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SUPREME COURT
STATE OF WASHINGTON
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No. 78321-7

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. OLVER, Special Administrator of the Estate of Thuy Thi Thanh Nguyen Ho, Respondent/Cross-Appellant,

Respondent,

v.

JULIE K. FOWLER, Special Administrator of the Estate of Cung Van Ho,

and

VU NGUYEN, Guardian ad Litem for Dianna Nguyen, a minor child, Intervenor/Appellant,

Petitioner.

SUPPLEMENTAL BRIEF OF NGUYEN

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ORIGINAL

TABLE OF AUTHORITIES

Cases

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"Equity's goal is to do substantial justice." *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 59, 101 P.3d 854 (2004) (Sanders, J., dissenting, internal punctuation and citation omitted). Equitable relief is available where there is no adequate remedy of law,[1] and a remedy is needed to prevent injustice.[2] On the facts of this case, equity was *not* needed; a remedy of law was available by allowing RCW 11.04.015(2)(a) and the claims provisions of RCW Chapter 11.40 to operate. By operation of these statutes, all property of both Cung and Thuy, no matter in whose name it was held, would pass to Harry – their sole surviving issue[3] – *subject to* the claims of Dianna and the other tort victims). The lower courts unlawfully derogated those unambiguous statutes in the name of equity. Further, in the name of equity the lower courts did *in*justice to Dianna, and others injured by Cung's negligence.

In *Soltero v. Wimer*, 128 Wn. App. 364, 372-73, 115 P.3d 393 (2005),

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[1] *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001) (citation omitted).

[2] *Gormley v. Robertson*, 120 Wn. App. 31, 39, 83 P.3d 1042 (2004).

[3] Cung executed a will, under which the sole devisee was Thuy. Accordingly, pursuant to RCW 11.04.105(2)(a), Harry would inherit all of Cung's property, as his sole surviving issue. Petitioner is not aware of any will by Thuy in the record. If she died intestate (either because she made no will, or like Cung, her will failed by the death of the sole devisee), then Harry would inherit all of her property, too, as her sole surviving issue.

review granted, 156 Wn.2d 1031 (2006), the Court of Appeals said:

> **In a conclusory section entitled "Property Distribution and Equitable Rights[,]" the court reasoned the "meretricious relationship is a fiction" sometimes "inconsistent with the goal of preventing unjust enrichment and achieving equity."** CP at 9. **This reasoning is consistent with *Vasquez v. Hawthorne***, 145 Wn.2d 103, 107, 33 P.3d 735 (2001) (equitable claims focus on the equities involved between the parties). **The *Vasquez* court reasoned the meretricious relationship rationale is a "mere analogy" to a marital relationship.** *Id.* **"Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case."** *Id.* at 107-08.

(Emphasis added.) Where both former "meretricious" partners have died, "equity" between them truly is fictitious. The injustice this court created the "meretricious relationship" doctrine to avoid[4] – that one partner not be unjustly enriched at the other's expense – no longer exists.[5] Further, by splitting Cung and Thuy's joint property between their estates *arbitrarily*,[6] the

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[4] *Connell v. Francisco*, 127 Wn.2d 339, 347, 898 P.2d 831 (1995); *Peffley-Warner v. Bowen*, 113 Wn.2d 243, 252778 P.2d 1022 (1989).

[5] *See* the "Brief Of Appellant Vu Nguyen" at p. 12.

[6] *See Morris v. Hillman Inv. Co.*, 99 Wash. 276, 288, 169 P. 837 (1918) (equity should not be arbitrary). Division was *arbitrary* because after deciding that Cung and Thuy had had a meretricious relationship, the trial court simply divided the joint property held in Cung's name in half. This was contrary to this court's instruction that once a meretricious relationship has been proved, courts should weigh equities, between the former partners, to determine how joint property should be divided. *See Connell v. Francisco, supra*, 127 Wn.2d at 347:

> In its place [*i.e.*, in place of the *Creasman* presumption], the court adopted a general rule requiring a just and equitable distribution of property following a meretricious relationship...

lower courts *disregarded* the facts of the case.

Finally, the lower courts *should* have considered how application of "meretricious relationship" would affect Dianna and the others harmed by Cung's negligence:

> Bartley-Williams and Forsch argue that the application of judicial estoppel to the bankruptcy trustee raises new considerations of fairness and equity. We agree. To prohibit the trustee from pursuing the claim on behalf of the estate may create a windfall for the party seeking to invoke judicial estoppel at the expense of the bankruptcy creditors. *See Cheng v. K&S Diversified Invs., Inc.*, 308 B.R. 448, 459-60 (B.A.P. 9th Cir. 2004). **While the facts of *Cheng* are distinguishable, the bankruptcy court noted that the application of judicial estoppel to a situation that first appears to be a two-party dispute "may be complicated by the effect that the result will have on others."** *Cheng*, 308 B.R. at 460.

Bartley-Williams v. Kendall, 134 Wn. App. 95, 102, 138 P.3d 1103 (2006) (emphasis added.) Here, the lower courts *rejected* consideration of the effect that "equitable" partition of the property in Cung's name at his and Thuy's deaths would have on others harmed by Cung's negligence. Those others include the minor, Dianna Nguyen, who was bodily injured and whose mother

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(Quoting *In re Marriage of Lindsay*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984)). Then *see id.* at 349:

> Once a trial court determines the existence of a meretricious relationship, the trial court then: (1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property.

(Citing *Lindsey* at 307, other citation omitted.)

was killed, as well as other living claimants and decedents' estates.

This case is not about justice between Cung and Thuy, or between their estates. If *Thuy* had been the negligent driver instead of Cung, would Thuy's estate still have sought to transfer property from Cung's estate to Thuy's? Of course not. *Why* not? Because to do so would have defeated the purpose of the transfer, *i.e.*, to put property beyond the reach of the tort victims. The lower courts expanded the scope of meretricious relationship equity unnecessarily, unwisely, and most importantly, inequitably. This court should reverse, and remand to the trial court, with direction to leave all property in Cung's name at his death in his estate, subject to the claims of Dianna and other injured by his negligence. In the alternative, if this court concludes that post-mortem partition of the property held in Cung's name was proper, then this court should still reverse and remand. In that event, the order should direct that all the joint property in Cung's name at his death be subject to joint liability for his negligence, regardless of whether the property is now in Cung's or Thuy's estate.

DATED this 9 day of November 2006.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS

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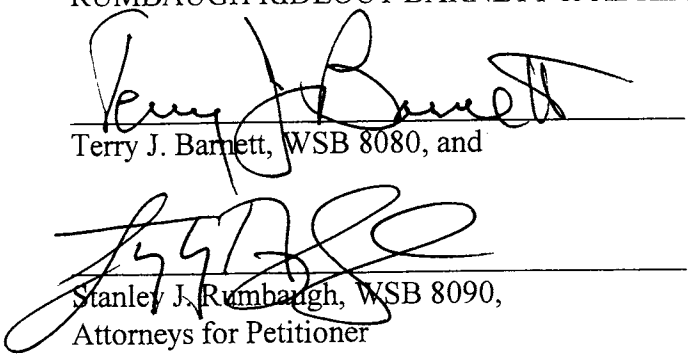
RUMBAUGH RIDEOUT BARNETT & ADKINS



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CERTIFICATE OF SERVICE

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

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DATED this 9 day of November 2006.

Michelle Rhodes

Michelle E. Rhodes, Legal Assistant

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