

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II

NO. 44328-7-II

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

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

Appellant,

v.

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

Respondents.

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**RESPONDENTS' BRIEF**

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## **I. IDENTITY OF MOVING PARTY**

Respondents Aacres WA, Aacres Allvest LLC, Aacres Landing, AALAN Holdings, Inc. (“Aacres”) ask for the relief designated in Section II.

## **II. STATEMENT OF RELIEF SOUGHT**

Respondent Aacres seeks a decision affirming the trial court’s summary judgment dismissal of Appellant Earl Vernon’s claims for lack of standing. *See* Clerk’s Papers (“CP”) at 225-227.

## **III. STATEMENT OF THE CASE**

### **A. Relevant Factual Background**

Henry David Vernon was born with certain disabilities. Despite his challenges, David Vernon<sup>1</sup> lived in his own residence at Aacres WA, LLC in Tacoma, Washington. He was also able to communicate through sign language, write simple sentences, and speak in a limited manner. CP at 45, 116.

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

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<sup>1</sup> Henry David Vernon, the decedent, is referred to as “David Vernon” by the appellants and accordingly, by the respondents. *See* CP at 1. The decedent’s brother, Earl Vernon is the appellant.

health oversight and medication management from an ARNP employed by Mountainside Mental Health, not a named defendant 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 and determined an accidental death. CP at 77, 93. The decedent died alone, with no surviving dependents.

**B. Procedural History**

On or about July 10, 2012, Earl Vernon, the decedent's brother, filed a Complaint against Aacres alleging negligence and violation of RCW 74.34. CP at 1-6. The appellant did not allege that he was dependent on the decedent for any reason.

Shortly thereafter, Appellant admitted that he was not financially dependent on decedent at the time of death. CP at 40. Specifically, Appellant responded to Aacres' 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

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**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 Appellant does not qualify as a beneficiary that can bring a private cause of action pursuant to RCW 4.20, Appellant's claims must be dismissed as a matter of law.

Appellant's claim for damages has never been recognized by Washington courts and is not supported by statute or precedent. Put simply, Appellant, as a non-dependent sibling of the deceased, does not have standing to bring these claims. The trial court correctly dismissed Appellant's cause of action. CP 225-227.

#### **IV. GROUNDS FOR RELIEF AND ARGUMENT**

##### **A. Standard of Review**

Review of a grant of summary judgment is de novo. *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 75, 247 P.3d 421 (2011). Statutory interpretation is a question of law that the appellate court reviews de novo. *Beggs*, 171 Wn.2d. at 75.

##### **B. Abuse of Vulnerable Adults Act**

Appellant's contention that economic damages survive to the estate is contrary to the survival statutory framework which plainly limits recovery to statutory heirs. Appellant brought this cause of action under the Abuse of Vulnerable Adults Act, chapter 74.34 RCW. CP at 5.

The Abuse of Vulnerable Adults Act provides, in relevant part:

In addition to the other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby.

RCW 74.34.200. Recovery under this statute is limited to spouses, children, stepchildren, and dependent parents and siblings. *Cummings v. Guardianship Servs.*, 128 Wn. App. 742, 753, 110 P.3d 796 (2005).

Washington courts have noted that because this Act is linked to the survival statutes, the unfortunate consequence is that elders without statutory beneficiaries cannot recover economic damages. *See Cummings*, 128 Wn. App. at 753. The legislature has amended this statute multiple times, in particular recently in 2013, and again chose to not provide a remedy for decedents without statutory beneficiaries. *See Abuse of Vulnerable Adults Act*, Wash. Sess. Laws SSB 5077, 219; *see also Cummings*, 128 Wn. App. at 753 (“[t]he effect of the provision, therefore, is that those without statutory heirs may be neglected with impunity so long as the result is death. Once again, we hope the legislature will resolve this discord.”). Therefore, given the settled case

law and the statutory framework, Appellant lacks standing and his claims must fail.

To be clear, the Abuse of Vulnerable Adults Act is the controlling statute at hand. While economic damages could be recoverable under the general survival statute, RCW 4.20.046, the analysis does not go that far because there is no standing under the Act. The Act requires statutory beneficiaries to recover any damages under chapter 4.20 RCW. *See Cummings*, 128 Wn. App. at 753. Here, because Earl Vernon is not a dependent sibling, as discussed further below, the decedent has no statutory heirs.

**C. Second Tier Beneficiaries Must Demonstrate Dependency for Standing Under RCW 4.20.020**

Turning to the survival statutes, Appellant is not a beneficiary under RCW 4.20.020 or RCW 4.20.046, the Washington wrongful death and survival statutes. Accordingly, this court should affirm the summary judgment dismissal of this action because Appellant lacks standing.

Regardless of the type of damages sought, where a death occurs, the statutory framework for the survival of an action plainly limits recovery to the beneficiaries set forth in the survival statutes, chapter 4.20 RCW. *Cummings*, 128 Wn. App. at 753. RCW 4.20.020 specifically defines the tiers of beneficiaries for wrongful death actions:

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband,

state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be *dependent upon the deceased person* for support, and who are resident within the United States at the time of his or her death.<sup>2</sup>

Causes of action for wrongful death and causes of action based on survival statutes are creatures of the legislature and statutory in nature; neither was recognized as common law. *Philippides v. Bernard*, 151 Wn.2d 376, 390, 88 P.3d 939 (2004). Accordingly, those statutes must be strictly construed. *Baum v. Burrington*, 119 Wn. App. 36, 41, 79 P.3d 456 (2003). The wrongful death and survival statutes are “*inescapably plain.*” *Triplett v. Dep’t of Soc & Health Servs.*, 166 Wn. App. 423, 428, 268 P.3d 1027 (2012) (emphasis added), *review denied*, 174 Wn.2d 1003, 278 P.3d 1111 (2012).

The statutory structure creates two tiers of beneficiaries. First tier beneficiaries do not have to demonstrate dependency because of the immediacy of the relationship. *Beggs*, 171 Wn.2d at 81. Second tier beneficiaries may recover *only* if they meet both of the following two requirements: (1) there are no first tier beneficiaries and (2) they can demonstrate dependency. *Armantrout v. Carlson*, 166 Wn.2d 931, 935, 214 P.3d 914 (2009) (“As part of the original code of Washington, the wrongful death statute has always required second tier beneficiaries to

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<sup>2</sup> RCW 4.20.020 “[A]nd its respective predecessors have been in existence for 100 years or more...and has without exception held that the class or classes of persons entitled to maintain an action for damages for wrongful death or entitled to benefit from such action, must be specifically designated by the legislature and not by the courts.” *Wilson v. Lund*, 74 Wn.2d 945, 955, 447 P.2d 718 (1968) (Donworth, J. dissenting), *reversed on other grounds*, 80 Wn.2d 91, 491 P.2d 1287(1971).

demonstrate their dependence on the decedent.”). As such, second tier beneficiaries require dependency for standing. *Schumacher v. Williams*, 107 Wn. App. 793, 795, 28 P.3d 792 (2001) (citing *Tait v. Wahl*, 97 Wn. App. 765, 769, 987 P.2d 127 (1999)). Because Appellant lacks proof of dependency on the decedent, he also lacks standing to bring this claim.

The Washington Supreme Court recently discussed the use of the word “dependency” in the statute. *Armantrout*, 166 Wn.2d at 938. The Court held that the beneficiary must show “substantial dependency” for financial contributions or for services that have economic value. *Armantrout*, 166 Wn.2d at 938. Further, the beneficiary must demonstrate a need for the decedent’s regular support contributions. *Armantrout*, 166 Wn.2d at 938. A mere benefit or occasional support is not enough to create the dependency contemplated by the wrongful death statute. *Bortle v. Northern P.R. Co.*, 60 Wash. 552, 111 P. 788 (1910) (characterizing occasional financial support as “nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity”).

**1. Appellant Cannot Demonstrate Substantial Dependency.**

RCW 4.20.020 does not permit Earl Vernon, the decedent’s adult brother, to recover as a non-dependent second tier beneficiary.<sup>3</sup>

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<sup>3</sup> RCW 4.20.010 creates a right of action by the personal representative appointed for the estate when a person’s death is caused by a wrongful act, neglect, or default of another. A wrongful death action, however, must be for the benefit of statutorily defined beneficiaries under RCW 4.20.020.

Appellant, the surviving brother of the deceased, unequivocally admitted that he was not dependent upon his deceased brother for support at the time of his death. CP at 40. Appellant further admitted that the statute as written did not apply to permit his recovery. Br. of Appellant at 13-24. The trial court's summary judgment dismissal must be affirmed as a matter of settled law because Appellant was not dependent on the decedent for financial contributions.

RCW 4.20.020 demonstrates the legislature's declination to include nondependent siblings as beneficiaries.<sup>4</sup> *Schumacher*, 107 Wn. App. at 805 (Ellington, J., concurring). As such, Earl Vernon's claim fails because he is a nondependent sibling of the decedent and cannot recover under the statute.

In *Triplett*, a 52-year-old disabled woman drowned at DSHS's disabled residential care facility. *Triplett*, 166 Wn. App. at 425-26 (emphasis added). The decedent's mother and brother brought suit against the care facility under the wrongful death and survival statutes. *Triplett*, 166 Wn. App. at 426. Division Three of the Court of Appeals held that the decedent's mother and brother did not have standing because they were not dependent on the decedent. Further, the court rejected Triplett's argument that "the legislature could not have intended for RCW 4.20.020 to require parents and siblings to show financial dependence upon the decedent where, because of mental disability, the

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<sup>4</sup> RCW 4.20.020 defines the statutory beneficiaries under wrongful death causes of action; Appellant fails to cite this as relevant legal authority.

decedent was incapable of providing support.” *Triplett*, 166 Wn. App. at 428. Similarly, here, the court should reject Appellant’s arguments and hold that the statute, as plainly written, does not apply to the facts at hand and Earl Vernon accordingly does not have standing to sue.

Moreover, in the case of *Schumacher*, Maria, a disabled resident of a privately owned adult boarding home, licensed by the Washington State Department of Health, died as a result of hot-water burns. *Schumacher*, 107 Wn. App. at 796. Maria’s brother, Charles Schumacher, filed an action as personal representative of Maria’s estate, and individually, seeking recovery against the boarding home, the homeowner, and the State. Schumacher argued that RCW 4.20.020 merely set forth a list of individuals who may maintain an action and argued that because the dependency requirement of second tier beneficiaries in the statute was not specifically contained in the Abuse of Vulnerable Adults Act, Chapter 74.34 RCW, it did not apply. *Schumacher*, 107 Wn. App. at 788-89. The Court of Appeals disagreed after reviewing the legislative history and held that both the Act and Chapter 4.20 RCW required the dependency requirement for those “other heirs.” *Schumacher*, 107 Wn. App. at 802. The Court of Appeals affirmed the summary judgment dismissal holding that Schumacher was not dependent on Maria for support and therefore, was not a statutory beneficiary under the general wrongful death or survival action statutes. *Schumacher*, 107 Wn. App. at 804-805.

Here, like in *Triplett* and *Schumacher*, Earl Vernon fails to demonstrate substantial financial dependency on the decedent. Rather, the evidence clearly shows the opposite – that he did not rely on the deceased for any support. Again, Appellant unequivocally admitted in his responses to Acres’ 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. Because Appellant did not depend on the deceased for support, he cannot maintain this action as a statutory beneficiary.

**2. Appellant Cannot Demonstrate Need for Dependent’s Contribution.**

Appellant was not substantially dependent on the decedent at any time, and therefore, fails to show a need for the decedent’s regular contributions. The record demonstrates Appellant’s clear recognition of his lack of need and thus, the court should affirm the grant of summary judgment.

To be clear, a second-tier beneficiary must prove two elements: (1) dependency *and* (2) a need for the dependent’s regular contributions. *Armantrout*, 166 Wn.2d at 938 (emphasis added). Under the facts at hand, there is no evidence of a “necessitous want on the part of” Earl Vernon for the financial benefit derived from David Vernon’s services. *Bortle*, 60 Wash. at 554. The record before this court lacks any evidence that Appellant necessarily depended on financial benefit derived from the decedent’s contributions. Thus, Appellant lacks standing to sue

under the wrongful death and survival statutes because the decedent, though mentally disabled, did not provide contributions to Appellant during his life nor did Appellant need or rely on contributions of economic value.

In sum, Appellant does not meet the requirements of RCW 4.20.020. Namely, Appellant cannot establish that he was financially and substantially dependent on the decedent at the time of death. As a result, the Appellant does not qualify as an eligible beneficiary and cannot bring a private action related to his brother's death. Therefore, based on controlling settled case law and clear statutory language, this Court should affirm the trial court's summary judgment dismissal of Appellant's claims.

**D. Settled Law Does Not Recognize Decedent's Brother, Earl Vernon, as a Beneficiary Under RCW 4.20.046**

Appellant brings this action, in part, under RCW 4.20.046. The beneficiaries allowed under this statute are those beneficiaries allowed by RCW 4.20.020, the wrongful death statute discussed above. For the same reason, settled law bars Appellant's claims.

Appellant argues that Earl Vernon incurred funeral costs. Br. of Appellant at 9. However, before the trial court, after David Vernon's death and burial, Earl Vernon alleged \$12,000 in funeral expenses. CP at 57. On appeal, Earl Vernon now alleges \$15,000 in said funeral expenses without offering a reason for the substantial increase in cost.

Br. of Appellant at 9. Regardless, the court need not seek to harmonize these facts because of the settled legal framework.

Washington's general survival statute, RCW 4.20.046, allows for any claims based on pain and suffering and emotional distress suffered by a decedent to survive for certain beneficiaries.<sup>5</sup> That statute provides, "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 (emphasis added). A review of the relevant legislative history of the survival statutes reflects:

[A] consistent conservatism on the part of the Legislature with regard to the beneficiaries of those statutes. Despite changes over the years broadening the basic concept of restricting survival of actions to economic damages...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.

*Schumacher*, 107 Wn. App. at 801-02 (citing *Tait*, 97 Wn. App. at 769; see also *Roe v. Ludtke Trucking*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987) (scope of statute protects only beneficiaries clearly contemplated

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<sup>5</sup> Appellant admits RCW 4.20.060, the special survival statute, does not allow recovery here. Br. of Appellant at 12. Further, Appellant states that he does not make a claim under RCW 4.20.060. Br. of Appellant at 12. Thus, RCW 4.20.060 should not be considered as a ground for recovery. Further, even if the court were to consider RCW 4.20.060 as an alternate ground, Appellant's claim fails for the same reason it fails under RCW 4.20.020 because the "action may be prosecuted" in "favor of the decedent's parents, sisters, or brothers" *only if* they depend upon the deceased for support at the time of the decedent's death. RCW 4.20.060. Similar to RCW 4.20.020, RCW 4.20.060 requires that the Appellant establish that he was dependent upon the support of his brother at the time of his brother's death. As previously discussed, the Appellant admitted the he was not dependent on his brother for support at the time of his brother's death.

by the statute)). Survival of an action for the benefit of siblings who are not dependent on the decedent is not contemplated by the legislative history of the survival statutes.

Here, the same statutory barriers previously discussed that prevent the decedent's brother from becoming an eligible beneficiary under RCW 4.20.020, also prevent Appellant's eligibility under RCW 4.20.046. *See Beggs*, 171 Wn.2d at 81-82 (a second tier beneficiary may recover under RCW 4.20.046 only if they were dependent upon decedent for support). Again, Appellant can present no conceivable facts that justify recovery under RCW 4.20.046 because he was not dependent on the decedent.

The Appellant misplaces his reliance on *Harms v. Lockheed Martin Corp.*, 2007 WL 2875024 (W.D. Wash), an unpublished decision from the U.S. District Court. Appellant cites that decision for the proposition that he should be able to recover economic damages. Br. of Appellant at 16-18. Appellant notably fails to cite to binding authority on the issue of recovery of economic damages such as *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 753, 110 P.3d 796 (2005). In addition, other persuasive authority also holds that a decedent without statutory decedents cannot recover economic damages, in accordance with the binding authority discussed. Only six months before the *Lockheed* decision relied upon by Appellants, the U.S. District Court for the Eastern District of Washington found that the non-dependent parents and siblings of the decedent could not recover

damages, including funeral expenses. *Rentz v. Spokane Cnty*, 438 F. Supp. 2d 1252, 1258 (2006).

The Washington Supreme Court recently held that a non-dependent sibling was not a qualified beneficiary under RCW 4.20.046. *Beggs*, 171 Wn.2d at 85. In its holding affirming the summary judgment dismissal, the Court made clear that a second tier beneficiary cannot recover without a showing of financial dependency on the decedent. *Beggs*, 171 Wn.2d at 82, 85 (citing *Armantrout*, 166 Wn.2d at 935; *Philippides v. Bernard*, 151 Wn.2d 376, 384-85, 88 P.3d 939 (2004)). This is simply because the statutory framework clearly controls beneficiaries eligible for pursuing causes of action after death.

In sum, under RCW 4.20.046, just like RCW 4.20.020 and RCW 4.20.060, Appellant does not qualify as a beneficiary entitled to bring an action.

**E. The Decedent's Constitutional Rights Have Not Been Violated.**

The appellant argues that prohibiting the decedent's recovery violates his constitutional rights. Br. of Appellant at 26. This argument is misplaced 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.

Appellant recycles the arguments rejected by Division Three of the Court of Appeals in *Triplett v. Dep't of Soc & Health Servs.*, 166

Wn. App. at 429, arguing that RCW 4.20.020's limitation on beneficiaries unconstitutionally restricts a decedent's access to the courts. Br. of Appellant at 26-29. Similarly, this court should reject Appellant's argument because it lacks merit.

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 appellant here does not cite any authority to support his assertion that the right to access the judiciary passes post mortem to a representative of the estate in violation of RAP 10.3(6). Further, 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 second tier beneficiaries demonstrate dependency on the decedent. RCW 4.20.020; .046; .060. Thus, the Appellant'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. David Vernon, a Disabled Adult, Should Not be Considered a Minor**

For the first time on appeal, Appellant argues that the decedent should be considered a minor for the purposes of the wrongful death statute. Br. of Appellant at 29-30. Appellant's argument ignores that the decedent died as a developmentally disabled adult.

The appellate courts do not consider theories not presented below. Because Appellant failed to argue the theory that the decedent should be considered by the courts to be a minor under RCW 4.20.020 below, the appellate court should decline to entertain this new theory. RAP 2.5(a); *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 304-305, 253 P.3d 470 (2011). Permitting Appellant to raise this argument for the first time on appeal would result in a significant injustice as no record has been made on this issue, and it goes well beyond the scope of the trial court's summary judgment dismissal on the issue of standing. Report of Proceedings (RP) at 14-15; CP at 225-227. Accordingly, review of this newly raised issue is improper.

**V. CONCLUSION**

For these reasons, the Court should dismiss Appellant's appeal. There is no colorable argument against dismissal of Appellant's claims because: (1) Earl Vernon has no standing to bring suit; (2) RCW 4.20.060 does not allow non-dependent sibling beneficiaries; and (3)

RCW 4.20.046 does not allow the decedent's brother to be a beneficiary under these circumstances. Appellant's factual assertions, even if true, do not provide for standing or the ability to recover as a beneficiary under the legal framework. The trial court correctly dismissed Appellant's cause of action. At this time, Respondent respectfully requests that the court affirm the summary judgment dismissal of all claims.

RESPECTFULLY SUBMITTED this 28 day of October, 2013.

PATTERSON BUCHANAN  
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**APPENDIX TO RESPONDENTS' BRIEF**

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## APPENDIX

- Appendix A: Order Granting Defendants' Motion for Summary Judgment; CP 225–227
- Appendix B: Plaintiff's Answers to Defendant's First Requests for Admission, p. 3; CP 40
- Appendix C: Declaration of Cheryl Borden in Support of Defendants' Motion for Summary Judgment; CP 44-45
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**CERTIFICATE OF SERVICE**

I hereby declare on the date provided below, I caused to be delivered via ABC Legal Messenger, **RESPONDENTS' BRIEF**, to the following individual(s):

Darrell L. Cochran, Esq.  
PFAU COCHRAN VERTETIS AMALA, PLLC  
911 Pacific Ave, Suite 200  
Tacoma, WA 98402-4413

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

Executed at Seattle, Washington, on October 31, 2013.

  
\_\_\_\_\_  
Jan Smith, Legal Assistant

*Vernon v. Acres Allvest, LLC*  
Washington Court of Appeals, Div. II Case No. 44328-7-II  
Respondent's Brief

# APPENDIX A



Honorable Ronald E. Culpepper  
Hearing Date/Time: December 14, 2012; 9:00am  
WITH ORAL ARGUMENT

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SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiff,

v.

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

Defendants.

No. 12-2-10662-8

~~[PROPOSED]~~ ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

THIS MATTER, having come before the Court on Defendants Aacres Allvest, LLC's, Aacres Landing, Inc.'s, Aacres WA, LLC's, and AALAN Holdings, Inc.'s Motion for Summary Judgment, the Court having heard oral argument of counsel as well as having considered the record and files herein and specifically:

1. Defendants Aacres Allvest, LLC's, Aacres Landing, Inc.'s, Aacres WA, LLC's, and AALAN Holdings, Inc.'s Motion for Summary Judgment;
2. Declaration of Cheryl Borden in Support of Defendants' Motion for Summary Judgment with exhibits;

[PROPOSED] ORDER GRANTING  
DEFENDANTS' SUMMARY JUDGMENT - I  
211956

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

2112 Third Avenue, Suite 500  
Seattle WA 98121 Tel. 206.462.6700 Fax 206.462.6701

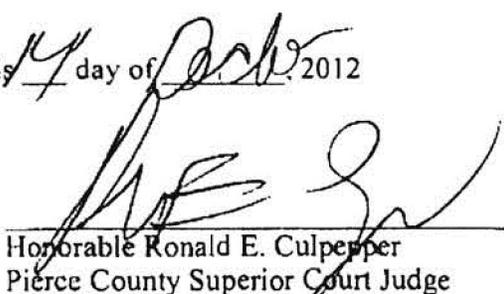
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- 1 3. Declaration of Charles P. E. Leitch in Support of Defendants' Motion for Summary
- 2 Judgment with exhibits;
- 3 4. Plaintiff's Response to Defendants' Motion for Summary Judgment with supporting
- 4 pleadings and exhibits, if any; and
- 5 5. Defendants' Reply in Support of Motion for Summary Judgment, if any.

6 The Court being fully advised in the premises, now, therefore it is

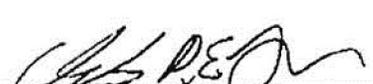
7 HEREBY ORDERED, ADJUDGED AND DECREED that Defendants Acres Allvest,  
 8 LLC's, Acres Landing, Inc.'s, Acres WA, LLC's, and AALAN Holdings, Inc.'s Motion for  
 9 Summary Judgment is hereby GRANTED. There are no genuine issues of material fact, and  
 10 entry of judgment as a matter of law in favor of Defendants is proper. All of Plaintiff's claims  
 11 and causes of action are hereby DISMISSED with prejudice.

12  
13 DONE IN OPEN COURT this 14 day of Dec, 2012

14  
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16   
 Honorable Ronald E. Culpepper  
 Pierce County Superior Court Judge

17 Presented by:

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

20  
21 By:   
 22 Charles P.E. Leitch, WSBA 25443  
 23 Andrew M. Weinberg, WSBA 36838  
 24 Of Attorneys for Defendants  
 25



1 Approved as to form;  
2 Notice of presentation waived

3 PFAU COCHRAN VERTETIS AMALA PLLC

4  
5 By:   
6 ~~Daniel L. Cochran, WSBA 22851~~  
7 Of Attorneys for Plaintiff

KEVIN HASTINGS WSBA # 42316

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*Vernon v. Acres Allvest, LLC*  
Washington Court of Appeals, Div. II Case No. 44328-7-II  
Respondent's Brief

# APPENDIX B



*Vernon v. Acres Allvest, LLC*  
Washington Court of Appeals, Div. II Case No. 44328-7-II  
Respondent's Brief

# APPENDIX C

November 16 2012 10:15 AM

KEVIN STOCK  
COUNTY CLERK  
NO: 12-2-10662-0

SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiff,

v.

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

Defendants.

No. 12-2-10662-8

DECLARATION OF CHERYL  
BORDEN IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

I, Cheryl Borden, hereby declare on oath as follows:

1. I am over the age of 18, have personal knowledge of all the facts stated herein and am competent to testify to them. I currently hold the position of Chief Operating Officer at Aacres WA, LLC.

2. On July 29, 2009, Henry David Vernon was found unresponsive at his residence by staff members of Aacres WA, LLC. Attempts to revive Mr. Vernon were unsuccessful and he was pronounced dead shortly thereafter. At the time of his death, Mr. Vernon was 55 years old.

3. Mr. Vernon received mental health oversight and medication management from Mountainside Mental Health (not a named defendant in this action).

DECLARATION OF CHERYL BORDEN - 1  
211968

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

2112 Third Avenue, Suite 500  
Seattle, WA 98121 Tel. 206.462.6700 Fax 206.462.6701

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*Vernon v. Acres Allvest, LLC*  
Washington Court of Appeals, Div. II Case No. 44328-7-II  
Respondent's Brief

# APPENDIX D



DIVISION OF DEVELOPMENTAL DISABILITIES (DDD)

DDD MORTALITY REVIEW

PART 2. REGIONAL QUALITY ASSURANCE REPORT

Upon receipt of Part 1, the Regional Quality Assurance Program Manager (QAPM) will review the report, make any recommendations, and complete Part 2. Forward both parts, along with any other pertinent information, to the DDD Central Office Incident Management Program Manager within 21 calendar days of receipt of Part 1 from the Case Resource Manager.

I. GENERAL INFORMATION

DECEASED'S LEGAL NAME

Henry David Vernon

APPARENT MANNER OF DEATH

- Natural       Suicide       Traffic accident       Pending investigation  
 Accidental       Homicide       Undetermined

SOURCE OF INFORMATION

Medical Examiner's Records, Providers report and records, Incident Report, CARE.

	YES	NO	UNKNOWN
Was physical abuse or neglect suspected as a factor in the death?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Was the case referred to the medical examiner or coroner?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Was an autopsy conducted?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
In your opinion was the death in any way unusual or unexplained?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Total number of incident reports regarding the deceased within the past two years: 0			
Total number of known referrals to APS/RCS/CPS regarding the deceased within the past two years: 0			
Number of known substantiations: n/a (Attach outcome report)			
Is there an open APS/RCS/CPS investigation?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is law enforcement investigating the death?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

EXPLAIN ALL "YES" ANSWERS BELOW:

Mr Vernon's case was referred to the Medical Examiner for an autopsy. Medical Examiner determined manner of death was accidental. The death was unusual and unexpected, so an internal mortality review team was convened and a report was completed by Dr. C. Dahl.

Is the region assembling an internal mortality review team to investigate this death further?  Yes  No

Is an external review being conducted?  Yes  No

If yes, list name of lead and affiliation:

RCS, Law Enforcement

NOTE: If a separate regional mortality review team is formed, the recommendations from that team may be sent separately when completed so as not to delay the submission of this report.

II. RECORDS REVIEWED

CHECK ALL RECORDS THAT WERE REVIEWED

- Part 1 - Provider Report       Residential evaluation(s)       DDD Incident reports       DDD Client file  
 Autopsy report       Medical records       Law enforcement reports  
 Medical Examiner/Coroner       Death certificate       APS/RCS/CPS information  
 Other: CARE

III. RECOMMENDATIONS AND ADDITIONAL INFORMATION

LIST RECOMMENDATIONS AND ANY ADDITIONAL INFORMATION PERTINENT TO THIS INCIDENT BASED UPON YOUR REVIEW. INCLUDE ANY MEDICAL PRACTICE ISSUES, PROVIDER POLICY OR PRACTICE ISSUES, AND DIVISION POLICY OR PRACTICE ISSUES THAT WERE RAISED AS A RESULT OF THIS REVIEW.

See Mortality Review dated 03-18-2010 for recommendations.

QA PROGRAM MANAGER (PRINT)

Debbie Roberts

SIGNATURE

*Debbie Roberts*

DATE COMPLETED

03-26-10

REGIONAL ADMINISTRATOR APPROVAL (SIGNATURE)

*a. delight*

DATE SIGNED

*04/06/10*



Pierce County

Medical Examiner's Office
3618 Pacific Avenue
Tacoma, Washington 98418
(253) 798-8494 • FAX (253) 798-2893

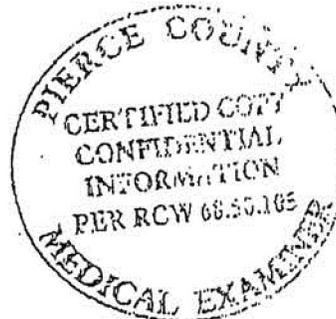
ERIC L. KIESEL, MD, PhD
Chief Medical Examiner
JACQUELYN L. MORHAIME, MD
Associate Medical Examiner

POSTMORTEM EXAMINATION REPORT

MEDICAL EXAMINER CASE #: 09-0965
NAME OF DECEASED: Henry David Vernon
DATE OF EXAMINATION: July 29, 2009
CAUSE OF DEATH: Exogenous Hyperthermia
OTHER SIGNIFICANT CONDITIONS: Acute Paroxetine Intoxication, Coronary Artery Atherosclerosis, Cardiomegaly
MANNER OF DEATH: Accident

NOTICE: THIS REPORT IS CONFIDENTIAL

RCW 68.50.105 Autopsies, post mortems-Reports and records confidential-Exceptions.
Reports and records of autopsies or post mortems shall be confidential, except that the following persons may examine and obtain copies of any such report or record: The personal representative of the decedent as defined in RCW 11.02.005, any family member, the attending physician, the prosecuting attorney or law enforcement agencies having jurisdiction, public health officials, or to the department of labor and industries in cases in which it has an interest under RCW 68.50.103. The coroner, the medical examiner, or the attending physician shall, upon request, meet with the family of the decedent to discuss the findings of the autopsy or post mortem. For purposes of this section, the term "family" means the surviving spouse, or any child, parent, grandparent, grandchild, brother, or sister of the decedent, or any person who was the guardian of the decedent at the time of death. [1987 c 331 § 58; 1985 c 300 § 1; 1977 c 79 § 2; 1953 c 188 § 9. Formerly RCW 68.08.105.]





STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

PO Box 600 • MS: B27-20 • Buckley WA 98321-1140

MAR 19 2010

DDD Field Services  
Region 5 Pierce Co.

### Mortality Review

Client: Henry David Vernon

DOB: 10/22/1953

DOD: 07/29/09

Home: Aacres, Tacoma, WA

March 18, 2010

#### Cause of Death

An autopsy was performed and the cause of death was determined by Dr. Eric Kiesel, Pierce County Medical Examiner. His report dated 10/01/09 attributed Mr. Vernon's death to exogenous hyperthermia (unusually high body temperature attributable to external sources) and noted other significant findings that included acute paroxetine intoxication, coronary artery atherosclerosis and cardiomegaly. Concerning the paroxetine intoxication, he wrote:

"His prescription medications, especially paroxetine and olanzapine, are known to decrease an individual's ability to reduce core body temperatures. The paroxetine level is greater than 16 times the upper therapeutic level. Even though there is postmortem redistribution, this level is felt to represent a toxic level."

The cause of death was reported as hyperthermia, consistent with core body temperature. The manner of death was listed as an accident.

#### Past Medical History

Mr. Vernon is one of four children. He was exposed to measles in utero which resulted in deafness and mild to moderate mental retardation. Later he developed rheumatic heart disease. He was able to communicate with American Sign Language, to write simple sentences, and he had limited vocalization.

Mr. Vernon had a DSM-IV Axis I diagnosis of schizophrenia and other psychotic disorders. His medications were managed at Mountainside Mental Health by an ARNP. He was on paroxetine 50 mg at bedtime; olanzapine 30 mg at bedtime; bupropion 150 mg in AM; and alprazolam 0.5 mg twice a day PRN for anxiety. The Mountainside ARNP saw him on a regular basis, with the last medication change having been on 06/26/08 when the olanzapine was increased from 20 to 30 mg due to hallucinations, aggressive responses to voices and his becoming more argumentative.

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## Mortality Review

Henry David Vernon Page 2 of 6

Mr. Vernon's brother, Earl Vernon, reported that psychiatrist Dr. Walter Lovell had felt Mr. Vernon was not schizophrenic and had started the paroxetine several years ago. He also reported that Michael Comte, a licensed social worker and certified sex offender treatment provider who evaluated Mr. Vernon in 2005 and 2006, had noted some suicidal ideation in Mr. Vernon and had suggested the paroxetine be discontinued. Mr. Comte's last report concerning Mr. Vernon is dated 6/13/06. In it he notes that the ARNP had begun tapering the olanzapine and increasing the paroxetine and comments that the change was "not beneficial"; he further notes that she was in the process of again increasing the olanzapine. The report includes no reference to decreasing the paroxetine.

Mr. Vernon's Axis II diagnosis included mild to moderate MR and obsessive-compulsive disorder. Axis III noted gut and urinary tract concerns. Axis IV noted problems with access to medical care (interpreter needed and not always available), occupational problems and recent death of family members (parents in 2005, sister in 1997).

Mr. Vernon was treated for prostate hypertrophy with Flomax 0.8 mg at bedtime by Dr. John van Buskirk. He was on daily aspirin, 81 mg prophylaxis, for rheumatic heart disease and Tylenol (acetaminophen) 650 mg four times a day for back and hip pain first noted on 02/07/08.

Mr. Vernon's appointment records from Aacres were available from 1/2/08. Clinic records and test results would typically be with the primary care physician and were not available at Aacres.

Mr. Vernon was seen at MountainSide on 1/2/08, 2/28/08, 4/24/08, 6/26/08 (change in olanzapine noted above), 8/5/08, 9/30/08 (AIMS evaluation for side effects was normal and labs were ordered), 2/26/09 and 5/26/09 (noted minimal use of alprazolam).

Dr. van Buskirk saw Mr. Vernon on 2/7/08 for right hip pain. Tylenol was started; X-rays and labs were ordered. Follow up on 2/14/08 notes no infections and suggests increased exercises. On 12/08/08 he was seen for his annual evaluation. There were no new concerns noted and labs were ordered.

Related to his hearing impairment. Mr. Vernon's written individual service plan, which was approved by his guardian on 1/8/09, specified door and window alarms in his bedroom to alert staff if they were opened, and a lighted smoke detector in his bedroom with a light bright enough to alert him in the event of a fire.

### Events Immediately Prior to Mr. Vernon's Death

Daily logs during the last week of July 2009 note typical activities for Mr. Vernon. He would bathe and eat breakfast in the morning, often nap until around 11:00 AM and then



# ON-GOING NARRATIVES

Client Name

Year

Key Word	Date	Narrative	Staff
		① David could write down what he was not able to communicate by sign language and staff would understand.	
		② David was able to use sign language to the staff and staff would understand what he meant.	
		③ Staff listen to David and was able to understand what he was saying.	
		④ Staff When staff talked to David face to face David had a unique way of following your lips to figure out what he is being told.	
		⑤ Some of his words were audible.	
		⑥ He would lead you to where/ what he wanted you to do.	
		Francis Murray ⑥ 8-21-09	

Revised 04/29/09

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*Vernon v. Aacres Allvest, LLC*  
Washington Court of Appeals, Div. II Case No. 44328-7-II  
Respondent's Brief

# APPENDIX E

July 10 2012 9:14 AM

KEVIN STOCK  
COUNTY CLERK  
NO: 12-2-10662-8

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

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

Plaintiffs,

v.

AACRES ALLVEST, LLC, a Limited  
Liability Corporation, AACRES LANDING,  
INC, AACRES WA, LLC, a Limited  
Liability Corporation, and AALAN  
HOLDINGS, INC. .

Defendants.

NO.  
COMPLAINT

Plaintiff, Earl Vernon, as Personal Representative of the Estate of Henry David  
Vernon, by and through his attorneys Darrell L. Cochran and Pfau Cochran Vertetis Amala,  
PLLC, for cause of action against Defendants Aacres Allvest, LLC, Aacres Landing, Inc.,  
Aacres WA, LLC, and Aalan Holdings, Inc. (hereafter referred to jointly as "Defendant  
Aacres"), alleges as follows.

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## I. PARTIES

1.1 At all times material hereto, Earl Vernon, individually, was and continues to be a resident of the State of Washington, Residing in Pierce County, Washington.

1.2 At all times material hereto, Earl Vernon was the brother and guardian of Henry David Vernon (David), a deceased, developmentally-disabled adult.

1.3 At all times material hereto, Aacres Allvest, LLC is and was a limited liability company duly authorized under the laws of Washington and doing business in Pierce County. Defendant Aacres Allvest, LLC carried out a traditional state function of caring for the developmentally disabled and was paid by the state for the care of the developmentally disabled. Thus, Aacres Allvest, LLC is a quasi-governmental agent and is susceptible to suit under 42 U.S.C. § 1983.

1.4 At all times material hereto, Aacres Landing, Inc. is and was a corporation duly authorized under the laws of Washington and doing business in Pierce County. Defendant Aacres Landing, Inc. carried out a traditional state function of caring for the developmentally disabled and was paid by the state for the care of the developmentally disabled. Thus, Aacres Landing, Inc. is a quasi-governmental agent and is susceptible to suit under 42 U.S.C. § 1983.

1.5 At all times material hereto, Aacres WA, LLC is and was a limited liability company duly authorized under the laws of Washington and doing business in Pierce County. Defendant Aacres WA, LLC carried out a traditional state function of caring for the developmentally disabled and was paid by the state for the care of the developmentally

1 disabled. Thus, Aacres WA, LLC is a quasi-governmental agent and is susceptible to suit  
2 under 42 U.S.C. § 1983.

3 1.6 At all times material hereto, Aalan Holdings, Inc. is and was a corporation duly  
4 authorized under the laws of Washington and doing business in Pierce County. Defendant  
5 Aalan Holdings, Inc. carried out a traditional state function of caring for the developmentally  
6 disabled and was paid by the state for the care of the developmentally disabled. Thus, Aalan  
7 Holdings, Inc. is a quasi-governmental agent and susceptible to suit under 42 U.S.C. § 1983.  
8

## 9 II. JURISDICTION AND VENUE

10 2.1 On information and belief, all defendants reside or may be found within the  
11 Western District of Washington and the Court has jurisdiction over their persons. This  
12 conduct giving rise to this action occurred within the Western District of Washington.  
13

14 2.2 Venue is appropriate in this Court.  
4

## 15 III. FACTS

16 3.1 David was a developmentally disabled citizen living in a facility operated and  
17 maintained by Defendants Aacres.

18 3.2 David suffered from aphasia, mild mental retardation and schizophrenia that  
19 caused him to have significant cognitive disabilities.

20 3.3 Defendants Aacres knew that David, at all times relevant to the present action,  
21 was developmentally disabled, as defined by RCW 71A.10.020.  
22

23 3.4 Due to his disability, David was subject to the protection afforded by RCW  
24 74.34.010.  
25  
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1           3.5     David was prone to delusions and had difficulty communicating with others.  
2     However, with supervision, David was able to enjoy a lifestyle where he held a job, attended  
3     church, went bowling and interacted with the community.

4           3.6     On August 17, 2005, Earl Vernon was appointed legal guardian of David.

5           3.7     In October of 2005, David was placed in Defendants Aacres facility. Aacres  
6     understood their care level for David as one where the “person needs frequent daily/weekly  
7     support and/or monitoring by trained others” and committed that “Aacres will provide him  
8     with supports as needed to assist him in meeting his basic health and safety needs.”

9           3.8     Defendants Aacres were to provide 24-hour staff support with awake  
10     instruction, distribution of medication, and overall supervision.

11           3.9     Defendants Aacres were responsible for giving David his medication, which  
12     included olansapine and paroxetine; the possible side effects of which include hyperthermia.

13           3.10    In late July, 2009, local news reports warned of an impending heat wave that  
14     would strike Washington in the coming days. Despite the warnings, Defendants Aacres failed  
15     to take necessary precautions to ensure that David would not die from the heat.

16           3.11    On the evening of July 28, 2009, David was given his medication by  
17     Defendant Aacre’s staff, with the knowledge that the medication could cause his body  
18     temperature to increase.

19           3.12    Defendant Aacres staff failed to check on David that night, despite the current  
20     103 degree temperatures outdoors, the known side effects of his medications, and the lack of  
21     air conditioning in his room.



