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DIVISION II

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STATE OF WASHINGTON

No. 47387-9-II

BY (Appeal of Pierce County No. 12-2-15257-3)  
DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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ESTATE of HUNG NGUYEN,  
*Appellant,*

v.

FRANCISCAN HEALTH SYSTEM; GILBERT JOHNSTON,  
M.D., dba ST. JOSEPH CARDIOTHORACIC SURGEONS;  
FRANCISCAN CARDIOTHORACIC SURGERY  
ASSOCIATES AT ST. JOSEPH; FRANCISCAN MEDICAL  
GROUP  
*Respondent.*

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Estate of Hung Nguyen seeks review of a decision by the trial court to (i) deny Personal Representative Phuoc Nhu's Motion to Substitute as the real party in interest in the Estate's wrongful death lawsuit, (ii) grant the motion of defendant health care providers to dismiss the lawsuit, and (iii) order that the lawsuit be dismissed with prejudice as a CR 11 sanction.

The denial of a motion to substitute the real party in interest as the plaintiff is an error of law where the real party in interest appears before the dismissal of the matter and seeks substitution; where the real party in interest (the widow of the decedent) is innocent of any claims of wrongdoing; and where the defendants have not been prejudiced. The application of CR 11 sanctions to dismiss a case, the most severe sanction available, is an abuse of discretion where the persons who will suffer the effects of dismissal are innocent of the asserted CR 11 violation and where the trial court has failed to consider whether a less onerous sanction would serve the deterrent purposes of the Rule.

The trial court's decisions must be reversed and remanded with an order requiring the court to substitute the real party in interest and permitting the case to go forward as if it had been commenced by Phuoc Nhu.

## **II. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1:**

The trial court erred when it denied the Estate's Motion under CR 17(a) to substitute the real party in interest, the personal representative, as plaintiff in the Estate's negligence action against defendant health care providers, and simultaneously granted the defendants' Motion to Dismiss pursuant to CR 17(a).

### **Issues Pertaining to Assignment of Error No. 1:**

A. Whether the trial court erred when it denied a motion for substitution which would have permitted the real party in interest to prosecute claims on behalf of an Estate where the Estate and its statutory heirs were contemplated as the beneficiaries of the action from the inception of the suit.

B. Whether it was error under CR 17(a) to dismiss an Estate's claims and deny the relation-back effect of the Rule where the real party in interest appeared before the hearing to request substitution and the real party's mistake was honest or understandable.

C. Whether Beal v. City of Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998), requires substitution and relation-back pursuant to CR 17(a) where the defendants will not be prejudiced.

**Assignment of Error No. 2:**

The trial court abused its discretion when it dismissed the lawsuit with prejudice as a CR 11 sanction.

**Issues Pertaining to Assignment of Error No. 2:**

A. Whether the imposition of the most severe remedy available under CR 11, dismissal of an action, is appropriate where the trial court failed to consider lesser sanctions that would serve the deterrent purposes of the Rule.

B. Whether dismissal of an action for a breach of CR 11 is proper where the sanction has the effect of punishing persons who are wholly innocent of the misconduct.

**Assignment of Error No. 3:**

The trial court erred when it denied the Estate's Motion for Reconsideration of its decisions to deny the Estate's Motion for Substitution and grant the defendants' motion to dismiss.

**Issue Pertaining to Assignment of Error No. 3:**

Whether a motion for reconsideration must be granted pursuant to 59(a)(9) where the record establishes that substantial justice has not been done.

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### III. STATEMENT OF THE CASE

#### A. BACKGROUND.

On December 15, 2008, Mr. Nguyen underwent triple bypass cardiac surgery at St Joseph Medical Center.<sup>1</sup> CP 284, 304. The surgery was not successful. Over the next two weeks, Mr. Nguyen developed serious complications, including acute kidney failure, septic shock, and liver failure. After suffering for two weeks, his brain was irreversibly damaged. CP 304. The next day, December 30, 2008, Mr. Nguyen died at St. Joseph's. CP 294. He was sixty-eight years old. CP 284, 303.

A board certified cardiovascular, thoracic and trauma surgeon reviewed Mr. Nguyen's medical records in early 2010. CP 303-305. The expert faulted the medical care provided to Mr. Nguyen, as "a gross departure from the standard of care." CP 304. Mr. Nguyen had documented chronic obstructive pulmonary disease, and yet the required tests to determine whether or not open heart surgery was viable were not performed. CP 304. Mr. Nguyen presented with elevated liver tests, but his liver function was not investigated. CP 304-305. He also had anemia, a condition that also must be scrutinized before surgery, but this also was not done. CP 305. Finally, Mr. Nguyen's post-operative care failed to

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<sup>1</sup> St Joseph Medical Center is operated by defendant Franciscan Health System. CP 284.

evaluate and treat his pulmonary disease, further undermining his recovery. CP 305.

**B. PROCEDURAL HISTORY OF THE CASE.**

Activity prior to the commencement of the case. Mr. Nguyen died intestate. CP 21. He was survived by his wife, Phuoc Nhu, and five adult children, including Gabrielle Nguyen-Aluskar (“Ms. Nguyen”). CP 47. In 2010, Ms. Nguyen sought appointment as the personal representative for Hung Nguyen’s Estate in King County. She was rejected three days later because of a prior felony conviction. CP 46-51. In 2006 Ms. Nguyen had been convicted of possession of cocaine, in violation of RCW 69.50.401(d).<sup>2</sup> CP 132-135.

Complaint and Answer. On December 3, 2012, the Estate of Hung Nguyen brought negligence claims against the defendant health care providers. The *Complaint* alleged that as a result of violations of the applicable standards of care, Hung Nguyen suffered damages, *inter alia*, of pain, suffering and death. CP 1-3. The caption designates the plaintiff as “ESTATE OF HUNG NGUYEN, by and through GABRIELLE NGUYEN-ALUSKAR.” CP 1.

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<sup>2</sup> No further convictions appear in this record. Ms. Nguyen’s 2006 record was expunged and removed from the criminal history records in 2013. CP 185.

The Estate filed a second *Complaint for Injury*, adding several defendants, on February 27, 2013. CP 8-10. The caption again designates the plaintiff as “ESTATE OF HUNG NGUYEN, by and through GABRIELLE NGUYEN-ALUSKAR.” CP 8. In March of 2013 Franciscan Northwest Physicians Health Network was dismissed by stipulation, and the caption was modified accordingly. CP 11-13. In May of 2013, Defendants Franciscan Health System, Franciscan Cardiothoracic Surgery Associates at St. Joseph, and Franciscan Medical Group (“collectively, “FHS”) answered, denying the allegations of negligence.<sup>3</sup> CP 14-17.

Additional attempts to appoint PR. In November 2013, in Pierce County, Ms. Nguyen made a second attempt to be appointed PR, this time jointly with her mother. CP 33, 63-67. This petition was also denied because of issues with Ms. Nguyen’s record. CP 221. Later, on that same calendar, Ms. Nguyen requested that her mother, Phuoc Nhu, be appointed PR. The probate court required Phuoc Nhu, who was not represented and was speaking through her daughter, to notify all interested parties because of her difficulty with the English language. CP 222, ll. 11-13.

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<sup>3</sup>No declaration of service on (or answer for) the remaining defendant, Dr. Gilbert Johnston, appears in the docket.

FHS seeks medical records. The defendants requested that the plaintiff execute releases for Mr. Nguyen's medical records on February 28, 2014. CP 71. According to FHS attorney Michelle Garzon, they received releases signed by Ms. Nguyen in early April of 2014, but the records provider refused to produce the records, requiring documentation establishing that Ms. Nguyen was in fact the PR. CP 23, 33.

However, the releases in the record that were signed in early April, 2014, are executed by Phuoc Nhu, Mr. Nguyen's widow, and also, perhaps, by Ms. Nguyen (the second signature is illegible). CP 267, 271. FHS also did not present the trial court with a copy of the alleged demand by the records provider for proof of the status of Ms. Nguyen as personal representative, or a declaration by the records provider. The only evidence of that alleged event is the declaration of Ms. Garzon. CP 33.

Defendants' Motion to Dismiss. FHS discovered that no personal representative had been appointed for the Estate, and that Ms. Nguyen had been rejected as a personal representative in 2010 and 2013. CP 33. One year after the defendants had filed their answer in the case, FHS moved for dismissal of plaintiff's claims on grounds that the plaintiff was not the real party in interest as required by CR 17(a).<sup>4</sup> CP 20-28.

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<sup>4</sup>Defendant Johnston joined the defendants' *Motion*. CP 72-73.

The gravamen of defendants' argument was that Gabrielle Nguyen lacked legal capacity to act as Personal Representative of the Estate due to a felony conviction and that she had misrepresented her status to the Court and to the defendants by bringing the Estate's case "by and through Gabrielle Nguyen-Aluskar," and that "there is no other real party in interest who can even be substituted for Ms. Nguyen-Aluskar." CP 22, 25, 27, 46-61. FHS noted that Ms. Nguyen had made a second attempt, in a different forum, to be appointed PR in November, 2013. CP 33, 63-67.

Phuoc Nhu Appointed PR. On June 13, 2014, seventeen days after the defendants filed their *Motion to Dismiss on the Ground that Plaintiff is Not the Real Party in Interest*, Phuoc Nhu, Hung Nguyen's widow, now assisted by attorney Lopez, was appointed personal representative of the Estate of Hung Nguyen. CP 84.

Estate's Response to Motion to Dismiss. The Estate filed a *Cross Motion to Substitute Personal Representative*, requesting an order permitting substitution of Phuoc Nhu in the case. CP 75. The Estate opposed dismissal based upon its proposed substitution of personal representative. CP 86.

Defendant's Reply. Defendants offered two new arguments in *Reply to the Estate's Motion to Substitute and Memorandum Opposing Dismissal*. First, the defendants now argued that the case should be

dismissed with prejudice as “an appropriate sanction [pursuant to CR 11] for Ms. Nguyen-Aluskar’s lengthy and intentional lack of candor.” CP 88-89, CP 92-96. 125. In alternative to dismissal, FHS suggested other, and lesser, sanctions, including an award of fees against Ms. Nguyen and a prohibition on her further testimony in the case. CP 96. fn. 4.

Second, the defendants claimed for the first time that Ms. Nguyen’s acts had prejudiced them. FHS urged that they were prejudiced because they had (a) defended an “invalid” lawsuit and (b) expended “enormous” efforts and expense to obtain Mr. Nguyen’s medical records. CP 91-92. FHS produced no evidence supporting its claim of any expense attendant to obtaining the Nguyen medical records other than a statement by an FHS attorney that her office sent out stipulations signed by Ms. Nguyen to various medical providers. CP 33. Other than that averment, there is neither testimony nor billing records in the record showing that the defendants suffered prejudice as a result Ms. Nguyen’s prosecution of the Estate’s case.

The exhibits produced in support of defendants’ *Motion to Dismiss* and their *Reply* establish that in 2009 (a year before Ms. Nguyen had been rejected as the Estate’s PR), Ms. Nguyen requested her father’s medical records, representing herself as his daughter, CP 104, and also as his “Personal Representative and daughter.” CP 107. In 2011, Ms. Nguyen

signed a release for medical records as Mr. Nguyen's daughter. CP 110. The provider rejected that 2011 release. CP 112. and Phuoc Nhu, the decedent's spouse, signed a valid release three weeks later.<sup>5</sup> CP 113. FHS did not present the trial court with any documents showing that Ms. Nguyen affirmatively maintained that she was the personal representative of the Nguyen Estate at any time after 2009, other than, of course, the fact that the Estate prosecuted the lawsuit "by and through" Ms. Nguyen.

In its *Supplemental Memorandum*, CP 186-189, the Estate noted:

There was no representation in the caption or in the body of the complaint that Gabrielle was personal representative of the Estate of Hung Nguyen. There has never been a representation in response to any interrogatory or other discovery that Gabrielle was the personal representative of the Estate of Hung Nguyen. [*see, e.g.*, CP 117]

The sole beneficiary of the Estate of Hung Nguyen is his wife, Phuoc Nhu. Gabrielle has no financial interest in the outcome of this cause.<sup>6</sup> She was chosen to help pursue this cause on behalf of the Estate of Hung Nguyen because her mother speaks very little English.

CP 186. The Estate's *Supplemental Memorandum* stressed that CR 17(a) allows reasonable time to substitute a real party in interest and that Phuoc Nhu was now the personal representative. CP 189. "The Gabrielle issues"

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<sup>5</sup> Phuoc Nhu's signature permitted release of the records pursuant to RCW 70.02.140.

<sup>6</sup> In fact, it would appear that as one of Hung Nguyen's five children, Gabrielle would have a 10% interest in her father's separate estate. See RCW 11.04.015.

asserted the Estate, “are a distraction. The case is not Gabrielle’s. It is the case of the Estate of Hung Nguyen” and Phuoc Nhu. CP 188.

Dismissal of the Estate’s Case. The court granted FHS’ *Motion to Dismiss* and denied the Estate’s *Motion to Substitute Personal Representative*. CP 228-229. At the July 18, 2014 telephonic hearing, the trial court concluded its substantive remarks as follows:

The Court is declining to substitute in Ms. Phuoc Nhu as a personal representative. I am unwilling to do this in light of what I believe is a deliberate fraud committed upon the Court and the prejudice caused to the defense. In the Court’s view, the due administration of justice demands that I address what I have concluded is fraudulent conduct, and in the exercise of my discretion, I am refusing to make this substitution. If the Court of Appeals or the Supreme Court were to find that this is an abuse of the Court’s discretion and were to order that the substitution occur and the case go forward, of course, I will follow the orders of a higher court, but there being no real party in interest in this case, it will be dismissed with prejudice as requested.

I am also finding that under Civil Rule 11 there’s been a violation due to the circumstances under which the Complaints have been filed. The Complaints are simultaneously dismissed for that reason.

RP 13. While exonerating plaintiff’s counsel, the trial court squarely laid all blame on Ms. Nguyen: “I will say, for the record, that I suspect that Ms. Aluskar’s [sic] behavior may be criminal.” RP 13, II. 22–25.

Matters Following the Dismissal. Mr. Lopez, the attorney for the plaintiff, notified the court of his withdrawal on July 23, 2014. CP 230-231. Ms. Nguyen and Phuoc Nhu appeared in the case on July 28, 2014.

CP 235. They filed a *Motion for Reconsideration* signed under penalty of perjury on the same day, and a *Supplemental Declaration* on August 5, 2014. CP 238-244, 306-309.

Proceeding *pro se*, Phuoc Nhu and Ms. Nguyen (neither one an attorney) sought reconsideration under CR 59(a)(3)–(9). The two women stressed that linguistic and cultural hurdles caused the difficulties regarding the appointment of a personal representative. The other misdeeds that FHS had attributed to Ms. Nguyen were explained as the products of misunderstandings and psychological issues. CP 238-244, 306-309. They attached, as exhibits, stipulations for the release of Mr. Nguyen's medical records to FHS (through Ms. Garzon's office) that were signed by Phuoc Nhu on April 3, 2014. CP 266-67, 270-271. These releases, they argued, contradict FHS' attorney Garzon's statements that FHS had not received valid authorizations in early 2014. CP 23, 33, 240.

FHS opposed the *pro se Motion for Reconsideration*, asserting that the requirements of CR 59 had not been met. CP 312-320. The Motion for Reconsideration was denied on August 11, 2014. CP 340, and the *Order* was amended on October 1, 2014 to include the materials considered by the trial court. CP 350. This appeal was filed timely on August 15, 2014, CP 192-201, and amended by notice on October 13, 2014. CP 350-352.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

A trial court's determination of who is the real party in interest must be reviewed *de novo* because it is an issue of law. *See, e.g., In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

As a general rule, a trial court's decision regarding the application of the civil rules is reviewed for abuse of discretion. *Sprague v. Svsco Corp.*, 97 Wn. App. 169, 171, 982 P.2d 1202 (1999). However, a trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

In this case, the trial court erred as a matter of law when it denied Phuoc Nhu's motion to be substituted as the real party in interest which would have permitted the relation-back of the Estate's case. The trial court disregarded the relevant holdings in *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), and incorrectly dismissed a meritorious claim absent a showing of prejudice.

With respect to the CR 11 sanctions imposed by the trial court, the proper standard of review is the abuse of discretion standard. *Fisons*, 122 Wn.2d at 338 (1993).

**B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE ESTATE’S MOTION TO SUBSTITUTE PERSONAL REPRESENTATIVE PHUOC NHU AS THE PLAINTIFF AND DISMISSED THE ACTION PURSUANT TO CR 17(a).**

In this case, an action was brought on behalf of the Estate of Hung Nguyen “by and through” his daughter, Gabrielle Nguyen-Aluskar. A wrongful death action, however, must be brought by the personal representative of the decedent's estate and cannot be maintained by the decedent's children or other survivors. RCW 4.20.010; Wood v. Dunlop, 83 Wn.2d 719, 723, 521 P.2d 1177 (1974).

Defendants sought dismissal pursuant to CR 17(a) because Ms. Nguyen was not the PR and therefore not the real party in interest. Within three weeks of objection by the defendants, and before the hearing on FHS’ motion, Mr. Nguyen’s widow and the primary beneficiary of his Estate<sup>7</sup> obtained appointment as Personal Representative. CP 75, 84. Nonetheless, the trial court denied the Estate’s motion to substitute Phuoc Nhu as plaintiff and dismissed the case. Thus the widow has been barred from prosecuting the defendants for the wrongful death of her husband.

This appeal focuses squarely on the trial court’s interpretation and application of CR 17(a), which states:

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<sup>7</sup> Under RCW 11.04.015, Phuoc Nhu receives all of Mr. Nguyen’s community estate and half of his separate estate.

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

“[T]he purpose of CR 17(a) is to expedite litigation so as not to allow narrow constructions or technicalities to interfere with the merits of a legitimate controversy.” In re Estate of Crane, 9 Wn. App. 853, 856, 515 P.2d 552 (Div. II, 1973) (citing In re Estate of Boyd, 5 Wn. App. 32, 35, 485 P.2d 469 (1971)).

The last sentence of the Rule, providing the relation-back provision, was added to the federal rule by amendment in 1966 in order to “protect the defendant against a subsequent action by the party actually entitled to recover.” Beal v. City of Seattle, 134 Wn.2d at 777. Because Washington’s CR 17(a) is identical to its federal counterpart, analysis of the federal rule is followed where persuasive. *Id.*

**1. Because the beneficiaries of the Estate were contemplated as the true plaintiffs at the commencement of the case, the motion for substitution should have been granted.**

FHS opposed Phuoc Nhu's motion for substitution because they contended that CR 17(a) "does not apply to cases where the original complaint was filed in fraud." CP 89. Defendants characterized Ms. Nguyen's actions as "the very abuse the Washington Supreme Court has cautioned could occur with CR 17(a)." *Id.*

Perhaps the only published case in Washington affirming a trial court's denial of a motion to substitute a real party in interest pursuant to CR 17(a) is In re Estate of Boyd, 5 Wn. App. 32, 35, 485 P.2d 469 (1971). In Boyd, the plaintiff petitioned to set aside her grandson's will. The plaintiff was not an "interested party" capable of bringing the action under the relevant will contest statutes. Boyd, 5 Wn. App. at 33. Defendant moved to dismiss the action under CR 17. The court rejected the grandmother's attempt to amend the petition to include her niece and nephew as petitioners. The Court of Appeals, Div. III, affirmed.

There are several important particulars that led the courts to reject substitution in the Boyd case. First, the grandmother declared that "she had not brought this action on behalf of, or under the authority of, or for the use of, the niece or nephew." Boyd, 5 Wn. App. at 35. Second, there was nothing before the trial court "which evidenced a desire on the part of

the niece or nephew to institute a will contest or acquiesce in petitioner's action." *Id.* Only after the trial court granted the dismissal did the niece and nephew come forward, claiming that they knew that their grandmother had brought a will contest and that they agreed with it. *Id.* Those statements were contrary to the grandmother's own statements, and so their credibility was subject to question. *Id.* Ultimately both the trial court and the appellate court agreed that the plaintiff, "solely in her capacity as grandmother, desired to challenge the will, that she had no standing to do so, and consequently her action was a nullity." 5 Wn. App. at 35-36. Because of the unusual facts and posture of the case, Boyd has since been distinguished by most of the cases that cite to it. *See, e.g., Kommavongsa v. Haskell*, 149 Wn.2d 288, 312-313, 67 P.3d 1068 (2003); Beal, 83 Wn. App. at 225; Crane, 9 Wn. App. at 856.

As noted in Rinke v. Johns-Manville Corp., 47 Wn. App. 222, 232, 734 P.2d 533 (Div. I, 1987), the niece and nephew in Boyd were "simply new plaintiffs suing on a new claim who were introduced in order to sustain the pending action." CR 17(a) does not support the swapping out of a plaintiff with no real interest in a lawsuit for a litigant with an interest who happens to be discovered later. As explained by the 1966 amendment's Advisory Committee Note:

The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the

proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period.

Rinke, 47 Wn. App. at 231, fn. 3. Plaintiffs may not use the Rule's relation-back provision "to join or substitute persons whose interests were not contemplated from the beginning of the suit." Rinke, 47 Wn. App. at 231.

Unlike Boyd, the facts in the instant case import no suggestion that that Phuoc Nhu was not aware of, and did not agree with, the bringing of the claims against the health care providers on behalf of her husband's estate. Rather, Phuoc Nhu signed releases for her husband's medical records before and during the litigation. CP 113, 267, 271. Importantly, Phuoc Nhu took immediate steps to have herself appointed as personal representative upon the defendants' motion for dismissal. CP 84-85. Even FHS does not contend that Phuoc Nhu was uninvolved with the claims against them at the beginning of the litigation. Nor does FHS claim that Ms. Nguyen was prosecuting the case solely for her own benefit and use. Phuoc Nhu was not, to paraphrase Rinke, simply a new plaintiff who was introduced in order to sustain a pending action.

**2. Dismissal under CR 17(a) and denial of its relation-back effect is improper where the real party in interest has appeared before the hearing to request substitution and the real party's mistake was honest or understandable.**

Washington cases uniformly hold that dismissal is improper when the record shows that the real party in interest has ratified or moved to join or substitute at the time of the hearing on the motion to dismiss. *See, e.g., Miller v. Campbell*, 164 Wn.2d 529, 538, 192 P.3d 352, 356 (2008); *Fitch v. Johns-Manville Corp.*, 46 Wn. App. 867, 869-870, 733 P.2d 562 (Div. II, 1987); *Rinke*, 47 Wn. App. at 227-28; *Fox v. Sackman*, 22 Wn. App. 707, 710, 591 P.2d 855 (Div. III, 1979); *Crane*, 9 Wn. App. at 855-6. Indeed, the last sentence of CR 17(a) provides that:

**[n]o action shall be dismissed... until a reasonable time has been allowed after objection for... substitution of, the real party in interest; and such... substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. [emph. added]**

The Rule's clear mandate has been somewhat modified over time. In 1978, *Rinke* noted that most courts "have restricted relation back to situations where there has been an 'honest mistake' or an 'understandable mistake' in naming an improper party." 47 Wn. App at 228. Citing to *Rinke*, our Supreme Court largely adopted the "honest" or "understandable" mistake exception standard in 1998. *Beal* 134 Wn.2d at 778.

FHS seized upon the exception to the rule allowing substitution by urging that Ms. Nguyen's mistake was neither honest nor understandable.

given that Ms. Nguyen had knowledge that she was ineligible to serve as personal representative. CP 26-27, 91, 99. Contrary to FHS' suggestions, however, Beal carves out the exception to the rule permitting substitution very narrowly.

In Beal, an attorney (Smith) filed a complaint on the eve of the statute of limitations for personal injuries relating to the death of Melissa Fernandez. The plaintiffs were named as Ms. Fernandez' mother, brother, and Beal, the guardian *ad litem* of her three minor children. The complaint bluntly alleged that Beal already was the personal representative of the mother's estate. Beal, 134 Wn. 2d at 774.

However, Beal was not the personal representative, and the attorney who filed the complaint for him knew it. Beal, 134 Wn. 2d at 774, 775. Beal was appointed personal representative three months after the statute of limitations ran. Smith then moved *ex parte* to amend the complaint to name Beal as a plaintiff in his capacity as personal representative, an improper act. In Smith's supporting declaration, he swore that he became aware that the complaint had to be brought in the name of the Estate only after he filed it. 134 Wn. 2d at 775.

The defendant moved to vacate and dismiss the amended complaint, and in response, Beal moved to amend the complaint pursuant to CR 17(a). Smith filed a declaration now stating that he knew before the complaint was

filed that the action could be brought only by the personal representative of the estate. This explanation, of course, contradicted his earlier declaration. Beal, 134 Wn. 2d at 775. The trial court denied Beal's motion to amend, reasoning that there "had been no honest or understandable mistake made [by Smith] in failing to name the personal representative of the estate as plaintiff." Beal, 134 Wn. 2d at 776. The case was then dismissed, and the Court of Appeals affirmed.

The Supreme Court reversed both of the lower courts. Beal, 134 Wn. 2d at 784, 788. In Beal, as in the case at bar, the defendant sought dismissal and opposed substitution, because the statute of limitations already had run. The Beal Court rejected the effort, noting that "[t]he relevant inquiry has been whether defendant was prejudiced." Beal, 134 Wn. 2d at 782. The opinion points out that the last provision of the Rule, allowing relation-back, was added:

in the interests of justice. . . . [T]he modern function of the rule... is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

Beal, 134 Wn.2d at 778-779. 954 P.2d 237 (1998) (citing 3A Moore, Moore's Federal Practice § 17.01(2d ed. 1996)). CR 17(a), in other words, is intended to protect defendant FHS from a second lawsuit brought by the Estate's true personal representative. As in Beal, that objective will be

satisfied when the proper party, Personal Representative Phuoc Nhu, substitutes in for a plaintiff who was not appointed PR.

Notwithstanding overwhelming evidence of the plaintiff's attorney's wrongful acts, the Washington Supreme Court reasoned that:

The purpose of CR 17(a) is to protect the defendant against a subsequent action by the party actually entitled to recover and to expedite litigation by not permitting technical or narrow constructions to interfere with the merits of legitimate controversies. Application of the "inexcusable neglect" or "honest mistake" standard to a change in representative capacity undermines the goals, as well as the literal language of the rules.

Beal, 134 Wn. 2d at 782. Because the defendant would not be prejudiced by the amendment, the Court held that CR 17(a) and CR 15(c) do not bar the amendment of the complaint and required that the amendment would relate back as if the action had been commenced in the name of the real party in interest. Beal, 134 Wn. 2d at 784, 788. After all, "[t]he same claim is involved, and the beneficiaries, if the action is successful, remain the same." Beal, 134 Wn. 2d at 781.

Ignoring the purposes and the intended effects of the Rule, FHS argued that Beal is distinguishable because the original plaintiff in that case "knew he could and did become personal representative." CP 199. FHS contended that "the only change was in [Beal's] representative capacity from guardian *ad litem* to personal representative. It wasn't a change from a different person to a new person." RP 5, ll. 13-16. But FHS' argument does

not explain how that difference relates to the goals of CR 17(a).

In Beal the real party in interest (Beal and the Estate's heirs) were innocent of the wrongdoing. It was Smith who filed the Complaint with its false allegation, Smith who improperly obtained an *ex parte* motion changing the name of the plaintiff, and Smith who filed the inconsistent declarations. So it is in this case. Similarly, in this case, Personal Representative Phuoc Nhu personally undertook none of the acts to which the trial court so strenuously objected. The goals of CR 17(a) are not promoted by refusing to permit the real party in interest to substitute in as the plaintiff and by dismissing the case. The action, after all, is the same.

**3. Beal v. City of Seattle requires substitution and relation-back where the defendants will not be prejudiced.**

For the first time in their *Reply* to the motion to dismiss and the cross motion to substitute, FHS asserted that the defendants were prejudiced by the so-called "fraudulently filed complaint." CP 91. However, FHS' claims of prejudice are not prejudice as that concept is applied under CR 17(a), are not supported by the record, or are so minimal that dismissal of the claim is inappropriate.

There is little doubt that this record casts Ms. Nguyen's actions in an unflattering light. But Ms. Nguyen is not an attorney. She did not call herself personal representative after being told that she could not be PR.

Mr. Lopez, the lawyer on the matter, drafted the Complaint which brought the case “by and through” Ms. Nguyen. Nor did Ms. Nguyen pursue the case for her own purposes, without the knowledge and support of the primary beneficiary. Phuoc Nhu. *Cf. Rinke*, 47 Wn. App at 231-232:

Although she erred in prosecuting the suit without a formal appointment as personal representative, the purpose of the suit was clear from its inception. Rinke's subsequent ratification was not an attempt to insert a new party or a new claim; it simply corrected the record to reflect the reality of how all the parties viewed the case. ... Reversed and remanded for trial.

So it is with the instant case. It was always clear to all the parties that the lawsuit was intended to be brought on behalf of the Estate, for the benefit of Mr. Nguyen's statutory heirs, his wife and children. “The [defendants] will not be prejudiced by relation back because the substitution changes only the representative capacity of the parties, not the nature of the claims against which the [defendants] must defend.” *Miller*, 164 Wn.2d at 538.

Nonetheless, FHS claimed that the plaintiff's presentation of the case “by and through [Ms.] Nguyen” somehow prejudiced them. CP 91-92. Defendants, of course, cannot be faulted for assuming that Ms. Nguyen had been appointed personal representative. The “by and through” language in the caption indeed suggests that Ms. Nguyen had the authority to pursue the matter. But FHS fails to explain how the improvident caption caused them to adopt different positions or strategies in defense than they might have had

Phuoc Nhu, as Personal Representative, pursued the Estate's case from its commencement. Because the action was the same, the defendants were not harmed by the caption alone.

Even the Plaintiff's attorney in this case asserted that he too believed that Ms. Nguyen was the PR. "Gabrielle, I mean. I actually thought she was the personal representative at the time." RP 7, ll. 9-10. Were this Court to assume<sup>8</sup> that Ms. Nguyen lied to Mr. Lopez, this fact does not militate against Phuoc Nhu. If an attorney credited Ms. Nguyen, her mother, an unsophisticated elderly woman, surely could make the same mistake. The only evidence on record suggests that Phuoc Nhu, who speaks little English, was guided by attorney Lopez and by her non-attorney daughter. CP 220-222, 226. Phuoc Nhu, the innocent party at interest, is a step further removed from the malfeasance in Beal, where Beal's attorney made clear misrepresentations on Beal's behalf. And, as will be recalled, the Supreme Court concluded that the defendants had suffered no prejudice in that case. Beal, 134 Wn.2d at 78 i.

Where the same lawsuit continues with merely a change in the denomination of plaintiff, that does not constitute a form of prejudice

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<sup>8</sup> Such an assumption would have to be made absent evidence. Indeed, it is contrary to the fair inference that Ms. Nguyen did not make any such statement to the attorney because she did not represent herself as PR on any document after 2009.

recognized by the law. The concept of prejudice applies where a party's defense on the merits is hobbled. *See, e.g., Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 173, 744 P.2d 1032 (1987) (holding that the prejudice principles of CR 15(c) apply to the relation back of amendments adding new plaintiffs). In any event, delay alone does not constitute prejudice. "As long as no prejudice is shown, the real party in interest may be added at any time, even after trial." *Rinke*, 47 Wn. App at 227. FHS's first claim of prejudice, that "FHS had to defend an invalid lawsuit for nearly two years,"<sup>9</sup> therefore must fail. CP 91.

FHS' second claim of prejudice is that it "expended enormous time, effort, and expense to simply obtain Mr. Nguyen's medical records." CP 91. But the record does not bear out this claim. The only evidence in the record is Ms. Garzon's testimony that her office sent out stipulations signed by Ms. Nguyen to various medical providers and then e-mailed Mr. Lopez asking for the order appointing Ms. Nguyen as personal representative. CP 33, 69. This minor inconvenience is not prejudice.

Appellant could not find any Washington or federal case finding that expense alone is sufficient prejudice to bar the substitution of, and continued prosecution of, the case by the real party of interest. However,

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<sup>9</sup> In fact, FHS filed its answer on May 28, 2013, CP 14, and brought its Motion to Dismiss on May 27, 2014, CP 20. Perhaps it felt like two years, but it was only one year.

even if additional expense is prejudice, the minor expense actually borne by the defendants in this case can, and should, be handled through sanctions.<sup>10</sup> The few hundred dollars possibly spent by the defendants<sup>11</sup> to ask again for releases is not adequate justification to thwart the goals of CR 17(a), which are to ensure that cases are prosecuted by the real party in interest and to protect defendants from subsequent litigation. Beal, 134 Wn.2d at 777-778.

There simply is no viable explanation for the trial court's decision to deprive the real party in interest of the right to pursue an action for the suffering and death of her husband where she is blameless and where the defendants were not prejudiced. CR 17(a), like all civil rules, must be applied to promote justice. "Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical

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<sup>10</sup>In other areas of the law, courts consider the magnitude of the expense borne by the objecting party in context. For example, in Steele v. Lundgren, 85 Wn. App. 845; 935 P.2d 671 (Div. I, 1997), which considered the waiver of an arbitration clause, the court commented:

Prejudice can be substantive, or it can be found when a party ... causes his adversary to incur unnecessary delay or expense. ... No bright line defines this second type of prejudice--neither a particular time frame nor dollar amount automatically results in such a finding--but it is instead determined contextually, by examining the extent of the delay, the degree of litigation ... the resulting burdens and expenses, and the other surrounding circumstances.

(citing Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991) (original emphasis removed)).

<sup>11</sup> There is no evidence in the record of any amount actually expended by the defendants.

niceties.” Fox, 22 Wn. App. at 709. For that reason, the vast majority of cases affirm a trial court’s substitution of the real party in interest and reverse a trial court’s denial. The function of the courts is to reach the substance of the matter.

**C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE LAWSUIT WITH PREJUDICE AS A CR 11 SANCTION.**

In its Reply to the motion to dismiss and the cross motion to substitute, FHS invited the trial court to sanction the plaintiff by dismissing the action with prejudice. CP 92-93. According to the defendants, the Complaint in this case was “both a baseless and a bad faith filing” because Ms. Nguyen knew when she filed the lawsuit that she was not the proper plaintiff because she had already been told by a Washington court that she could not serve as the personal representative.” CP 93-94. This assertion may be correct or it may not be—it is possible that Ms. Nguyen believed that she could bring the case as Mr. Nguyen’s daughter. Certainly laymen have believed more specious things than that. She may not have understood that most attorneys would interpret the “by and through” language on the caption to mean that she was in fact the personal representative.

But we need not linger too long on such speculation. Let us assume—even though the record does not establish—that Ms. Nguyen

purposefully set out to game the system. What logical purpose can there be to sanctioning the innocent real party in interest by dismissing her case as punishment for the folly of another? How can that serve the foundational objectives of CR 11, which are to deter baseless filings and abuses of the judicial system? Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). The alleged wrong-doer, Ms. Nguyen, will at most face a loss of 1/10 of her father's Estate's separate property recovery from the suit, and no doubt witness her mother's pain and frustration. But the innocent intestate heirs of Mr. Nguyen's Estate, widow Phuoc Nhu and his other four children, will lose their opportunity to recover anything on the claim for their father's wrongful death.

Furthermore, in deciding upon a CR 11 sanction, "the trial court should impose the least severe sanction necessary to carry out the purpose of the rule." Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (citing Bryant, 119 Wn.2d at 225). In this case, the record is void of any evidence that the trial court considered any sanctions that were less severe than the harshest sanction available: dismissal of the case with prejudice. Even FHS suggested a variety of lesser sanctions that could be imposed against Ms. Nguyen. CP 96, fn. 4.

Given that the purpose is deterrence, how does punishing the entire Nguyen family serve the purposes of Rule 11? None of them are attorneys.

and the attorney on the case, Mr. Lopez, was specifically absolved of any wrongdoing. Compare this result with the logical regimen prescribed by our Supreme Court:

In fashioning any sanction, the trial court must remain cognizant of the fundamental deterrent purpose of the rule. Biggs is no longer practicing law, and although he may resume doing so in the future, his exit from the legal profession alone may be enough to deter any future abuse. If the trial court finds that a monetary sanction is additionally necessary in order to deter similar abuse by Biggs and others in the future, the court is encouraged to consider an award to be paid to a particular court fund or court-related fund. .... Further, if the trial court finds that attorney fees are appropriate, they are to be limited to at most the fees actually expended in responding to the sanctionable conduct, and should be further limited by the apparent absence of any attempts at mitigation on the part of Vail.

Biggs, 124 Wn.2d at 202, fn. 3. Dismissal of the Estate's claims for the acts of a non-attorney does not accord with the deterrent purpose of CR 11, hurts innocent parties who are left without a remedy, and is simply unfair.

**D. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE MOTION FOR RECONSIDERATION.**

As noted above, on page 12, Phuoc Nhu and Ms. Nguyen sought reconsideration *pro se*. Among the bases for reconsideration, they cited CR 59(a)(9), that substantial justice had not been done, CP 307. The trial court erred when it failed to grant reconsideration on this ground, as the

trial court's summary dismissal of this case was and is unjust.

## V. CONCLUSION

The alleged misconduct of a non-attorney who was not the real party in interest is not a proper basis to dismiss an action under CR 17(a). The defendants' remedy, as set forth in the Rule, was substitution of the real party in interest. While the defendants allege fraud, the fraud, if any, did not prejudice the defendants—rather, it was an error that could be, and was, corrected by the plaintiff. The dismissal of the case as a CR 11 sanction was a grossly exaggerated punishment which severely prejudices the innocent widow. The matter must be remanded to the trial court with an order to permit the substitution of Personal Representative Phuoc Nhu and to allow the case to proceed as if the action had been commenced in the name of the real party in interest

RESPECTFULLY SUBMITTED this 2 day of March, 2015.

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