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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 47387-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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,

Respondents.

BRIEF OF RESPONDENTS FRANCISCAN HEALTH SYSTEM,
FRANCISCAN CARDIOTHORACIC SURGERY ASSOCIATES AND
FRANCISCAN MEDICAL GROUP

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I. INTRODUCTION

This appeal is about a fraud on the court, and the trial court having the authority and discretion to deal with that fraud. Purported plaintiff Gabrielle Nguyen-Aluskar filed this lawsuit knowing that she was not, and could not be, the personal representative of her father Hung Nguyen's estate because she was convicted of a felony. Ms. Nguyen-Aluskar deliberately and repeatedly misrepresented her status to both the Court and defendants. The record supports the conclusion that this was done with the knowledge of Hung Nguyen's wife, Phuoc Nhu. The trial court found these actions to be fraud on the court and as a result, dismissed the case.

Now, plaintiffs argue that the fraud was a series of honest and understandable mistakes, and that there is no prejudice to respondents Franciscan Health System, Franciscan Cardiothoracic Surgery Associates and Franciscan Medical Group (collectively, FHS). They claim that the real party in interest is the spouse, Phuoc Nhu, and that she is "innocent" of the fraud committed by Gabrielle Nguyen-Aluskar. Thus, plaintiffs argue, the trial court erred in dismissing the case against the "innocent" parties.

The plaintiffs are incorrect. A reviewing of the briefing, both at the trial court and to this court, shows a complete lack of honesty and remorse by Gabrielle Nguyen-Aluskar. Faced with her multiple perjurious

statements she refuses to acknowledge any wrongdoing. Rather, she makes excuse after excuse, from claiming medical problems (for which there is no expert support), to cultural issues to “honest mistakes” based on a lack of recollection. This fraud on the court, and to FHS, did prejudice FHS, though the law does not require prejudice when there is fraud on the court.

Plaintiffs seek to reverse the trial court’s discretionary, factual findings. These factual findings are reviewed under an abuse of discretion standard. Thus, the only issues for this court are whether the trial court abused its discretion in making a finding of fraud committed on the court and whether it abused its discretion in declining to substitute in Ms. Nhu as the personal representative. There is ample evidence supporting the trial court’s decision, which should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in finding that plaintiffs committed a fraud on the court?
2. Did the trial court abuse its discretion in declining to substitute Ms. Nhu as the personal representative because of the fraud on the court?
3. Did the trial court abuse its discretion in dismissing the case under CR 11 because of the fraud on the court?

III. COUNTER-STATEMENT OF THE CASE

A. **Substantive Background Facts**

In December 2008, 68-year-old Hung Nguyen presented to his cardiologist complaining of chest pain for about a year. CP 37-41. A cardiac catheterization procedure revealed that he had very significant cardiac disease including total occlusion of the right coronary artery and a 90-95% blockage of his left anterior descending artery. CP 38. In an attempt to keep Mr. Nguyen's heart functional and avert the heart attack that could occur at any time, Dr. Gilbert Johnston performed a triple bypass on December 15, 2008. *Id.*

Although the surgery was successful, Mr. Nguyen developed many postoperative complications. CP 39-41. These complications included respiratory failure, metabolic acidosis, and lactic acid levels that indicated his tissues were not properly perfusing. *Id.* Other lab work suggested liver disease, though the possible causes of that could not be determined. *Id.* He was intubated and on hemodialysis at various times during his hospitalization. *Id.* He had a transfusion, a great number of diagnostic tests and procedures, many medications, and intensive resuscitation efforts including two codes. *Id.* The final resuscitation attempt was unsuccessful, and he died on December 30, 2008. *Id.* The family declined an autopsy. CP 44.

B. Relevant Procedural History

More than a year after Mr. Nguyen's death, on April 30, 2010, one of Mr. Nguyen's adult children, Gabrielle Nguyen-Aluskar, applied to the King County Superior Court for appointment as administrator of Mr. Nguyen's estate and was so appointed. CP 46-49. Just three days later, the Court *revoked* Ms. Nguyen-Aluskar's status as administrator. CP 51. The Court had discovered that Ms. Nguyen-Aluskar was "disqualified from serving as personal representative because of her conviction of a felony crime" pursuant to RCW 11.36.010. CP 51, 53. *This fact was not volunteered by Nguyen-Aluskar.* The Court denied Ms. Nguyen-Aluskar's motion for reconsideration on the same grounds. CP 53. These events occurred years before the present lawsuit, and unbeknownst to FHS.

After Ms. Nguyen-Aluskar received notification that the King County Superior Court had revoked her status as personal representative, she had a 12-minute motion for reconsideration hearing before Judge Richard Eadie on May 4, 2010, in which he explained precisely why she could not serve as personal representative. CP 210-215. There was an extensive discussion between the court and Ms. Nguyen-Aluskar regarding her disqualification due to being convicted of a felony. CP 210-214.

THE COURT: I agree with everything that says. **Now the trouble is here you're convicted of a felony.**

MS. NGUYEN-ALUSKAR: Right. But it says here felony or misdemeanor involving moral turpitude.

THE COURT: Yeah. The way I understand that is **any felony** or a misdemeanor involving moral turpitude

...

CP 210 (emphasis added).

THE COURT: **It's any felony.**

MS. NGUYEN-ALUSKAR: **Right. Correct, sir.**

THE COURT: **Any felony. And you've been convicted of a felony.**

CP 210 (emphasis added).

THE COURT: Right. And let me try it again. It can be a misdemeanor involving moral turpitude. And you weren't even convicted of DUI, you were convicted of being in physical control of a motor vehicle.

MS. NGUYEN-ALUSKAR: Correct. Correct.

THE COURT: So that does not involve moral turpitude.

MS. NGUYEN-ALUSKAR: Right.

THE COURT: But it's a misdemeanor involving moral turpitude or **any felony**.

CP 211 (emphasis added).

MS. NGUYEN-ALUSKAR: It says it right here: Possession of less than one ounce of marijuana –

THE COURT: That's a misdemeanor.

MS. NGUYEN-ALUSKAR: -- crimes involving moral turpitude.

THE COURT: That's a misdemeanor.

MS. NGUYEN-ALUSKAR: I understand that, Your Honor. But it clearly says here: Felony or misdemeanor.

THE COURT: With all due respect, I disagree with the way you read that. We are reading it differently. **And my opinion is it is any felony at all.**

MS. NGUYEN-ALUSKAR: I've even -- I've even shown this to Mr. Kargianis.

THE COURT: Okay. Well, you --

MS. NGUYEN-ALUSKAR: And my professor even agrees with me.

THE COURT: **Well, your professor isn't a judge** and --

MS. NGUYEN-ALUSKAR: I understand that. But the statute is the statute.

THE COURT: -- and I disagree with your professor. **And unfortunately for you, this is my decision to make, it's not yours.**

CP 212 (emphasis added).

THE COURT: I'm going to make it clear. I'm going to make it clear.

MS. NGUYEN-ALUSKAR: I'm really sorry. I don't --

THE CLERK: (Inaudible) caption, Your Honor.

THE COURT: Excuse me?

MS. NGUYEN-ALUSKAR: I said I'm really sorry; I don't understand why you're giving me a hard time.

THE COURT: I'm not giving you a hard time.

MS. NGUYEN-ALUSKAR: I mean, the law -- the statute is right here. It clearly says, felony or misdemeanor. Well, is -- can you at least sign the form to where I can get my money back?

THE COURT: No. I don't give money back because you started the case and --

MS. NGUYEN-ALUSKAR: I understand that. But then I'm looking at the statute and it clearly says, felony or misdemeanor.

THE COURT: **There's a court of appeals that will --**

MS. NGUYEN-ALUSKAR: **I don't need to go to court of appeals....**

CP 212-13 (emphasis added).

THE COURT: Okay. I have some other people who are waiting here now, **so I'm going to go through this once more. And the statute says here that a person who has been convicted of any felony -- any felony. And then there's an "or." So "any felony" stands alone. And then there's an "or" which is another basis: Conviction of a misdemeanor involving moral turpitude. So you can be convicted of some misdemeanors that do not involve moral turpitude, but any felony.**

MS. NGUYEN-ALUSKAR: Your Honor, with all due respect, it clearly -- it clearly says here: Involving moral turpitude.

THE COURT: Yeah, but it's only for --

MS. NGUYEN-ALUSKAR: **Okay.** You know, I really don't understand why you're giving me a hard time. I've already paid my debt to society. **I'm a law student at Seattle University.** My attorneys and the --

THE COURT: (Inaudible).

MS. NGUYEN-ALUSKAR: That's fine. That's fine.

THE COURT: (Inaudible).

MS. NGUYEN-ALUSKAR: Jesus have mercy on you.

(Conclusion of hearing.)

CP 213-214 (emphasis added).

Despite the court revoking her status as administrator of Mr. Nguyen's estate, Ms. Nguyen-Aluskar commenced this medical malpractice action on behalf of the estate two years later, on December 3, 2012. CP 1-3. On February 27, 2013, plaintiff filed an amended complaint which added several entities as defendants. CP 8-10. Both complaints named the plaintiff as the "Estate of Hung Nguyen, *by and through Gabrielle Nguyen-Aluskar.*" CP 1, 8 (emphasis added). Both alleged in generalities that "Plaintiff Hung Nguyen" "suffered damage including but not limited to death, physical injury, pain and suffering..." due to the alleged negligence of defendants. *Id.* FHS answered the complaint, and the lawsuit proceeded per the case scheduling order.

Meanwhile, on November 22, 2013, almost a year after this case was filed, and again unbeknownst to FHS, Ms. Nguyen-Aluskar again applied to Superior Court (this time in Pierce County, instead of King) for appointment as personal representative for Mr. Nguyen's estate. CP 63-65. This time Ms. Nguyen-Aluskar added her mother, Phuoc Nhu, to the petition for letters of administration for Mr. Nguyen's estate. *Id.* Ms.

Nguyen-Aluskar appears to have signed the petition, but then, at some point, crossed out the signature and all references to herself, leaving only Ms. Nhu. *Id.* Before crossing out her signature, the petition read that Ms. Nguyen-Aluskar declared under penalty of perjury that she was “qualified to act as Decedent’s Personal Representative” despite knowing for years that she is disqualified. *Id.* The petition originally stated that it sought to have the court “[a]ppoint my daughter, Gabrielle Nguyen-Aluskar as Decedent’s Personal Representative on Phouc Nhu’s behalf to serve with Nonintervention Powers.” CP 64. As to the spouse Phuoc Nhu, she indicates in the petition that she “does not speak fluent English.” *Id.*

The Court did not appoint either Ms. Nguyen-Aluskar or Ms. Nhu as personal representative on November 22, 2013. CP 67. According to the transcript from November 22, 2013, the court asked whether both people were asking to be appointed as the personal representative. CP 220. Ms. Nguyen-Aluskar stated “Um, yes, but more (inaudible) for me because my mom doesn’t speak fluent English.” CP 220. Ms. Nguyen-Aluskar further stated that “[a]nd there’s an ongoing medical malpractice case that our attorney says he would appoint me as personal representative which is with this courthouse as well.” CP 220. Ms. Nhu speaks at this hearing (CP 220, line 6), and Ms. Nguyen-Aluskar further acknowledges

her mother's presence at that hearing stating "my mom is with me." CP 222.

The commissioner declined to make either person the personal representative at that time. As to Ms. Nguyen-Aluskar, the court stated that "there are some issues with your background and I do not know if the court will approve you as the personal representative." CP 221. The court commissioner stated that they would have to file a motion, and give notice to all of the other adult children. CP 220-222. The transcript then indicates that a recess was taken. CP 222. After the recess, and apparently unhappy with this requirement, Ms. Nguyen-Aluskar then stated that "My mom is with me and she said that's too much time [to file a motion and give notice] and she'll just be the personal representative to my – her husband's estate." CP 222.¹ The court replied "I'm still requiring notice because of the language issue. So there has to be notice. You have to file a motion." CP 222. The clerk of the court also stated that "[a]nd what you might want to do also is go down to Court 7 and you can arrange for an interpreter." CP 222. There is no evidence that anything else was done on this file (Cause No. 13-4-01794-4) until spring of 2014, after the motion to dismiss in this case was filed.

¹ Based on the context and the transcript, it is likely that it was during this recess that the interlineations were made, crossing out the references to Ms. Nguyen-Aluskar.

On February 28, 2014, FHS requested that Ms. Nguyen-Aluskar sign several records stipulations so that it could obtain Mr. Nguyen's medical records. CP 33, 69-71; see also, CP 104-13. FHS received no response. CP 33. FHS again requested her signatures on the stipulations on March 20 and March 28, 2014. *Id.* At the beginning of April, FHS finally received the stipulations which Ms. Nguyen-Aluskar had signed on behalf of Mr. Nguyen. *Id.* FHS sent these out to various medical providers to obtain Mr. Nguyen's records. *Id.* On April 16, however, FHS received notification from the records provider that Ms. Nguyen-Aluskar was required to provide additional documentation proving her status as personal representative for the estate of Hung Nguyen. *Id.* FHS immediately emailed plaintiff's counsel requesting this documentation. *Id.*

FHS then searched court records throughout the state and discovered what has been outlined above—that the Court revoked Ms. Nguyen-Aluskar's status as administrator over four years ago. CP 33, 51-53. FHS also discovered that Ms. Nguyen-Aluskar had tried again in a different forum to be appointed personal representative for Mr. Nguyen's estate with no success. CP 33, 63-67.

FHS then brought a motion to dismiss the based on a lack of a real party in interest. CP 20-29. Plaintiff filed a cross-motion to substitute Phuoc Nhu as the personal representative for her husband's estate. CP 75.

After the motion to dismiss was filed, plaintiff's counsel, who was representing the estate in November 2013, applied ex parte for Ms. Nhu to be the personal representative. A review of the transcript from that hearing demonstrates that the court commissioner was never told of the previous two attempts to get a personal representative appointed, was not told of the issues surrounding Ms. Nguyen-Aluskar, and was not told of the language barrier issues involving Ms. Nhu. CP 226.

The court in this case continued the original hearing on the motion to dismiss and asked for additional briefing. In plaintiff's supplemental brief and the declaration of Ms. Nguyen-Aluskar, Ms. Nguyen-Aluskar continued making inaccurate, perjurious statements. See CP 186-91. Ms. Aluskar stated that when applying to be the personal representative "we did not have the help of a lawyer." The record shows, however, that the first time she applied in 2010, she claimed to be a law student who had consulted with one of her law professors. CP 210-14. The second time she tried in November 2013, she was represented by attorney Carl Lopez. In fact, she referenced this at the November 2013 hearing: "And there's an ongoing medical malpractice case that our attorney says he would

appoint me as personal representative which is with this courthouse as well.” CP 220.

She further stated that she did not understand why she had been rejected in 2010. CP 191. As indicated above, Judge Eadie carefully and repeatedly told her why she could not be the personal representative. CP 210-14. Ms. Nguyen-Aluskar further stated that there was no reason why her mother should have been rejected. Again, as noted, above, the court in 2013 told Ms. Nguyen-Aluskar and Ms. Nhu that proper notice needed to be given to the other adult children and there were concerns about language issues. CP 221-222.

The hearing on the motion to dismiss and the cross-motion to add Ms. Nhu as the personal representative occurred on July 18, 2014. 7/18/14 RP 1-16. At that hearing, the judge stated as follows:

These facts in this case, I think, are fairly extraordinary. I'm finding that Ms. Gabrielle Nguyen-Aluskar is disqualified from serving as personal representative of Hung Nguyen, her father's -- representing her father.

She was convicted of a felony in King County in 2006, a felony drug offense. It remains a valid conviction.

The Court does not find credible, Ms. Nguyen-Aluskar's latest representations in her most -- latest declaration.

I find that she, in fact, knew that she could not serve as personal representative. King County Superior Court revoked her authority to act as administrator of her father's

estate due to the felony conviction and explained clearly to her why.

I am not finding that she merely had reason to know that she could not serve as personal representative. I am finding that she subjectively knew that she could not serve in that capacity.

With knowledge that she is prohibited, I find that she held herself out as personal representative in filing both the Complaints in this case -- initially on December 3rd of 2012 and then a second Complaint on February 27th of 2013.

Throughout this lawsuit, she has continued to hold herself out as the personal representative of her father. I find that this conduct constitutes a deliberate, intentional fraud upon the court, a deliberate and concerted effort to advance this lawsuit ostensibly for her father, but without legal authority to do so while knowing that she had no such authority.

There has been no real party in interest in this case.

Now, after Ms. Nguyen-Aluskar's conduct was discovered by the defense, she then sought to substitute her mother into this case as personal representative. The plaintiff has asked the Court to order this substitution so that there would be a real party in interest of Mr. Nguyen's widow, the mother of Ms. Nguyen-Aluskar. This request is made under Civil Rule 17. The effort is to have the substitution, of course, relate back to the original filing to avoid a statute of limitations bar.

I don't believe that the law mandates that I do this substitution. I don't believe that I am without discretion in this matter. The Court is bound to avoid the very sort of abuses that Ms. Nguyen-Aluskar is attempting to have occur in this case.

Civil Rule 17 itself does not require a showing of prejudice to the defense. Perhaps the Beal case does require such a

showing. The Court is satisfied that the defense has been prejudiced throughout a fairly lengthy pendency of the trial in this case and that the defense has shown substantial and real prejudice in this matter.

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.

Now, I have been referring to what I believe is fraudulent conduct on the court by Ms. Nguyen-Aluskar. I re-emphasize that I'm not making any such finding with respect to Plaintiff's counsel. I will say, for the record, that I suspect that Ms. Aluskar's behavior may be criminal. The prosecuting attorney for Pierce County, State of Washington -- they're not parties to this action, and I'm certainly not attempting to enter an order that the prosecuting attorney investigate this conduct, but I do feel it would be appropriately investigated by the prosecuting attorney.

Those are the findings that I wanted to make. I'm prepared to sign an appropriate order dismissing this matter.

7/18/14 RP 10-14.

Plaintiff's attorney Carl Lopez filed a Notice of Withdrawal on July 23, 2014. On July 28, 2014, Ms. Nguyen-Aluskar and Ms. Nhu filed a Notice of Appearance.² Ms. Nguyen-Aluskar and Ms. Nhu filed a motion for reconsideration on July 28, 2014. CP 238-305. Along with this motion was a supplemental declaration of Nguyen-Aluskar and Nhu. CP 306-11.

In this motion for reconsideration and accompanying declaration, Ms. Nguyen-Aluskar and Ms. Nhu made several arguments, including that: 1) Ms. Nguyen-Aluskar make an honest mistake with respect to her "knowledge" of her felony conviction due to trauma inflicted by witnessing her father's death. CP 238, 307; 2) Ms. Nguyen-Aluskar did not "recollect with certainty" any reconsideration hearing before Judge Eadie in 2010. CP 239; and 3) any conversation with Judge Eadie was complicated by a culture clash and the fact that Ms. Nguyen-Aluskar (again referring to herself as "plaintiff") was hearing voices and suspected Judge Eadie of bias. CP 239. This motion is signed by both women. CP 244.

In response to this motion for reconsideration, FHS argued that the requirements of CR 59 had not been met, as the information provided

² It is unclear how either person could have filed a Notice of Appearance. Neither are attorneys, and neither were a party to the case. As to Ms. Nguyen-Aluskar, she has never been appointed as a personal representative. This raises serious questions as to whether she is practicing law without a license.

could have been provided in response to the original motion. CP 313-19. FHS further noted that Ms. Nguyen-Aluskar and Ms. Nhu continued to present incorrect information, noting that the petition for the appointment of a personal representative filed with the motion for reconsideration was different than what had been filed with the court at the time. CP 316, and compare CP 325-27 (filed with the court in November 2013) with CP 332-334 (filed with the motion for reconsideration)(striking out portions of paragraphs 5 and 7 on CP 333 that were not struck on CP 326 in the original document filed with the court). Furthermore, FHS pointed out that the actual service of the motion for reconsideration was on August 5, 2014, placing it out of the 10-day window required by CR 59. CP 316, 335-39. The trial court denied this motion without oral argument. CP 340.

Finally, because many of the facts related to Ms. Nguyen-Aluskar's background and representations have been challenged, a summary of the timeline of key events is useful.

- February 14, 2003 Gabrielle Nguyen-Aluskar charged in King County with felony (RCW 69.50.401(d)), and gross misdemeanors (RCW 46.61.502), (RCW 46.61.506) CP 131.
- March 28, 2006 Gabrielle Nguyen-Aluskar convicted in King County of felony (RCW 69.50.401(d)) and gross misdemeanor (RCW 46.61.504). CP 131.

- July 27, 2006 Felony judgment and sentence entered in King County against Gabrielle Nguyen-Aluskar. CP 132-38.
- July 27, 2006 Gross misdemeanor judgment and sentence entered in King County against Gabrielle Nguyen-Aluskar. CP 139-44.
- August 27, 2007 Court of Appeals of Washington, Division I, upholds Gabrielle Nguyen-Aluskar's King County felony and gross misdemeanor Convictions. CP 145.
- December 30, 2008 Hung Nguyen dies
- December 31, 2008 Washington Supreme Court affirms Court of Appeals' decision regarding Gabrielle Nguyen-Aluskar's convictions. CP 146-59.
- April 30, 2010 Gabrielle Nguyen-Aluskar applies to King County to be appointed administrator of Hung Nguyen's estate. CP 160-63.
- May 3, 2010 King County court revokes Gabrielle Nguyen-Aluskar's status as administrator for Hung Nguyen's estate based on her felony conviction (RCW 11.36.010) CP 164.
- May 4, 2010 King County court denies reconsideration on its revocation of Gabrielle Nguyen-Aluskar's appointment as administrator of Hung Nguyen's estate. CP 165.
- January 4, 2011 Criminal Information filed against Gabrielle Nguyen-Aluskar in Pierce County for First Degree Theft and Forgery. CP 165-68.
- March 17, 2011 Gabrielle Nguyen-Aluskar signs medical records request as "legal representative" for Hung Nguyen. CP 169.
- March 21, 2011 Medical records company informs Gabrielle Nguyen-Aluskar that she cannot receive Hung Nguyen's medical records. CP 170.

- December 3, 2012 Gabrielle Nguyen-Aluskar files 1st Complaint on behalf of Hung Nguyen's estate. CP 171-73.
- February 27, 2013 Gabrielle Nguyen-Aluskar files 2nd Complaint on behalf of Hung Nguyen's estate. CP 174-76.
- November 22, 2013 Gabrielle Nguyen-Aluskar applies in Pierce County to be appointed administrator for Hung Nguyen's estate. Mother Phuoc Nhu is also listed on the petition but was not present at the ex parte hearing. Neither is appointed at this hearing. CP 177-81.
- November 25, 2013 Pierce County felony theft and fraud charges dismissed to ELCID. CP 182-84.
- December 10, 2013 Pierce County felony theft and fraud charges expunged. CP 185. **[NOTE: King County felony conviction remains intact.]**

IV. AUTHORITY & ARGUMENT

A. Standard of Review

All of the issues in this appeal are reviewed for abuse of discretion.

We hold that the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard. The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "better positioned than another to decide the issue in question." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 88 L. Ed. 2d 405, 106 S. Ct. 445, (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to 'reduce the reluctance of courts to impose sanctions'. . . . If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court's willingness to impose . . . sanctions." *Cooper v. Viking Ventures*, 53 Wash. App. 739,

742-43, 770 P.2d 659 (1989) (quoting Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

“Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The decision of whether to apply CR 17 to a given set of facts is reviewed under an abuse of discretion standard. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 171-72, 982 P.2d 1202 (1999). Likewise, the standard of review of a trial court’s sanctions under CR 11 is abuse of discretion. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 826, 225 P.3d 280 (2009). “In deciding whether the trial court abused its discretion, we must keep in mind that “[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.”” *Id.* quoting *Biggs*, 124 Wn.2d at 197 (emphasis omitted) (alteration in original) (quoting *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992)).

Finally, the review of a motion for reconsideration is also abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

B. There has never been a proper personal representative as the plaintiff in this lawsuit.

A claim for wrongful death can only be brought by the personal representative of the estate. RCW 4.20.010. The statute states as follows:

When the death of a person is caused by the wrongful act, neglect, or default of another **his or her personal representative may maintain an action** for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

RCW 4.20.010 (emphasis added). That only the personal representative may bring and maintain either action is also consistent with the general probate rules.³

Here, Ms. Nguyen-Aluskar brought this medical malpractice on behalf of Mr. Nguyen's estate. Yet she was not the personal representative for his estate, nor could she have been the personal representative of the estate because of her prior felony conviction. *See* RCW 11.36.010 (“(1) ... the following persons are not qualified to act as

³ “...the personal representative shall collect all debts due the deceased.... The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due to the estate...” RCW 11.48.010.

personal representatives: ...or persons who have been convicted of (a) any felony or (b) any crime involving moral turpitude.”).

Moreover, Ms. Nguyen-Aluskar’s status as one of Mr. Nguyen’s children did not bestow on her legal standing as a personal representative to bring a survivorship or wrongful death action. *See, e.g., Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998) (“A wrongful death action must be brought by the personal representative of the decedent’s estate and cannot be maintained by the decedent’s children or other survivors.”). This is because, in a wrongful death or survivorship action, “it is the personal representative, not the child, who possesses the claim...., who is the nominal party to the action, and who must maintain it....” *Wood v. Dunlop*, 83 Wn.2d 719, 723, 521 P.2d 1177 (1974).

C. The trial court did not abuse its discretion in declining to allow the substitution of Ms. Nhu because of the fraud on the court.

There is no dispute that Ms. Nguyen-Aluskar is not a proper personal representative in this case. As such, the case could only continue if a proper personal representative is substituted in under CR 17(a). The trial court did not abuse its discretion in finding fraud on the court and did not abuse its discretion in declining to substitute Ms. Nhu as the personal representative.

It is true that courts generally allow the plaintiff a reasonable time to join the real party in interest per CR 17(a). See, e.g., *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 226, 734 P.2d 533 (1987). However, because of the fraud and the facts of this case, the court was well within its discretion in declining that substitution. In *Rinke*, for example, a wife brought an action in her name and as personal representative for her husband's estate. *Rinke*, 47 Wn. App. at 223. When she filed the lawsuit, the wife mistakenly thought that she had already been appointed personal representative based on a community property agreement. *Id.* at 223-24. Realizing her mistake, she filed a petition to be appointed personal representative, was appointed, and ratified her earlier actions with respect to the lawsuit. *Id.* The Court held that, though "she erred in prosecuting the suit without a formal appointment as personal representative," she had made an "honest mistake understandable under the circumstances" so her action should not be barred under CR 17(a). *Id.* Plaintiff was accordingly permitted to add the "real party in interest" late in the lawsuit. *Id.* at 231-32.

By contrast, Ms. Nguyen-Aluskar did not reasonably believe that she would be appointed personal representative of Mr. Nguyen's estate when she filed the complaint. She did not make an honest mistake, but rather a *deliberate misrepresentation*. By the time she filed the lawsuit,

she had known for over three years that she was barred from serving as the personal representative.

The trial court found that she subjectively knew that she could not be the personal representative, but filed the lawsuit anyway. Nearly a year after filing the lawsuit in blatant disregard for the King County Court's ruling (from 2010), she tried again, this time in Pierce County, with her mother present at the hearing, and during a time they were represented by counsel. When told what process to take (provide notice to the other siblings and get an interpreter), both Ms. Nguyen-Aluskar and Ms. Nhu failed to take any additional action until the motion to dismiss was filed.

Plaintiffs, though refusing to acknowledge the obvious fraud by Ms. Nguyen-Aluskar, make the argument that Ms. Nhu is the real party in interest and that she is innocent of any wrongdoing. Plaintiffs argue that "[i]mportantly, Phuoc Nhu took immediate steps to have herself appointed as personal representative upon the defendants' motion for dismissal."

Appellant's Brief at 18. First, it was Ms. Nguyen-Aluskar – and Ms. Nhu - who originally stated that Ms. Nhu should not be the personal representative because of language issues. CP 220; CP 326; *see also*, CP 188.⁴ In any event, Ms. Nhu knew, at least by November 2013, that the

⁴ In that sense, judicial estoppel should prevent plaintiffs from now asserting that Ms. Nhu is a proper personal representative. See *Skinner v. Holgate*, 141 Wn. App. 840, 843, 173 P.3d 300, 301 (2007)(holding that judicial estoppel is an equitable doctrine

court was not appointing Ms. Nguyen-Aluskar or herself as the personal representative, but the Court told them how to get this done. She failed to take any action for six months. Thus, there was no further additional “reasonable time” that the court was required to give prior to dismissing the case. Moreover, Ms. Nhu was signing motions and declarations containing Ms. Nguyen-Aluskar’s misrepresentations. *See, e.g.*, CP 63-65, 238-305, CP 306-11. She is not the “innocent” party claimed by plaintiffs.⁵

Plaintiffs primarily rely on the case of *Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998). In *Beal*, the plaintiff, who was the guardian ad litem, filed the action as personal representative of the estate before he had actually been appointed personal representative, but knowing that this legal status was required to bring the action. *Id.* at 774-75, 776-77. He did in fact become personal representative, but simply had not had time to do so prior to filing within the statute of limitations. *Id.* The court held that where the change is only in the representative capacity in which the case is brought (i.e. from guardian ad litem to personal

precluding a party from asserting one position in a court proceeding and later seeking advantage by taking an inconsistent position).

⁵ These filings also show that Ms. Nguyen-Aluskar was acting as Ms. Nhu’s agent, with Ms. Nhu’s approval. As such, she cannot claim she is “innocent” of these misrepresentations.

representative) and there is no prejudice to the defendant, then substitution is appropriate. *Id.* at 783-84.

Here, unlike *Beal*, Ms. Nguyen-Aluskar filed the Complaint after she had already been informed ***that she could never be appointed personal representative*** due to her prior felony. She knew she could never be the personal representative, but deliberately filed the lawsuit in that capacity anyway. This was not a change in representative capacity. This was an attempted change in person (to Ms. Nhu). And Ms. Nhu knew of the problem by at least November 2013 but did nothing about the problem, even though she was represented by counsel.

Perhaps most importantly, there was no finding in *Beal* of a fraud on the court. This fact takes the analysis out of the realm of a garden variety CR 17(a) situation and distinguishes this case from every case cited by plaintiffs. Because of this finding, which is easily supportable by the facts in the case, the analysis is not the typical analysis under CR 17(a). Rather, the analysis is now, did the court abuse its discretion in declining to substitute in a new party in the face of that fraud?

Citing to *Beal*, plaintiffs argue that FHS must show prejudice. They are incorrect. When there is fraud on the court, individual prejudice is not required because the prejudice is to the judicial system itself. See, e.g., *Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir. 2003)(holding that

“fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced.”) But even if such prejudice was required, FHS has been prejudiced by these actions. CP 91-92.

The Washington Supreme Court has specifically recognized “the potential for abuse in a literal interpretation of CR 17(a) if applied in every circumstance.” *Kommavongsa v. Haskell*, 149 Wn.2d 288, 315, 67 P.3d 1068 (2003). In that case, the individual who had been personally harmed by legal malpractice assigned his interest in that lawsuit to the guardians ad litem for two people he had previously injured in a car crash because he lacked assets to compensate them. *Id.* at 294. There was no clear law on whether an interest in a legal malpractice action could be assigned in Washington, but there was support for this position in other jurisdictions. *Id.* at 316. The plaintiffs proceeded on the good faith belief that their position was warranted either by the existing law, or an extension or change thereof. *See id; see CR 11*. The Washington Supreme Court held that this interest was not assignable, making the plaintiffs (guardians ad litem) not the real party in interest. *Id.* The Court permitted substitution because the plaintiffs took a calculated risk (based on a good faith belief) that the court could find that they were the real party in interest if it agreed that the lawsuit interest was assignable. *Id.* at 317-18.

The facts in the present action are nearly the opposite of those in *Kommavongsa*. Here, Ms. Nguyen-Aluskar knew with certainty that a Washington court would not consider her the real party in interest because a Washington court had already actively revoked her status as personal representative. There was no uncharted legal territory here; hers was not a calculated risk as in *Kommavongsa*, but a blatant misrepresentation. And unlike the plaintiffs in *Kommavongsa* who openly presented the situation to the Court and argued their position, Ms. Nguyen-Aluskar continued to act in bad faith, hiding her true status from the Court until it was discovered by defendant.

That bad faith continues. In the motions for reconsideration and this brief, plaintiffs continue to argue that no fraud occurred. Plaintiffs have the audacity to claim in their brief that Ms. Nguyen-Aluskar never represented that she was the personal representative of the estate. *Appellant's Brief at 10*. She filed a case, represented by counsel, stating that it was "by and through" Ms. Nguyen-Aluskar. Given that only personal representatives can bring such claims, what was FHS to think? This is gamesmanship and shows why dismissal was the appropriate remedy.

Ms. Nguyen-Aluskar's actions in this case represent the very abuse the Washington Supreme Court has cautioned could occur with CR 17(a).

To have permitted Ms. Nguyen-Aluskar here to “substitute” her mother in as the personal representative would have converted the rule into a tool with which individuals like Ms. Nguyen-Aluskar could easily manipulate courts by filing and maintaining lawsuits with no authority to do so, then adding the “real” party only if it became necessary—if they were caught. Plaintiffs should not be rewarded for the intentional misrepresentations.

D. This case was also properly dismissed under CR 11.

In addition to declining to substitute Ms. Nhu as the personal representative, the court separately held that there were CR 11 sanctions that justified dismissal of the case. The court did not abuse its discretion in making this finding.

CR 11 sanctions are designed to “curb abuses of the judicial system” which, if widespread, cripple it. *See, e.g., Neigel v. Harrell*, 82 Wn. App. 782, 919 P.2d 630 (1996) (citing to *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992)). CR 11 sanctions were appropriate for the egregious and repeated conduct of plaintiffs in this case.

The courts have defined two types of sanctionable filings under CR 11: (1) those that are not well grounded in fact and warranted by law (baseless filings); and (2) those that are interposed for an improper purpose such as harassment or unnecessary delay (bad faith filings). *Stiles*

v. Kearney, 168 Wn. App. 250, 261-62, 277 P.3d 9 (2012), *rev. denied*, 175 Wn.2d 1016 (2012); *Bryant*, 119 Wn.2d at 219. A complaint is the proper subject of CR 11 if it lacks a legal basis. *Bryant*, 199 Wn.2d at 220. Washington courts have found complaints to be legally baseless where, for instance, the tort alleged in the complaint had already been abolished as a viable cause of action by a prior court decision. *See, e.g., Madden v. Foley*, 83 Wn. App. 385, 390-91, 922 P.2d 1364 (1996) (upholding CR 11 sanctions when the complaint had no foundation in fact or law as it alleged the tort of alienation of affections, which had been abolished as a cause of action). Washington courts have also found complaints to be legally baseless when it is clear that one of the elements of the tort could not be established. *See Stiles v. Kearney*, 168 Wn. App. 250, 254, 256, 277 P.3d 9 (2012) (upholding CR 11 sanctions when falsity and damages element in defamation claim could not be established).

The complaint in this case was even more lacking than in *Madden* and *Stiles*. Here, the case was filed without a valid plaintiff, without a real party in interest. Ms. Nguyen-Aluskar's conduct was sanctionable as both a baseless filing and a bad faith filing. She 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. At no point did she, or Ms. Nhu, take steps to rectify the

erroneous complaint or candidly convey this critical information to the Court or defendants.

Courts have held that CR 11 violations have occurred under these circumstances. In a similar case, for example, *Jimenez v. Madison Area Tech. College*, the U.S. Court of Appeals⁶ held that a Rule 11 violation occurred when the plaintiff relied on false documents to plead a discrimination claim in her complaint. 321 F.3d 652, 656 (7th Cir. 2003). Here too, Ms. Nguyen-Aluskar had to rely on falsely conveying herself as the personal representative to be able to file the complaint. This is a violation of CR 11, and sanctions were warranted.

Dismissal was an appropriate sanction. CR 11 permits the Court “to impose upon the person who signed the offending pleading, the represented party, or both, an appropriate sanction. . . .” CR 11(a). The Court retains broad discretion regarding the nature and scope of sanctions. *See, e.g., Miller v. Badgley*, 51 Wn. App. 285, 301, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988). “Although CR 11 expressly provides for the award of reasonable expenses caused by the violative motion, such an award does not exhaust the options available to the trial judge.” *Miller*, 51 Wn. App. at 303 (citing *Huettig & Schromm, Inc. v. Landscape*

⁶ “CR 11 was modeled after the Federal Rule of Civil Procedure (Rule 11), and federal decisions interpreting Rule 11 often provide guidance in interpreting our own rule.” *See e.g., Biggs v. Vail*, 124 Wn.2d 193, 196-197, 876 P.2d 448 (1994) (citing *Bryant v Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992)).

Contractors Coun., 582 F. Supp. 1519 (N.D. Cal. 1984) (in addition to monetary sanctions, trial court directed that opinion criticizing lawyer's pleadings be circulated throughout his firm), *aff'd*, 790 F.2d 1421 (1986).

In using its broad discretion to fashion the appropriate sanction under the given circumstances, the Court "must of necessity determine priorities in light of the deterrent, punitive, compensatory, and educational aspects of sanctions as required by the particular circumstances." *Miller*, 51 Wn. App. at 303. The only limitation placed on trial courts is to impose the least severe sanction which is adequate to serve the purpose. *Id.* at 304.

In the *Jimenez* decision described above, the U.S. Court of Appeals upheld dismissal as a CR 11 sanction under similar circumstances as here, where the plaintiff needed to rely on false information to file the complaint. In so doing, the Court acknowledged that "dismissal is a hard sanction," but that dismissal was appropriate "to deter repetition of the misconduct or to deter similar misconduct by third parties." 321 F.3d at 657. This was particularly true "given the egregious nature" of the plaintiff's conduct, which was "so deceptive that filing of her baseless claim amounted to a veritable attack on our system of justice." *Id.*

Similarly here, dismissal was the only appropriate sanction to deter, punish, compensate, and educate for several reasons. First,

pragmatically, the Complaint was the offending pleading, and therefore it needed to be stricken to remedy the CR 11 violation. Second, and more importantly, Ms. Nguyen-Aluskar demonstrated that she had no qualms about deceiving the Court and the parties and maintaining such a deliberate misrepresentation for as long it served her own interests. The fact that her briefing, both at the trial court and the appellate court, shows no acknowledgment of her misrepresentations drives home that point. The trial court did not, and this Court should not, permit participants in the justice system to get away with such blatant dishonesty and disregard for court rules, court rulings, and legal authority. While dismissal was a harsh sanction, it was the appropriate remedy under these circumstances.

E. The trial court did not abuse its discretion in denying the motion for reconsideration.

Ms. Nguyen-Aluskar and Ms. Nhu filed a motion for reconsideration and along with a supporting declaration. First, it is unclear by what authority this motion was filed, especially with regard to Ms. Nguyen-Aluskar, who is not an attorney and not a party to the case. Additionally, the motion was untimely (it was served outside of the 10 day window), and did not identify the specific reasons in fact and law as to each ground, as required by CR 59(b). Finally, all of the information contained in the motion and declaration were available to Ms. Nguyen-

Aluskar and Ms. Nhu prior to the motion to dismiss, making it inappropriate to bring up in a motion for reconsideration. *See, e.g., Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 906-07, 977 P.2d 1139 (1999), *rev. denied*, 139 Wn.2d 1005 (1999) (“If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence.”) (internal citations omitted). The trial court was well within its discretion in denying this motion.

F. FHS requests attorneys’ fees and costs on appeal.

Pursuant to RAP 18 and any other applicable statute or case law, FHS requests its fees and costs on appeal.

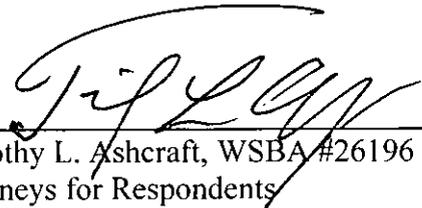
V. CONCLUSION

If this case involved an innocent mistake of presenting the wrong person as the personal representative of Mr. Nguyen’s estate, then it may have been proper to allow the substitution of Ms. Nhu to occur. That is not what happened. After repeated and egregious intentional misrepresentations to the trial court, the court justifiably found a fraud on the court. Based on that fraud, the court declined to allow the substitution to occur, meaning there was no real party in interest, and dismissed the case. The trial court separately found that the fraud on the court justified dismissing the case under CR 11. These decisions were well within the

court's discretion. The law gives trial courts wide latitude and discretion in managing their courtrooms and determining sanctionable conduct. The only issue here is whether the trial court abused its discretion in making its decision. It did not. The dismissal of this case should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 4th day of May, 2015, I caused a true and correct copy of the foregoing document, "Brief of Respondents." to be delivered in the manner indicated below to the following counsel of record:

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[Signature]
Christine Spake, Legal Assistant