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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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MICHAEL L. OLVER, Special Administrator of the  
ESTATE OF THUY THI THANH NGUYEN HO,

Respondent,

v.

JULIE K. FOWLER, Special Administrator of the  
ESTATE OF CUNG VAN HO,

and

VU NGUYEN,

Appellant.

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REPLY BRIEF OF CROSS APPELLANT

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55167-1-1  
11/19/05  
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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| I. Reply to Nguyen's Response to Motion to Strike Assignments of Error                                      | 1           |
| II. Reply to Response of Appellant Re: Cross Appeal that Post Judgment Intervention Should Have Been Denied | 4           |
| IV. Errata?   | 8           |
| V. Conclusion   | 9           |

## TABLE OF AUTHORITIES

| A. <u>Cases</u>  | <u>Page</u> |
|--|-------------|
| <u>Creasman v. Boyle</u> , 31 Wn. 2d 345 (1948)        | 8           |
| <u>Kreidler v. Eikenberry</u> , 111 Wn. 2d 828 (1989)  | 5, 6, 8     |
| <u>Martin v. Pickering</u> , 85 Wn. 2d 241, 244 (1975) | 5, 7, 8     |
| B. <u>Statutes and Regulations</u>                     |             |
| CR 24 (a)  | 6, 9        |
| RAP 10.3 (a) (3)                                       | 3           |

**I. REPLY TO NGUYEN'S RESPONSE TO MOTION TO STRIKE ASSIGNMENTS OF ERROR.**

Olver moved to strike Nguyen's first three Assignments of Error pertaining to "creditor's rights" or to "joint liability" for tort claims on the grounds that nothing in Judge Mary Yu's Findings of Fact (CP 235) or Judgment of Disbursement (CP 232) entered on September 7, 2004 addressed such legal issues or made any ruling upon such issues in any manner whatsoever.

Nguyen responds that the court of appeals may review issues not mentioned in the trial court's findings if the record shows the issue was raised and considered in the trial court (Response pg. 1).

In point of fact the transcript of the October 28, 2004 Oral Argument (Appendix A to Motion to Supplement Record On Review) shows that Judge Yu repeatedly refused to consider Nguyen's alleged creditor rights issue because he had a separate lawsuit asserting the same issue against the Estate of Thuy Thi Thanh Nguyen Ho pending in another court:

“The Court: Mr. Rumbaugh, Let me hear from you. That did concern me. There is other pending matter, and why isn’t it appropriate to have it addressed there”

App. A. pg. 12, lines 6-9.

“The Court: How is it that the Creditor Rights somehow are jeopardized, given that there is this other lawsuit?

And I do not believe in stretching the law. I don’t believe that this is the role of a trial court. I really believe that should be left to the court of appeals or the supreme court in terms of creating new law or applying it differently.

How is it that I can frankly avoid the legal effect of a decision in regard to the meretricious relationship in this case, given again, that you do have a forum and it probably ought to be litigated in the other forum?”

App. A. pg. 16, lines 16-25; pg. 17, lines 1-3.

“The Court: . . . That’s really the forum to address the legal effect of finding whether there is a meretricious relationship between these two. This is properly done in another forum and I believe that’s where the questions can be raised in terms of what right the creditor has and how the assets should be divided. And I’m denying the motion.”

App. A. pg 33, lines 5-11.

The trial court repeatedly refused to consider Nguyen’s creditor rights issues because Nguyen already was prosecuting a suit on a rejected creditor’s claim in Nguyen v. The Estate of Thuy Thi Thanh Nguyen Ho, King County Cause No. 03-2-40778-0 SEA. The legal effect of a tort creditor’s claim against one-half of a meretricious

person's assets was "at issue" in the lawsuit assigned to Judge Nicole Macinnes and Judge Yu repeatedly referred Nguyen to that suit and never addressed the issue of creditor's rights.

RAP 10.3 (a) (3) requires a party to make a concise statement of each error made by the trial court. Given that the issue was never raised prior to the entry of the Findings and Judgment from which appeal is taken and give that the separate lawsuit exactly on point between the same parties was pending, Judge Yu made the appropriate decision to defer that issue (neither ruling for or against) to the trial judge in the parallel lawsuit. It was an appropriate means to provide for the orderly administration of justice.

**II. REPLY TO RESPONSE OF APPELLANT RE: CROSS APPEAL THAT POST JUDGMENT INTERVENTION SHOULD HAVE BEEN DENIED**

To recap: Judgment was entered September 7, 2004; and Intervention was allowed November 5, 2004 nunc pro tunc to October 28, 2004, almost two months after entry of Judgment.

The Cross Appeal claimed that judgment should not have been granted because:

a) Nguyen received notice of all hearings in each of the various causes of action;

b) Nguyen admitted twice to the trial court that his interests were being “vigorously and capably” (CP 334) represented and that Ms. Fowler was doing a “fine job” (Transcript, App. A. pg. 23) (It might be pointed out that Ms. Fowler’s vigorous, capable, and fine representation of Nguyen’s interests, was an expense of the Estate of Cung Van Ho, and because there were so many other creditor’s of this insolvent estate, it was almost free litigation for Nguyen.)

c) Nguyen’s Post Judgment Motion to Intervene was not timely.

d) Nguyen’s delay in moving to Intervene was attributable to a purposeful strategy on his part.

e) Nguyen’s delay prejudiced the Estate of Thuy Thi Thanh Nguyen Ho by wasting a year of litigation efforts and tens of thousands of dollars.

The Response of Nguyen was to claim that the standard for review of the issue of timeliness is abuse of discretion; that no prejudice occurred; or if any harm did occur, that it was harmless. Nguyen further argues without citation to any facts or law, that no declarations to excuse his delay were necessary to make a “strong showing”<sup>1</sup> and that the record shows no gamesmanship by Nguyen in waiting.

By way of Reply, it must be pointed out that Nguyen dismisses to readily the two leading supreme court cases directly on point, Kriedler supra and Martin v. Pickering 85 Wn.2d 241 (1975). Nguyen claims the former does not require declarations and that the latter is simply “unwarranted”. Response Brief pg. 10.

Kriedler and Martin set forth the judicial philosophy for interpreting CR 24 (a) intervention as a matter of right after judgment. Nguyen declines to test his particular fact pattern against the Kriedler and Martin standards.

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<sup>1</sup> as required by Kriedler v. Eikenberry 111 Wn.2d 828, 832-833 (1989)

Using Kriedler:

- a) Strong showing: None presented. In fact, Nguyen had another lawsuit pending on point.
- b) Prior notice: He received all notices.
- c) Prejudice to other parties: Almost a year's worth of time and litigation costs would be undone.
- d) Reason for length of delay: A free lawyer doing a vigorous and fine job was representing him capably. No other reason offered despite direct inquiry by the court:

“The Court: And then let me just ask, if that was true in February of 2003, why hasn't there been any participation at all in this particular matter until post-judgment?”

App. A. Transcript, pg. 4, lines 7-10.

Counsel replies that he did not intervene because Ms. Fowler was doing a fine job of representing his interests.

The court, puzzled asks again:

“The Court: Again, I'm still trying to understand, if you didn't intervene actively in the summary judgment because you thought that your interests were being represented by Ms. Fowler . . .

Mr. Rumbaugh: The Estate's interests, yes.

The Court: I'm still at a loss as to why - -again, the timing, because the issues raised in your pleadings seem to be issues already addressed in the Summary Judgment motion. And that was prior to Judge Shellan being involved."

Transcript, App. A., pg. 4, lines 25 to pg. 5, lines 1-9.

Nguyen chose not to intervene while the estate lawyer, Ms. Fowler, argued his position that no meretricious relationship existed. Her time was paid by the estate and he could sit back and consult with her throughout, as he admitted doing:

"Mr. Rumbaugh: Well, I have been in consultation with Ms. Fowler throughout all of this and I felt that the Estate's assets were being properly represented . . ."

Appendix A., pg. 4, lines 11-14.

This comment leads us into Martin at 244 where the court stated:

"In short, the timing and tardiness of the motion to intervene was directly attributable to the tactics or game plan of Mid Century. Under these circumstances the motion to intervene cannot be considered timely."

Nguyen's counsel admitted that his strategy was to sit on the sidelines and "consult". Why Nguyen failed in his brief to respond to this issue is puzzling as it appears damning to his claim that his post judgment

motion to intervene was somehow timely.

### **III. ERRATA?**

Nguyen claims that Creasman v. Boyle 31 Wn.2d 345 (1948) did not remand to the trial court to redistribute the property. At pages 346-347, it will be noted that real and personal property were divided equally. At page 358 it will be noted that the supreme court ordered the trial court to award the real property and postal savings account to the Estate of Caroline Paul and the household furniture to Harvey Creasman, without concern that one party to the meretricious relationship was dead.

### **IV. CONCLUSION**

This court should not act as a trial court, ruling upon issues of fact and law never presented or decided by the trial court regarding creditor rights. The trial court repeatedly deferred to parallel litigation between the same two parties on that subject. Her discretion in exercising the orderly administration of justice should be respected.

Under the facts of this case, Kriedler and Martin deny intervention under CR 24(a) and it is not surprising that Nguyen was unable to distinguish their philosophy.

Respectfully submitted this 25th day of August, 2005.

MERRICK & OLVER, P.S.



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Michael L. Olver, WSBA No. 7031  
Special Administrator of the  
Thuy Ho Estate/Respondent

**CERTIFICATE OF SERVICE BY MAIL**

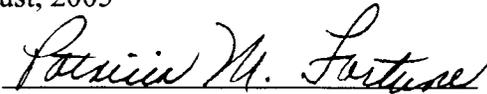
I certify that on the date noted below, I mailed copies of this pleading as follows:

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I certify that on the date noted below, I sent by ABC Legal Messenger copies of this pleading as follows:

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DATED this 24th day of August, 2005

  
Patricia M. Fortune, Secretary

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