵² CP at 19.

⁵³ CP at 22-26.

⁵⁴ CP at 58-60

⁵⁵ CP at 60-68.

⁵⁶ RP (December 14, 2012) at 3.

[A]t first glance this does sound to me like egregious negligence. We have a defendant who's in the business of providing care for a vulnerable adult who let him die in a heat wave because he had no ventilation in his room. That seems really basic to me. Washington isn't known for heat, but when it gets warm, you open some windows or turn on a fan and cool people off or else they get ill and die. I don't know about the medication. There was some indication it was 16 times the level it should have been, so that strikes me as odd. Whether that's the responsibility of the defendant, I don't know.

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.

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.⁵⁷

Earl filed his timely notice of appeal on December 19, 2012.

IV. ARGUMENT

At issue is the trial court's grant of Aacres' motion for summary judgment. "The standard of review on an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068

⁵⁷ RP (December 14, 2012) at 8:9-13, 13:25-15:12.

(2002). “The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party.” *Jones*, 146 Wn.2d at 300. The court must deny summary judgment unless the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jones*, 146 Wn.2d at 300.

A. The Trial Court Erred in Dismissing Earl’s Claim for Economic Damages.

Washington’s survival statutes consist of two provisions: (1) RCW 4.20.046 (general survival) and (2) RCW 4.20.060 (special survival). The survival statutes preserve the decedent’s own cause of action for personal injury or death, permitting the action to be brought on behalf of the statutory beneficiaries and/or the decedent’s estate. *See, e.g., Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). “[R]ecovery under the general survival statute is for the benefit of, and passes through, the decedent’s estate, whereas recovery under the special survival statute is for the benefit of, and is distributed directly to, the statutory beneficiaries.” *Otani*, 151 Wn.2d at 756.

Here, Earl admitted that David does not have any statutory beneficiaries, and therefore, he made no claim under the special survival statute, RCW 4.20.060, or the wrongful death statute, RCW 4.20.020. Instead, Earl has argued and continues to argue that he may recover economic damages like funeral expenses.⁵⁸ Contrary to Aacres’ argument

⁵⁸ CP at 63-67.

to the contrary⁵⁹, the general survival statute allows such recovery.⁶⁰

Unlike the special survival statute, it is well-settled that the general statute does not require the decedent to have statutory beneficiaries. *See, e.g., Criscuola v. Andrews*, 82 Wn.2d 68, 69-70, 507 P.2d 149 (1973) (holding that the estate of person who died instantaneously and left no statutory beneficiaries could recover under general survival statute); *Warner v. McCaughan*, 77 Wn.2d 178, 184, 460 P.2d 272 (1969), *superseded by statute on other grounds* (holding that the estate could recover damages under the general survival statute for a decedent who left behind no statutory beneficiaries and died as the result of the complained of injuries).

The general survival statute, RCW 4.20.046, provides in pertinent part as follows:

(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....

⁵⁹ CP at 24-26.

⁶⁰ CP at 25-26.

(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 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.

Where the language of the statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *Dahl - Smyth, Inc. v. City of Walla Walla*, 110 Wn. App. 26, 32, 38 P.3d 366 (2002) (citing *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982)). The primary goal is to ascertain and give effect to the Legislature's intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). The statute is read as a whole and the language at issue placed in the context of the overall legislative scheme. *Miller v. City of Tacoma*, 138 Wn.2d 318, 328, 979 P.2d 429 (1999). In determining the meaning of a statute, the Court should be guided by reason and common sense. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 917-18, 390 P.2d 2 (1964).

According to the general survival statute's plain language, "**All** causes of action . . . shall survive to the personal representatives . . . whether such actions would have survived at the common law." RCW 4.20.046. The economic damages permitted under this language include burial and funeral expenses and diminished earning capacity (net accumulation). See, e.g., *Warner*, 77 Wn.2d at 182-83; *Tait v. Wahl*, 97

Wn. App. 765, 774, 987 P.2d 127 (1999) 1999), *review denied*, 140 Wn.2d 1015 (2000); *see also* Steve Andrews, *Survivability of Noneconomic Damages for Tortious Death in Washington*, 21 SEATTLE U. L. REV. 625, 635-37 (1998) (“Washington courts have awarded damages under the general survival statute for burial and funeral expenses and for general damages, including permanent injury and diminished earning capacity.”).

WPI 31.01.02 encapsulates this area of Washington law and directs jurors to consider the following items if their verdict is for a plaintiff:

(1) The health care and funeral expenses that were reasonably and necessarily incurred.

(2) The net accumulations lost to [his] [her] estate. In determining the net accumulations, you should take into account (name of decedent’s) age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account (name of decedent’s) earning capacity, including [his] [her] actual earnings prior to death and earnings that reasonably would have been expected to be earned by [him] [her] in the future, including any pension benefits. Further you should take into account the amount you find that (name of decedent) reasonably would have consumed as personal expenses and deduct this from [his] [her] expected future earnings to determine net accumulations.

WPI 31.01.02.

David anticipates that Aacres will rely upon *Philippides v. Bernard*, 151 Wn.2d 376, 386, 88 P.3d 939 (2004), for the proposition 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.” However, this is not a correct

statement of the law to the extent that it is read to require a decedent to have statutory beneficiaries before the decedent's estate can recover. The quoted sentence of *Philippides* is dictum and cannot be relied upon. See, e.g., *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 363 P.2d 121 (1961) (“dictum in that case ... should not be transformed into a rule of law”); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed;” “Dicta is not controlling precedent.”); *In re Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (“Dicta is language not necessary to the decision in a particular case.”).

This issue was recently decided in *Harms v. Lockheed Martin Corp.*, 2007 WL 2875024 (W.D. Wash.) (unpublished).⁶¹ There, Lockheed contended that the general survival statute prohibits recovery by the estate when there are no statutory beneficiaries. *Lockheed* at *1. The court disagreed, finding that “Lockheed misreads the relevant statutes and misconstrues well-settled case law.” *Lockheed* at *1. In so holding, the court stated,

⁶¹ GR 14.1 permits a party to cite as authority an unpublished opinion that (1) has been issued by any court from a jurisdiction other than Washington state and (2) is permissible authority under the law of the jurisdiction of the issuing court. Here, the US District Court, Judge Robart, issued *Lockheed* in September 2007. The Ninth Circuit has permitted citation to unpublished federal opinions issued after January 1, 2007. FED. R.APP. P. 32.1. Therefore, David offers *Lockheed* as authority for the court to consider and cite. See, e.g., *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 165 n. 16, 189 P.3d 233 (2008) (citing an unpublished federal opinion issued after January 1, 2007). *Lockheed* is attached as Exhibit 1 to the Appendix.

Lockheed's interpretation of the law would mean that a tortfeasor could negligently kill a person who lacked statutory beneficiaries without being liable to anyone. That tortured logic conflates wrongful death and survival actions, on the one hand, and confuses the scope of the general and special survival actions, on the other.

Lockheed at *1. The court also stated, "Lockheed makes an unwarranted attempt to impose the requirements of the special survival statute onto the general survival statute." *Lockheed* at *2. While the special survival statute is narrow and for the benefit of statutory beneficiaries, "[t]he *general* survival statute is broad and preserves all claims on behalf of the estate (as to economic damages)." *Lockheed* at *2. (emphasis in original.)

The *Lockheed* Court recited Washington's well-settled law that an estate could recover damages under the general survival statute for a decedent who left behind no statutory beneficiaries. *Lockheed*. at *2-3. Turning its attention to Lockheed's arguments under *Philippides*, the court held that Lockheed's "theory" was "based on its misreading of the statute's language and the case law dicta." *Lockheed*. at *4. Regarding the language in *Philippides*, the court reasoned:

The *Philippides* court never suggested that its single sentence summation about tortious death overturned the well-settled understanding that an estate may recover under the general survival statute for economic damages due a decedent who leaves no statutory beneficiaries.

Lockheed. at *5 (citations omitted). Therefore the court rejected Lockheed's argument. *Lockheed*. at *5.

Under the court's decision in *Lockheed* and the well-settled authority cited therein and discussed above, the *Philippides* decision does

not change the law to require a plaintiff to establish a statutory beneficiary before the estate is entitled to recover under the general survival statute, RCW 4.20.046. Therefore, the trial court erred in granting summary judgment and precluding Earl from recovering economic damages.

B. The Trial Court Erred in Dismissing the Estate’s Claim for Noneconomic Damages.

Justice requires this court to expand the common law and recognize a cause of action for the Estate to recover noneconomic damages. It is the court’s duty to develop the common law consistent with the needs of a changing society:

‘The genius of the common law is that it is constantly expanding to meet new and unique conditions. The spirit of the common law is not dead.’

Christen v. Lee, 113 Wn.2d 479, 512, 780 P.2d 1307, 1323 (1989) (quoting *Colligan v. Cousar*, 38 Ill.App.2d 392, 187 N.E.2d 292, 302 (1963)). “***When the ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred.***” *Christen*, 113 Wn.2d at 512. (quoting *United Australia, Ltd. v. Barclays Bank, Ltd.*, 4 All E.R. 20, 37 (Lord Atkin, 1940), quoted in *El Chico Corp. v. Poole*, 732 S.W.2d 306, 315 (Tex.1987)) (emphasis added). Here, wrongful death is rooted in common law and should be expanded to recognize a cause of action for the Estate to recover noneconomic damages.

The United States Supreme Court has recognized that actions for wrongful death were cognizable at common law. In *Moragne v. States*

Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970), the court overruled earlier maritime law decisions that prevented a widow from recovering damages for the death of her husband. After a thorough analysis of English and American legal history, the *Moragne* court found the widow had a common law right to damages for the wrongful death of her husband. *See also Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 121 S. Ct. 1927, 150 L.Ed.2d 34 (2001) (expanding *Moragne* to all maritime duties of care).

Washington courts have labored under a historical misconception that wrongful death claims are purely statutory in nature and were not recognized at common law. In effect, the courts have deferred to the Legislature about standing to bring a wrongful death action and recoverable damages in such an action on the mistaken belief that the courts should not act in this sphere. *See, e.g., Warner*, 77 Wn.2d at 181; *Tait*, 97 Wn. App. at 771-72. But this conception of the law is historically inaccurate.

The mistaken perception of wrongful death actions in the common law began with Lord Ellenborough's pronouncement that there was no tort action at common law for the death of a human being. *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.”) In the trial court action, Lord Ellenborough offered no citation to support his position, and the *Baker* decision was never appealed. His assertion erroneously became the basis for the pronouncement in many later American cases that there

could be no recovery for wrongful death in the absence of statute. *See LaFage v. Jani*, 766 A.2d 1066, 1076, 166 N.J. 412 (2001).

An arguable basis for the English rule was the “felony-merger” doctrine. *LaFage*, 766 A.2d at 1076-77. 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.*

In *Moragne*, the Supreme Court indicated that “the historical justification marshaled for the [felony-merger] rule in England *never existed in this country at all.*” 398 U.S. at 381 (emphasis added). In fact, many early American decisions permitted common law wrongful death actions. *See Cross v. Guthery*, 2 Root 90 (Conn. 1794); *Piscataqua 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); *see also* Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1055 (1965). Justice Harlan had the insight to conclude in *Moragne* that the most likely reason the *Baker* rule applied in America without much analysis was “simply that it had the blessing of age.” 398 U.S. at 386.

Washington has allowed the ghosts of Lord Ellenborough's erroneous reasoning to stand in the path of justice. For example, in *Tait*, the Court of Appeals concluded, without analysis, that "[i]t is settled beyond controversy that, at common law, no civil action could be maintained for damages resulting from the death of a human being." 97 Wn. App. at 771; *see also Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 819-20, 732 P.2d 1021 (1987) (citing *dictum* of Lord Ellenborough); *Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 470 n.1, 680 P.2d 58 (1984); *Whittlesey v. City of Seattle*, 94 Wn. 645, 646, 163 P. 193 (1917) (there was no issue regarding a common law basis for death action, because the parties "*conceded* that the common law gave no remedy for the wrongful death of a person.") (emphasis added). However, these decisions are the result of courts that have *assumed* that Washington's Legislature created a "new" and therefore entirely statutory cause of action for wrongful death. No Washington decision has undertaken a careful analysis of the English common law as it pertained to wrongful death actions or of the real effect of Lord Ellenborough's *dictum* in *Baker*. The understanding of English common law and wrongful death expressed in Washington case law, as the *Moragne* decision clearly reveals, is historically inaccurate.

Many state courts have chosen to correct his historical error. In Massachusetts, for example, the Supreme Judicial Court stated:

[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.

Gaudette v. Webb, 284 N.E.2d 222, 229 (Mass. 1972); *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 statute 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.”).

The law on beneficiaries who may sue has not been static. For example, Washington loss of consortium law was very conservative about who could sue for the injury or death of a loved one⁶² until the courts began applying common law principles to expand the persons who may sue or loss of consortium with a loved one. The courts expanding the beneficiaries who may sue noted that the common law is amorphous and

⁶² See, e.g., *Erhardt v. Havens, Inc.*, 53 Wn.2d 103, 330 P.2d 1010 (1958); *Roth v. Bell*, 24 Wn. App. 92, 600 P.2d 602 (1979) (children could not sue for loss of consortium on the injury or death of a parent); *Ash v. S. S. Mullen, Inc.*, 43 Wn.2d 345, 350-52, 261 P.2d 118 (1953) (wives cannot sue for loss of consortium upon the injury or death of their husbands).

may expand in times of need:

The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them.

Lundgren v. Whitney's, Inc., 94 Wn.2d 91, 95, 614 P.2d 1272 (1980).

Similarly, in finding a common law cause of action for children on the loss of a parent, Justice Pearson stated:

When justice requires, this court does not hesitate to expand the common law and recognize a cause of action.
In the present case, just as in *Lundgren*, to defer to the Legislature in this instance would be to abdicate our responsibility to reform the common law to meet the evolving standards of justice.

Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 136, 691 P.2d 190 (1984) (emphasis added); *accord Sommer v. Yakima Motor Coach Co.*, 174 Wn. 638, 659, 26 P.2d 92 (1933) (Blake, dissenting) (“The genius of the common law has always been its capacity to expand and encompass new conditions.”).

Here, the common law should allow the Estate to bring a claim for noneconomic damages. Although RCW 4.20.020 has changed over time, first recognizing step-parents as beneficiaries and then later recognizing domestic partners as beneficiaries, the statute has not yet recognized the inequitable situation here where a disabled adult is negligently killed but

has no remedy in law to hold tortfeasors accountable. The Legislature has considered bills that eliminate the financial dependence requirement for tier two beneficiaries, but it has failed to act and effectuate a change in the law. *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”). The Legislature has continually ignored the needs of the disabled community, and the courts must step in to restore justice.

RCW 4.20.020—and the Washington wrongful death statutes generally—still presume that adults will marry and/or have children. But developmentally disabled adults generally do not marry or have children and are largely dependent on other people for help doing even the simplest tasks. David, for example, was legally prohibited from marrying due to his cognitive disabilities. In fact, rarely do cognitively disabled adults go on to have families of their own. *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); *Schumacher v. Williams*, 107 Wn. App. 793, 805, 28 P.3d 792 (2001) (concurring opinion notes that the plaintiff, an adult woman with Downs Syndrome, lacked any statutory beneficiaries, as is the case with most vulnerable adults). By acknowledging that our severely disabled rarely, if ever, financially support a family, it becomes clear that our disabled are essentially disqualified from recovering noneconomic damages for their wrongful death.

Without the right to recover under Washington's wrongful death statutes, David's death will go completely unpunished. Earl has already approached the prosecuting attorney urging that he file criminal negligence charges, but the prosecutor's office declined. The only other mechanism left under law was to file a civil lawsuit, which is an empty remedy because Washington wrongful death statutes do not account permit noneconomic damages for the severely disabled who cannot support a family or even legally marry. The result is that tortfeasors are largely immune from liability, and there is no mechanism to hold them truly accountable their negligence. Although a disabled adult like David would have had a cause of action for noneconomic damages had he survived with injury, his cause of action evaporates upon his death because the law deems there is no worthy beneficiary.

The injustice here is that the law deprives developmentally disabled people like David of a voice. *See* <http://www.youtube.com/watch?v=RSLzydOUv0k>. It was difficult enough for someone in David's condition to have a voice in life, and now with his passing any such voice is completely extinguished. David was mistreated and ignored at an especially vulnerable time. He was found to have 16 times the therapeutic level of Paxil in his system, a finding that only could have resulted from the gross negligence of Acres staff. His body essentially cooked to death with a core temperature at his time of death of 107 degrees Fahrenheit. In cases of cognitively disabled adults, the Court needs to correct the discriminatory effect the law has on them

and their families so people like David can be adequately represented and protected.

David depended on Defendant Aacres' to provide the basic necessities of life, including safe dwelling, which it wholly failed to do. David needlessly endured extensive pain and suffering as his body slowly began to shut down from excessive heat, and equity demands that the common law expand to give him a remedy for noneconomic pain and suffering damages. Allowing the Estate to recover for his pain and suffering would also serve as a necessary deterrent for anyone who cares for disabled adults. If a plaintiff cannot recover for a disabled adult's pain and suffering if he or she dies, tortfeasors have an incentive to allow the disabled adult to die.

This court must not stand idle while the "ghosts of the past stand in the path of justice." *Christen*, 113 Wn.2d at 512. This court must expand the common law to allow the Estate to recover noneconomic damages for his wrongful death.

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

Federal law provides that "no qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by such 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 provides that

access to the Courts is a protected fundamental right. *Tennessee v Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). Similarly, Article I, Section 10 of our State Constitution guarantees that an individual shall have access to the courts. Our State’s Supreme Court has likewise held that access to the judicial system is a “preservative . . . and fundamental right . . . since a judicial system is the central institution for the assertion, protection and enforcement of most other rights in our society.” *Carter v. University of Washington*, 85 Wn.2d 391, 398, 536 P.2d 618, 623 (1975); *see also John Doe v Bloodsender*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (Article I, Section 10 of the State Constitution guarantees Washington citizens a right of access to court and identifies that right as “the Bedrock Foundation upon which rests all the people’s rights and obligations”).

Under Washington law, recovery for a wrongful death action is limited to the spouse or children of the deceased. RCW 4.20.020. These “Tier I” beneficiaries have no requirement of demonstrating financial dependency. The statute provides another level of beneficiaries that are oft regarded as “Tier II” beneficiaries. Under the second tier, parents or siblings of an adult decedent must demonstrate financial dependency upon the decedent in order to recover. *Philippides*, 151 Wn.2d at 386; *see also Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009). Tier II beneficiaries also include a deceased’s estate where the decedent had no surviving spouse or children. RCW 4.20.020. In this circumstance, the deceased’s estate recovery is limited to “net accumulations which the State

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)). 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 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.

Throughout the years, great strides have been made to address the disparities, discrimination and inequities faced by the disabled population of our State. In 2006, the Washington State Department of Health released a report entitled “Disability in Washington State (May 2006)” in which there was an estimated 934,000 Washington residents over the age of five who had a disability as defined by Washington statute. *Id.* These disabilities ranged from vision or hearing impairment to more severe

cognitive or physical disabilities. *Id.* Less than 50 percent of the disabled population is employed compared to 75 percent of the nondisabled population. *Id.* The report concluded that it was an important task to rectify these disparities as well as to further the protection of that class of individuals with disabilities. *Id.*; *see also* <http://www.youtube.com/watch?v=RSLzydOUv0k>.

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. Because he was not capable of work and, therefore, had no net accumulations to recover, application of RCW 4.20.020 and the holding in *Philippides*, 151 Wn.2d at 376, would deny David of 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.

D. David Should be Considered a Minor Under Washington Law for the Purposes of RCW 4.20.020.

RCW 26.28.015 defines the age of majority and specifies the rights of an adult upon reaching the age of 18 years. This includes:

- (1) To enter into any marriage contract without parental consent if otherwise qualified by law;
- (2) To execute a Will for the disposition of both real and personal property if otherwise qualified by law;
- (3) To vote in any election if authorized by the Constitution and otherwise qualified by law;
- (4) To enter into any legal contractual obligation and to be legally bound thereby to the full extent as any other adult person;
- (5) To make decisions in regard to their own body and the body of their lawful issue whether natural born to or adopted by such person to the full extent allowed to any other adult person including, but not limited to, to consent to surgical operation; and
- (6) To sue and be sued on any action to the full extent as any other adult person in any of the Court's of this State without the necessity for a Guardian ad Litem.

RCW 26.28.015. Specifically, the statute identifies the rights an adult would have. Conversely, the statute also specifies the rights that are not afforded to a minor. In David's case, given his profound cognitive disability, he would not be able to exercise the rights set forth in RCW 26.28.015. Despite chronologically having reached the age of 55 at the time of his death, David did not have the cognitive capacity necessary to be considered an adult. He was for all purposes, the equivalent of a minor child at the time Acres negligently caused his death.

The Washington State Legislature has recognized in other areas of the law that an adult due to a physical, cognitive or sensory handicap should still be considered a "child." RCW 51.08.030 defines a "child" for purposes of the industrial insurance statutes and provides as follows:

'child' means every natural born child, posthumous child, step child, child legally adopted prior to the injury, child born after the injury where conception occurred prior to the

injury, and dependent child in the legal custody and control of the worker, all while under the age of 18 years, or under the age of 23 years while permanently at a full time course in an accredited school, and over the age of 18 years if a child is a dependent as a result of a physical, mental, or sensory handicap.

RCW 51.08.030. Here, there is no dispute that since birth David has suffered from a significant cognitive disability and has always required full-time care. He was never employable nor could he have provided services to his parents or brother Earl. He was under institutional care for nearly his entire life. In every aspect of his mental, emotional, and physical limitations, David functioned as a minor.

The question as to whether an adult can be treated as a child has also been addressed in the area of divorce. In *Childers v. Childers*, 89 Wn.2d 592, 575 P.2. 201 (1978), the Court was faced with the question as to whether in a dissolution proceeding, a parent could be required to support a child beyond the age of majority while a college education was being pursued. *Childers*, 98 Wn.2d at 594. In answering this question affirmatively, the Court looked to whether an adult could be defined as a dependent child.

The Court first defined “dependent” as “one who looks to another for support and maintenance,” “one who is, in fact, dependent,” and “one who relies upon another for the reasonable necessities of life.” *Childers*, 98 Wn.2d at 598. The Court further stated that “dependency is a question of fact to be determined from all surrounding circumstances,” or as the Legislature put it: “all relevant factors.” RCW 26.09.100; *Childers*, 98

Wn.2d at 598. “Age is but one factor. Other factors would include the child’s needs, prospects, desires, aptitudes, abilities and disabilities.” *Childers*, 98 Wn.2d at 598 (emphasis added). The *Childers* Court correctly recognized that age alone did not define whether an individual should be regarded as a child. This fact was not lost upon the Court in *Philippides*, 151 Wn.2d 376. In distinguishing the parents of minor child from the parents of adult children, the Court stated that “the need for love and guidance, as well as financial support is a generational characteristic of minor children. Different considerations applied to adult children.” *Philippides*, 151 Wn.2d at 392.

Philippides, 151 Wn.2d at 376 and *Armantrout*, 166 Wn.2d at 931, recognized the difference between a minor child incapable of providing for his/her own reasonable necessities of life and an adult child who could provide for the same. This constitutes the defining difference between David and other adults who have no limiting cognitive disability. Other than the fact that David was chronologically 55 years of age, in every other respect, he was a child.

The Legislature as well as the Courts in other areas of law has recognized that an adult can be considered a child by reason of cognitive disability. Similarly, in David’s case, there can be no dispute that given his level of profound cognitive disability, he was dependent upon everyone in his life for support. He was, in all respects, dependent upon these same individuals for the reasonable necessities of life. *See Childers*, 89 Wn.2d at 598. Therefore, RCW 4.20 should not apply to preclude the

Estate's wrongful death claim or, to the extent that this court disagrees with the analysis in Part A, should not apply to preclude Earl's survivor claim.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this court to reverse and remand.

RESPECTFULLY SUBMITTED this 30th day of May 2013.

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By:  _____

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CERTIFICATE OF SERVICE

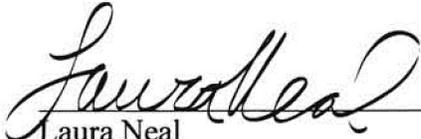
Laura Neal, being first duly sworn upon oath, deposes and says:

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

That on May 30, 2013, I personally delivered, a true and correct copy of the above document, directed to:

Charles Philip Edward Leitch
Patterson Buchanan Fobes & Leitch
2112 3rd Ave. Ste. 500
Seattle, WA 98121-2326

DATED this 30th day of May 2013.



Laura Neal
Legal Assistant to Darrell Cochran

4812-2285-6724, v. 1

VI. APPENDIX

EXHIBIT 1

2007 WL 2875024

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Richard G. HARMS, as personal representative
of the Estate of Kurt Stanley Harms, Plaintiff,
v.

LOCKHEED MARTIN CORPORATION, Defendant.

No. Co6-572JLR. | Sept. 27, 2007.

Attorneys and Law Firms

T. Jeffrey Keane, Rodihan & Keane, Bellevue, WA, for
Plaintiff.

David Philip Hansen, Aiken, St. Louis & Siljeg Seattle, WA,
for Defendant.

Opinion

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JAMES L. ROBART, United States District Judge.

*1 This matter comes before the court on Defendant Lockheed Martin Corporation's ("Lockheed") motion for summary judgment (Dkt.# 40). The court DENIES the motion.

I. BACKGROUND

The relevant facts are not in dispute. In March 2005, Kurt Harms died as the result of injuries sustained in a car crash on an Australian highway. Am. Compl. ¶¶ 3.8-3.15 (Dkt.# 3). He was the passenger in a car driven by Gary Boughton, a Lockheed employee who was acting within the scope and course of his employment. *Id.* ¶ 3.15; Answer ¶ 10 (Dkt.# 10). Plaintiff contends that Mr. Harms' death was the result of Mr. Boughton's negligence. Resp. at 2 (Dkt. # 45).

Mr. Harms was unmarried and had no children. *Id.* He was survived by his father, his brother, and his sister, none of whom was dependent on Mr. Harms for financial support. *Id.* His father, Richard Harms, brought this action for tortious

death as personal representative for Kurt Harms' estate ("estate"). Am. Compl. ¶¶ 4.1-4.2.

The estate concedes that it has no cognizable claims under Washington's wrongful death statutes, RCW §§ 4.20.010 (wrongful death), 4.20.020 (beneficiaries of wrongful death), and 4.24.010 (child death/injury), or the special survival statute, RCW § 4.20.060 (death by personal injury), because Mr. Harms left no statutory beneficiaries enumerated in RCW § 4.20.020.¹ Resp. at 3-4. The estate contends, however, that it may still seek economic damages under the general survival statute, RCW § 4.20.046. *Id.*

II. ANALYSIS

Lockheed moves for summary judgment based on a purely legal question. First, Lockheed argues that the general survival statute, RCW § 4.20.046, disallows suits by a decedent who dies from the injuries that form the basis of the complaint. Mot. at 5-6. Second, Lockheed contends that the general survival statute prohibits recovery by the estate when there are no statutory beneficiaries. *Id.* at 8-10. In effect, Lockheed argues that Washington law prohibits an estate from recovering against a tortfeasor unless the decedent had statutory beneficiaries and died from other causes.

The court disagrees. Lockheed misreads the relevant statutes and misconstrues well-settled case law.

A. Standard of Review

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates there is no genuine issue of material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir.2007). For purely legal questions, summary judgment is appropriate without deference to the non-moving party.

B. Scope of Survival Actions

Lockheed's interpretation of the law would mean that a tortfeasor could negligently kill a person who lacked statutory beneficiaries without being liable to anyone. That tortured logic conflates wrongful death and survival actions, on one hand, and confuses the scope of the general and special survival actions, on the other.

*2 The right to bring tortious death claims is purely statutory. See *Warner v. McCaughan*, 77 Wash.2d 178, 460 P.2d 272, 274 (Wash.1969)²; *Tait v. Wahl*, 97 Wash.App. 765, 987 P.2d 127, 130 (Wash.Ct.App.1999). In Washington, these claims may be brought pursuant to the wrongful death statutes, RCW §§ 4.20.010, 4.20.020, 4.24.010, and the survival statutes, RCW §§ 4.20.046 and 4.20.060. See *Otani v. Broudy*, 151 Wash.2d 750, 92 P.3d 192, 194 (Wash.2004); *Masunaga v. Gapasin*, 57 Wash.App. 624, 790 P.2d 171, 172 (Wash.Ct.App.1990). The primary differences between wrongful death and survival actions are in (1) the causes of action, and (2) the beneficiaries. See *Otani*, 92 P.3d at 198; Michael M. Martin, *Measuring Damages in Survival Actions for Tortious Death*, 47 Wash. L.Rev. 609, 610 (1972).

The wrongful death statutes create new causes of action for statutory beneficiaries of the deceased to recover their own damages. RCW §§ 4.20.010, 4.20.020; see *Otani*, 92 P.3d at 195. In contrast, the survival statutes do not create new causes of action but instead *preserve* causes of action for a decedent's personal representative that the decedent could have maintained had he or she not died. RCW § 4.20.046, 4.20.060; see *Otani*, 92 P.3d at 194-95, 198. The beneficiaries of these preserved claims are either the decedent's (a) estate (the creditors and the heirs or devisees), or, under certain circumstances, (b) statutory beneficiaries. RCW § 4.20.046; RCW §§ 4.20.060; see *Otani*, 92 P.3d at 198; *Warner*, 460 P.2d at 276; *Tait*, 987 P.2d at 131 (“[U]nlike the wrongful death and special survival statutes, the decedent's personal representative can recover damages under [the general survival statute] on behalf of the decedent's estate.”); Martin, *supra*, at 612.

Lockheed makes an unwarranted attempt to impose the requirements of the special survival statute³ onto the general survival statute.⁴ But the special and general survival statutes differ as to *which* survival claims are preserved and who will collect the decedent's damages. Unsurprisingly, the *special* survival statute is narrow and preserves the decedent's claims for death by the complained of injuries on behalf of statutory beneficiaries. The *general* survival statute is broad and preserves *all* claims on behalf of the estate (as to economic damages) and on behalf of statutory beneficiaries (as to certain non-economic damages).

In *Warner v. McCaughlin*, the Washington Supreme Court recognized the broad scope of the general survival statute. It found that the special survival statute did not restrict

the applicability of the general survival statute because the “legislature was intent on preserving causes of action, rather than pleas of abatement.” *Warner*, 460 P.2d at 276 (quoting *Engen v. Arnold*, 61 Wash.2d 641, 379 P.2d 990, 993 (Wash.1963)). It held, therefore, that the estate could recover damages under the general survival statute for a decedent who left behind no statutory beneficiaries and died as the result of the complained of injuries. See *id.* at 276-77 (holding that wrongful death action did not apply because there were no statutory beneficiaries). The court noted that, in enacting the general survival statute, the legislature meant for *all* causes of action to survive so that it would not be more profitable for the defendant “to kill the plaintiff than to scratch him,” thereby leaving “the bereaved family of the victim ... without a remedy.” *Id.* at 275 (quoting Dean Prosser, Prosser on Torts, § 121, at 924 (3d ed.1964)); see *Otani*, 92 P.3d at 198 (“Although Washington's wrongful death and survival statutes benefit different parties, they provide recoverable damages for the death or injury of another, depending on the circumstances. Thus it is not cheaper for a defendant to kill, instead of injure, another person in Washington.”).

*3 “It is well settled law that the estate of a person who dies after birth can maintain a survival cause of action under [the general survival statute].” *Cavazos v. Franklin*, 73 Wash.App. 116, 867 P.2d 674, 676 (Wash.Ct.App.1994) (holding that the estate of a viable, unborn child could recover under general survival statute); see *Criscuola v. Andrews*, 82 Wash.2d 68, 507 P.2d 149, 150 (Wash.1973) (holding that the estate of person who died instantaneously and left no statutory beneficiaries could recover under general survival statute when death is instantaneous and decedent left no statutory beneficiaries); *Balmer v. Dilley*, 81 Wash.2d 367, 502 P.2d 456, 458 (Wash.1972) (holding that estate of boy who died in car crash could recover damages under general survival statute); see, e.g., *Federated Servs. Ins. Co. v. Personal Representative of Estate of Norberg*, 101 Wash.App. 119, 4 P.3d 844 (Wash.Ct.App.2000) (reviewing the proper measure of damages permissible under general survival statute to estate for decedent who died in head-on collision and left no statutory beneficiaries). The estate's right to recover damages under the general survival statute is limited to the lost net accumulations of the decedent. See *Wooldridge*, 638 P.2d at 570; *Norberg*, 4 P.3d at 848; *Tait*, 987 P.2d at 131-32.

Thus, Lockheed's arguments must fail unless it can show that the legislature has restricted damages available to decedents' estates under the general survival statute or the courts have overturned well-settled case law.

C. Injuries Causing Death

Lockheed argues that because the special survival statute applies only to actions brought by a personal representative on behalf of statutorily designated beneficiaries for injuries that cause the decedent's death, the general survival statute contains a similar limitation, i.e., it applies *only* to "actions brought by a personal representative on behalf of the estate for injuries suffered by a decedent that did not cause the decedent's death." Mot. at 5 (quoting *Higbee v. Shorewood Osteopathic Hosp.*, 105 Wash.2d 33, 711 P.2d 306, 309 (Wash.1985)). Lockheed contends that the estate cannot recover here because Kurt Harms died from the injuries sustained in a car crash and those injuries serve as the basis of the complaint. The court rejects this evisceration of the general survival statute.

The general survival statute was enacted to rectify the anomaly of it being "more profitable for the defendant to kill the plaintiff than to scratch him." See *Warner*, 400 P.2d at 275 (citation omitted). Only in a looking-glass world would a statute that specifies that "[a]ll causes of action ... shall survive," RCW § 4.20.046(1) (emphasis added), actually exclude actions for injuries that led to death. The *Higbee* court never carved out such a categorical exclusion. See *Higbee*, 711 P.2d at 309 (noting that "[t]he general survival statute ... applies to" actions for injuries not leading to death, but that "[t]he special survival statute ... applies only to" actions for injuries leading to death) (emphases added).

*4 The *Higbee* court relied upon *Walton v. Absher Constr. Co.*, 101 Wash.2d 238, 676 P.2d 1002, 1004 (Wash.1984), for its description of the general survival statute's scope. In *Walton*, the Washington Supreme Court explicitly approved the *Warner* court's reconciliation of the general and survival statutes. *Id.* (noting that the court was presented with the "flip side of the issue before the *Warner* court," i.e., whether the general survival statute implicitly restricted recovery of non-economic damages under the special survival statute). The *Warner* court permitted the estate of a woman who left no statutory beneficiaries to recover under the general survival statute for damages arising out of her death. See *Warner*, 460 P.2d at 276.

Read in proper context, the *Higbee* court stated no more than that unlike the special survival statute, the general survival statute applies to actions for injuries not leading to death. Cf. RCW § 4.20.046(1) (noting that statutory beneficiaries may also recover certain non-economic damages "whether or not

the death was occasioned by the injury that is the basis for the action"). The same holds true for Lockheed's citation to *Otani ex rel. Shigaki v. Broudy*. See *Otani*, 92 P.3d at 195-96 (noting that estate could recover for lost net accumulations and not restricting such damages only to injuries that caused death). The court rejects Lockheed's suggestion that the general survival statute applies *only* where the decedent's injuries did not cause the decedent's death. "Were we to read [the general survival statute] so restrictively, the estate of a decedent with no surviving statutory beneficiaries could not recover injuries which caused the decedent's death...." *Vail v. Toftness*, 51 Wash.App. 318, 753 P.2d 553, 555 n. 1 (Wash.Ct.App.1988).

D. Recovery by the Estate

Lockheed argues that the general survival statute requires that Kurt Harms be survived by statutory beneficiaries in order for the estate to recover on his behalf. Reply at 2-7. Its theory is based on its misreading of the statute's language and case law dicta.

Lockheed argues that the following language from the general survival statute supports its position: "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...." RCW § 4.20.046(1). But this language, added in a 1993 amendment to the statute, was an *expansion*, not a contraction, of damages available under the general survival statute.

Prior to 1993, recovery for non-economic damages such as pain and suffering was available to statutory beneficiaries under the special survival statute but was not available to *anyone* under the general survival statute. Compare 1961 Wash. Laws Ch. 137, § 1 with RCW § 4.20.046 and RCW § 4.20.060. Thus, statutory beneficiaries could not recover for non-economic damages if the decedent died, for example, of old age during the pendency of their personal injury case. This loophole rewarded insurance managers who delayed settlements with elderly victims: they would pay less if the injured party died. See House Bill Report, SB 5077, at 1-2, reported by House Committee on Judiciary (1993). The legislative history shows that the 1993 amendment was meant to close this loophole by permitting statutory beneficiaries to recover those non-economic damages under the general survival statute. See *id.* That is, because the general survival statute encompassed *all* survival actions, whether the person died or not, the legislature found it an expeditious way

to afford a certain class of beneficiaries the same kind of damages afforded under the special survival statute.

*5 The legislature never indicated the intent to curtail recovery of purely economic damages by the estate. Both pre-and post-1993, the estate is not entitled to recover *non-economic damages* (pain and suffering, etc.) on behalf of the decedent. Compare 1961 Wash. Laws Ch. 137, § 1 with RCW § 4.20.046. The legislature expanded the general survival statute's scope and left the estate's right to recovery alone. See House Bill Report, SB 5077, at 1-2.

Lockheed relies upon generalized dicta to reach the contrary position. For example, in *Philippides v. Bernard*, 151 Wash.2d 376, 88 P.3d 939, 944 (Wash.2004), the court stated: "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 4.20.010 (child injury/death) [sic]⁵; RCW 4.20.020 (wrongful death); RCW 4.20.046 (general survival statute); RCW 4.20.060 (special survival statute)." See, e.g., *Schumacher v. Williams*, 107 Wash.App. 793, 28 P.3d 792, 797 (Wash.Ct.App.2001) (examining child injury/death statute but noting that "the beneficiaries under both the survival of action provisions and the wrongful death statute have not included siblings or parents who are not dependent on the decedent for support").⁶ There is no further discussion of the general survival statute. In only one of the cases cited by Lockheed did a court hold that the personal representative could not maintain an action under the general survival statute

because the decedent lacked statutory beneficiaries. See *Rentz v. Spokane County*, 438 F.Supp.2d 1252 (E.D.Wash.2006). In that decision, the court referred to the broad summation sentence in *Philippides* and held summary judgment to be proper. *Id.* at 1259.

The *Philippides* court never suggested that its single-sentence summation about tortious death overturned the well-settled understanding that an estate may recover under the general survival statute for economic damages due a decedent who leaves no statutory beneficiaries. See, e.g., *Norberg*, 4 P.3d at 846; *Wooldridge*, 638 P.2d at 567; *Walton*, 676 P.2d at 1004; *Criscuola*, 507 P.2d at 150; *Balmer*, 502 P.2d at 458; *Warner*, 460 P.2d at 276; *Tait*, 987 P.2d at 131; *Cavazos*, 867 P.2d at 677; *Wagner v. Flightcraft, Inc.*, 31 Wash.App. 558, 643 P.2d 906, 912 (Wash.Ct.App.1982). Cf. *Otani*, 92 P.3d at 195 ("[S]pecifically, recovery under the general survival statute is for the benefit of, and passes through, the decedent's estate, whereas recovery under the special survival statute is for the benefit of, and is distributed directly to, the statutory beneficiaries."). The court, therefore, rejects both Lockheed's argument and the conclusion in *Rentz*.⁷

III. CONCLUSION

For the reasons stated, the court DENIES Lockheed's motion for summary judgment (Dkt.# 40).

Footnotes

- 1 Effective July 22, 2007, RCW §§ 4.20.020 and 4.20.060 were revised to insert references to state registered domestic partners. See 2007 Wash. Legis. Serv. Ch. 156 (S.S.B.5336) (West). The pre-July 2007 versions apply here.
- 2 Warner remains the seminal case in any discussion of the general survival statute, though its discussion of the proper measure of damages was clarified in *Wooldridge v. Woolett*, 96 Wash.2d 659, 638 P.2d 566, 568-570 (Wash.1981).
- 3 In relevant part, the special survival statute provides:

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 or child living, including stepchildren, or leaving no surviving spouse 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 in favor of the surviving spouse and such children, or if no surviving spouse, in favor of such child or children, or if no surviving spouse 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.

RCW § 4.20.060 (emphases added).
- 4 In relevant part, the general survival statute provides:

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) (emphases added).

- 5 The child injury/death statute is at RCW 4.24.010. The wrongful death statute is RCW 4.20.010 and the beneficiaries for a wrongful death action are set forth in RCW 4.20.020.
- 6 Lockheed cites *Masunaga v. Gapasin* in support of its argument, but the case undermines its position. First, *Masunaga* addressed the child injury/death statute, RCW 4.24.010, which is not applicable here. *Masunaga*, 790 P.2d at 172. Second, the estate's claims were not before the court because they had been settled beforehand. *Id.*
- 7 The court did not find particularly informative Lockheed's discussion of a proposed bill to amend RCW § 4.20.046 in light of *Philippedes* and *Otani*. Reply at 5, Ex. A. Lockheed would have been better served by discussing the legislative history of the statute actually in effect.

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EXHIBIT 2



12-2-10662-8 40201808 VRPT2 03-20-13

IOR COURT OF THE STATE OF WASHINGTON
IN COUNTY CLERK'S OFFICE
IN AND FOR THE COUNTY OF PIERCE

A.M. **MAR 19 2013** P.M.

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

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

Plaintiff,

COA NO. 44328-7-II

vs.

S/C NO. 12-2-10662-8

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

MOTION FOR SUMMARY JUDGMENT

Defendants.

REPORT OF PROCEEDINGS

FRIDAY, DECEMBER 14, 2012

Pierce County Courthouse
Tacoma, Washington

Before the

HONORABLE RONALD E. CULPEPPER

Presiding Judge

Department No. 17

[Appearances on next page]

Reported by: Karla A. Johnson, RPR
Official Court Reporter, #82191

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APPEARANCES:

For the Plaintiff:

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For the Defendants:

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Motion for Summary Judgment, 12-14-12

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FRIDAY, DECEMBER 14, 2013; MORNING SESSION

(All parties present.)

--ooOoo--

THE COURT: So Vernon vs. Aacres Allvest. That's our Case 12-2-10662-8. This is a motion for summary judgment on a wrongful death case, and this is a request to change the law a bit, apparently.

MR. LEITCH: You read the briefing materials, Your Honor.

THE COURT: Yes. This was apparently originally assigned to Judge Arend and then assigned to Judge Hickman, and I was kind of helping Hickman because he had a busy calendar. I'm not Judge Arend.

MR. LEITCH: We appreciate your accommodation.

THE COURT: I have read the materials and the statutes.

MR. LEITCH: If you will, Judge, I will start.

THE COURT: Yes. Please.

MR. LEITCH: For the record, Charles Leitch, L-E-I-T-C-H, here on behalf of the defendants. We are here on the defendants' motion for summary judgment.

Motion for Summary Judgment, 12-14-12

1 As Your Honor has indicated, it is, I guess the best
2 way to look at it, an attempt to change the law in
3 terms of the response of the plaintiff.

4 The first thing we'll say is, these cases, all the
5 wrongful death cases, survival cases, are about loss.
6 There's no question, there's no issue, that there is,
7 if you look through the case law they cited, a long
8 history of loss related to decision-making on these
9 statutes, and I'm certainly not insensitive to that in
10 the nature of the subject. That being said, the motion
11 we have before you is one of --

12 THE COURT: We've got a loss. Everybody
13 agrees with that. At least, looking at first glance,
14 arguably, there's negligence but no recovery.
15 Someone's negligence leads to death and there's no
16 recovery.

17 MR. LEITCH: Well, I will start off, first
18 and foremost, that one of the things we talk about
19 immediately is standing to bring suit, and that's what
20 this motion is about. The plaintiff, in response to
21 the motion for summary judgment, raised the specter of
22 a variety of aspects of the facts, and while we
23 understand the assertions there, we aren't necessarily
24 prepared to address it. It's not in the plaintiff's
25 motion for summary judgment, and we have a motion to

Motion for Summary Judgment, 12-14-12

1 strike and we did the briefing schedule.

2 The issue here is, the standing is at issue and is
3 a statutory cause of action. With the discovery that
4 has been completed in this cause of action and that was
5 in the record and attached to my declaration is we sent
6 requests for admission, and one of the requests for
7 admission was admit or deny that Henry David Vernon
8 does not have any statutory beneficiaries pursuant to
9 4.20, which is the statute that basically designates
10 the beneficiaries of an action under the Washington
11 State statutory scheme. And the admission was he
12 admitted that he didn't have any.

13 There's no issue in this motion for summary
14 judgment that he does not have the right or standing to
15 bring a cause of action. That doesn't mean that no
16 cause of action exists; it just says that the cause of
17 action is limited to certain beneficiaries by statute.
18 The fact pattern here has been --

19 THE COURT: Who has a cause of action?

20 MR. LEITCH: Well, the cause of action exists
21 by statute for the -- well, if you look at just the
22 language, you know, for the benefit of a wife, husband,
23 state registered domestic partner, child or children,
24 including stepchildren, and then if they are
25 nonexistent, benefit of parent, sisters or brothers,

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1 who may be dependent. So there is a cause of action;
2 it's just not applicable to him in this present cause
3 of action. He does not have standing to bring in the
4 present nature. There is no standing in this cause of
5 action presently here today, Judge, we would submit.

6 And we would also submit that the case law is
7 clear. This matter has been up before the Court of
8 Appeals, Division I, on the Tait case. It came up on
9 the Schumacher case, in which there was a petition for
10 review to the Supreme Court, which was denied. The
11 matter has been raised repeatedly directly on point,
12 and the courts have found that, without exception,
13 under the facts we have presented here today in which
14 he admits he doesn't have the standing, the cause of
15 action does not move forward. That's the gatekeeping
16 function of the statute.

17 Unlike a lot of materials that were cited by the
18 plaintiffs, the cases -- you know, there was Morange, I
19 believe it is, a United States Supreme Court decision,
20 Massachusetts. In those causes of action they were
21 implying from common law. Well, in the State of
22 Washington, as has been repeatedly cited, there is a
23 consistent conservatism as to the application of the
24 beneficiary portion of the wrongful death causes of
25 action in the state of Washington, and under the

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1 present facts of this case and the law, the result is
2 clear. And we would submit that in this particular
3 case he admits the facts are clear in the law.

4 The reality is, if the legislature wanted to go
5 ahead and change it, they would have, and that's one of
6 those things that's replete in the case law. In fact,
7 the state legislature has revisited this statute and
8 the beneficiary actions as recent as 2011 to add in
9 state registered domestic partners. So there has been
10 a variety of specific action on the statute to amend it
11 and expand its application to a certain class of
12 beneficiaries. There is a class of beneficiaries. He
13 does not fall into it, and we believe that summary
14 judgment is appropriate.

15 THE COURT: Okay.

16 MR. HASTINGS: Good morning, Your Honor.
17 Kevin Hastings for the plaintiffs. With me today also
18 is my client, Earl Vernon, David's brother. Your
19 Honor, the defendants request --

20 THE COURT: Can I ask, the Schumacher case
21 was pretty similar and the Court of Appeals said no
22 cause of action. The Supreme Court was asked to review
23 that and they declined to review it, so that issue was
24 certainly presumably before the Supreme Court and they
25 declined to review the Schumacher case. Isn't the law

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1 somewhat settled, actually, on this question, good, bad
2 or indifferent?

3 MR. HASTINGS: Well, Your Honor, it's our
4 intent to take this case before the Supreme Court as
5 well. We feel that the facts of the case are
6 compelling --

7 THE COURT: Just for what it's worth, what
8 little I know about the facts, I agree they're
9 compelling. Somebody's negligence resulted in this
10 disabled person's death. Clearly, to me -- again, I
11 know there hasn't been a lot of discovery on
12 negligence, but this is as close to *res ipsa loquitur*
13 from my view, from what little I know of it. So I
14 think you're right; the facts are compelling, but don't
15 I have to follow the law?

16 Isn't it kind of a slippery slope if judges can
17 just say, well, we should change this law and since the
18 legislature hasn't done what they should do, I'm going
19 to do it? That's maybe not a good idea always. What
20 if you get somebody who thinks it should be more
21 restrictive, for example?

22 MR. HASTINGS: Well, Your Honor, I think what
23 I would ask then is that we can create as good a record
24 as we can and this court's opinion as to the compelling
25 facts, and it's our position that David, who was

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1 developmentally delayed and cognitively disabled his
2 entire life, required 24-hour assistance his entire
3 life, depended on everyone by his very nature to
4 provide the basic necessities of life that we all take
5 for granted: showering, shaving.

6 He had little conception of his personal safety
7 and issues, remaining in a hot room, for example, and
8 not calling for help, and it was Aacres'
9 responsibility. They had a duty to protect him. They
10 assumed that duty. They were paid by the government, a
11 portion at least, for that care and protection, and
12 they didn't.

13 And the tragedy here is that if David had survived
14 but had been injured from overexposure to heat and
15 maybe hospitalized for heat stroke for three weeks,
16 that we would have a cause of action and we could hold
17 them liable for their negligence in causing that, but
18 when they cause his death, the law just says no,
19 there's no cause of action for that. That's an
20 inequity that the law shouldn't allow by any stretch of
21 the imagination.

22 THE COURT: But the legislature has amended
23 the statute a number of times over the years. I
24 recall, and I'm not sure when this was, a very similar
25 case, nondependent adult relatives even addressing the

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1 legislature at one point, and I don't remember when
2 this was exactly. I just remember reading about it,
3 and they didn't change the law for whatever reason.

4 MR. HASTINGS: And, Your Honor, the wrongful
5 death statutes have changed over time, but a similar
6 issue has been before the legislature the past two
7 years and they have failed to act. It's been a close
8 call each time. I cited to some of that in my briefing
9 here. And where the legislature hasn't or refused to
10 act, it's the plaintiff's position that the Court
11 should step in and create a common law remedy for this
12 tragedy that was preventable and shouldn't have
13 happened.

14 Again, as it stands now, Washington law rewards
15 tortfeasors who cause the death of developmentally
16 disabled folks. And, furthermore, I would like to
17 point out that one of the requirements in the statute
18 if you're over 18, someone has to be dependent on you,
19 but David couldn't even marry legally because he was
20 declared incapacitated and he couldn't give the
21 informed consent. Every step of the way he has no
22 cause of action after 18 by his very nature.

23 THE COURT: Well, let me ask, so as a result
24 of negligence, and for purposes of summary judgment I'm
25 assuming the defendants were negligent here, if he had

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1 been injured, hospitalized, some physical problems, he
2 would have a cause of action?

3 MR. LEITCH: He would have been under the
4 vulnerable adult statute.

5 THE COURT: If he dies, then nobody can do
6 anything except complain about it?

7 MR. LEITCH: If he doesn't have any
8 dependents. If he has tier 1 beneficiaries, they can,
9 but if he has tier 2, he can't. There are some for
10 certain beneficiaries. And that's what Schumacher
11 specifically said, Judge. You're correct that the case.
12 law is settled, and even though it appears we might
13 have an issue with the impact of that decision, it is
14 certainly not for --

15 THE COURT: You said you disagree with the
16 negligence. Again, I understand there hasn't been a
17 lot of discovery on that and we have kind of
18 plaintiff's allegations here.

19 MR. LEITCH: For the record, I'm disagreeing
20 with a conclusion -- your belief if it was a matter of
21 fact because I don't believe that that is what is
22 before you currently in the motion.

23 THE COURT: It isn't all the facts,
24 certainly. Again, a guy who can't take care of himself
25 is left in an unventilated room when it's 90 degrees

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1 outside and ends up with a core body temperature of 107
2 degrees Fahrenheit taking medication that's given to
3 him by the defendant, which apparently limits the body
4 the ability to cool itself, ends up dead, doesn't that
5 sound negligent?

6 MR. LEITCH: Well, Judge, first of all, I'm
7 proscribed by the defendants here so there's a variety
8 of factual issues that I'm not necessarily prepared to
9 address.

10 THE COURT: 107 degrees, is that disputed?

11 MR. LEITCH: Well, I'm not necessarily, quite
12 frankly, versed in the facts enough to address that.
13 The motion here is on standing, and the issue, to me,
14 is that, as a matter of law, it mandates a certain
15 result. I don't dispute that they want to change the
16 law or that maybe some of those individuals, including
17 Your Honor, may have an issue with it, but it's well
18 settled, and at this point the place for that decision
19 would be the legislature. If Your Honor follows the
20 law and they choose to appeal it, that's their
21 discretion, but at this point today I do not believe
22 that a result other than what is clear in the case law
23 and the statutory construction and the line of how
24 these beneficiary statutes have been designated since
25 the 1800s -- 1854 is when it was first codified --

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1 there's no basis to deny the motion, we submit
2 respectfully.

3 THE COURT: Mr. Hastings, anything else?

4 MR. HASTINGS: Well, I suppose, in closing I
5 would say that I understand this court is bound to
6 follow the law, and I absolutely respect that. On the
7 same token, I would urge this court to perhaps state
8 its view on the issue on the record, you know, as Judge
9 Schindler has in two of the cases and said that this is
10 something that's egregious and modern society should
11 not tolerate whatsoever. Allowing our most vulnerable
12 population who largely go their entire life without a
13 voice, to not have a voice after something like this
14 happens, it's a tragedy on multiple levels that we
15 shouldn't tolerate, and this notion that there's an
16 incentive to allow the death of someone instead of
17 saving them, that there's an incentive to allow that,
18 it just shouldn't be tolerated, so I leave the Court
19 with those remarks.

20 THE COURT: Well, with respect to the facts,
21 I know those aren't completely developed. There hasn't
22 been a lot of discovery on the facts, and I understand
23 that. I appreciate the defendants' position there, so
24 anything I say about that is just initial first glance,
25 but, as I said, at first glance this does sound to me

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1 like egregious negligence. We have a defendant who's
2 in the business of providing care for a vulnerable
3 adult who let him die in a heat wave because he had no
4 ventilation in his room. That seems really basic to
5 me. Washington isn't known for heat, but when it gets
6 warm, you open some windows or turn on a fan and cool
7 people off or else they get ill and die. I don't know
8 about the medication. There was some indication it was
9 16 times the level it should have been, so that strikes
10 me as odd. Whether that's the responsibility of the
11 defendant, I don't know.

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

21 So I'm going to reluctantly grant the motion for
22 summary judgment. This will be a great case, I think,
23 for the Supreme Court to maybe expand the purview of
24 the statute. Again, I think it's probably a bad idea
25 for judges just to start changing the law because they

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1 don't like it. There's a lot of things they do I don't
2 like, but I follow them.

3 MR. LEITCH: I understand, Judge.

4 THE COURT: So I'm going to grant the motion
5 for summary judgment on the issue of standing. I'm not
6 going to grant other issues because I think it's
7 unnecessary. I hope the plaintiff appeals and if I get
8 reversed on this, it won't bother me in the slightest.
9 And I'm not making any decision on negligence. This is
10 simply, glancing at the plaintiff's materials and in a
11 light most favorable to the plaintiff, there was
12 negligence.

13 MR. LEITCH: I can appreciate that. I
14 understand. Thank you.

15 MR. HASTINGS: Thank you.

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17 (The matter was concluded.)

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