Replaces petition for review filed 3/28/19

No. 97015-7

SUPREME COURT

OF THE STATE OF WASHINGTON

NO.77522-7-I

COURT OF APPEALS, DIVISION I

OF STATE OF WASHINGTON

SUSAN CHEN as parent and natural guardian of J.L, a minor and L L, a minor, and Naixiag Lian, as parent and natural guardian of J.L, a minor and L. L., a minor

Appellants

v.

DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D., SEATTLE CHI'DREN'S HOSPITAL, REDMOND CITY POLICE DEPARTMENT, DETECTIVE NATALIE D'AMICO, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND

Respondents

AMENDED PETITION FOR REVIEW

Susan Chen, *Pro Se* appellant

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A. IDENTITY OF PETITIONER & INTRODUCTION

Petitioner Susan Chen asks this Court to review of two important issues of first impression: jurisdiction and courtroom fairness, at appellate level.

For over a century, Washington courts have long recognized the importance of fundamental fairness in courtroom. But here, when Court of Appeals stayed only brief of Respondents by providing them longer than statutory-authorized 30 days, it substantially prejudiced Chen, a *pro se* Appellant who is also victim of Respondents' Attorney-Client Privilege violation. When Chen asked to be treated fairly as Respondents, her appeal was sua sponte dismissed. The cumulative effect of errors here constitutes a constitutional violation or an abuse of discretion.

The decision on this case has wide-ranging impact on the justice system, particularly at appellate level. It is widely recognized that "Appeal is a matter of right" therefore cannot be deprived absent showing of "knowing, intelligent, voluntary" waiver. While Respondents did not meet the threshold burden but were granted "an extraordinary relief" of dismissal against an innocent *pro se*. Moreover, Due Process requires that notice and opportunity for genuine adverseness but none of the requirements were presented when Division One dismissed Chen's appeal. The jurisdiction and powers of courts must be delineated by statute, as they have no inherent power. RAPs did not authorize a sua sponte dismissal without hearing the merit of the case. The decision of the Court of Appeals in this case has important ramifications for the appellants' rights to appeal in Washington courts. This Court should accept for review.

Chen, subject of the wrongful dependency and criminal cases, is the losing party of the

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This amendment was submitted pursuant to Deputy Clerk's 3/29 ruling on incorporating arguments by April 22. *But* Petitioner *still* believed that it is *more* appropriate to file RAP 13.5 motion for discretionary review because January 24 decisions were interlocutory in nature. Petitioner thus submitted motion to modify Deputy Clerk's ruling asking this Court to allow filing motion for discretionary review and grant three-weeks to amend motion for discretionary review after the decision on her motion to modify.

subsequent civil action due to alleged imperfect service (there is no allegation that they did not receive the complaints, just that they were served by certified mails and later by sheriff at their workplace rather than their homes). Trial court entered an unclear order against Chen and further denied clarification. Chen was forced to seek clarification at appeal and now before this Court, for the ambiguous order entered by trial court over two years ago. Whether Chen, a person bound to the judgement, is entitled to a clear order is an issue of the first impression. Chief Civil Judge Ken Schubert affirmed in his January 28, 2019 Order that Chen (and Court of Appeals) is entitled to a clear judgment. This Court should reaffirm that litigants bound to the judgment are entitled to an order with clear and unambiguous language under rights of access to the courts.

B. COURT OF APPEALS DECISIONS

On December 31, 2018, Commissioner of Division One entered a ruling on remand for findings on the alleged Attorney-Client privilege violation. (Appendix A). Chen moved for clarification which was treated as modification. On January 24, 2019, Division One denied motion to modify and dismissing appeal. (Appendix B). Chen's motion for reconsideration was denied by order dated on February 27, 2019 (Appendix C).

C. ISSUES PRESENTED FOR REVIEW

1. Considering Rules of Appellate Procedure, did the Court of Appeals err by acting without statutory authority in sua sponte dismissing Chen's appeal, and violate Chen's Due Process Rights vested under RAP 18.9?
2. Considering Rules of Appellate Procedure, did the Commissioner of Court of Appeals err by acting without statutory authority in only staying Respondents' brief, and violate Appearance of Fairness Doctrine?

3. Did Court of Appeals and trial court's refusal and failure to provide a clear order to the persons bound to the judgment undermine litigants' constitutional rights to access to the courts under Article I & 10 of the Washington Constitution?
4. Does RAP 18.9 (c) violate the equal protection clause of the Washington Constitution?

D. STATEMENT OF THE CASE

In its Orders dismissing appeal and denying reconsideration, Division One largely omits critical factual background relevant to this case. Chen presents these relevant facts.

Brief summary of the factual background (also see Appendix L, *Brief of Appellant* at 9-14)

Taking the facts in a light most favorable to Chen as the non-moving party on summary judgment, ***Dowler v. Clover Park Sch. Dist. No. 409,*** 172 Wn. 2d 471, 484, 258 P.3d 676 (2011)[1], in 2013, without consulting with J.L.'s main treating physicians and reviewing his medical history available in their own institution, *i.e*., Seattle Children's Hospital ("SCH"), Respondent physicians jumped to the conclusion that J.L. was abused by his mother, Chen who was subsequently arrested and criminally charged. J.L. and his brother L.L. was removed out of home. CP 1-23. Dependency court was "outrageous" that respondent physicians at SCH never tried to talk with parents and main treating physicians and ordered Respondent Darren Migita talk with Dr. Green. CP 235-236, 194. Fortunately, both dependency and criminal prosecution were dropped with a conclusion from the state that respondent physicians' reports were *directly* contrary to the patient's medical record. CP 56. Unfortunately, these rightful dismissals came far

[1] But in this case, Chen's version was actually endorsed by both state and prosecutor's dismissal decisions (available as public record). Respondents' misrepresentation was *directly* contrary to J.L.'s medical record. Also, various professional witnesses also confirmed Chen's description of the event, *e.g*., *Declaration of John Green, M.D.* at App. S; also, *Declaration of Twyla Carter, WSBA No. 39405,* at App. T. *Declaration of Chen (review on J.L.'s 600 pages' medical records),* at App. R; *Chen's motion to vacate summary judgment,* at App. Q.

too late, after more than a year of the family having been torn apart and everyone in the family having suffered tremendous harm. These harms would not have happened if the Respondent physicians had adequately investigated J.L.'s medical history and consulted with main treating physicians, instead of providing a false report to the state and the court that contrary to facts on records. J.L. significantly regressed and lost all the abilities he previously had and at age 8 is still in diapers, cannot speak, and screams uncontrollably, sometimes for hours, at any actual or possible separations from his parents. CP 44-61, 405-412. Chen sued police arisen from the same event in federal court who after reviewing the merits of the case, decided to appoint counsel to assist with the litigation. Dorsey & Whitney took the representation (Case No. 2:16-cv-01877 JLR). Chen *pro se* sought legal redress against Respondent physicians and SCH in state court. No guardian ad litem was appointed, two complaints were unsigned, no discovery was conducted. Trial court granted Respondents' pre-disovery summary judgment relying upon 20 pages' medical records[2] but did not state in order if the dismissal was with or without prejudice. Chen moved for clarification but was denied. Chen appealed, perfectioned records on appeal, prepared 45-pages' brief but her appeal later was sua sponte dismissed when sought clarification on Court of Appeals' decision which appeared inconsistent with RAP 10.2 (b). Chen's access to the courts so far had been unsuccessful at both trial court and Court of Appeals.

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[2] SCH declined Chen's access to her child, J.L.'s medical record but submitted 20 pages' records to the court for pre-discovery summary judgment. Chen later obtained J.L.'s 600 pages' full medical record through discovery in federal claim and found Respondents' significant withhold and deceit. For instance, Respondents submitted treatment record of Dr. ***Russel*** Migita to obtain a dismissal order for Respondent ***Darren*** Migita. At the Show Cause Hearing of motion to vacate summary judgment, Chief Civil Judge Ken Schubert believed that this was wrong, and stated that "*I believed that my three colleagues at Court of Appeals will get this fixed.*" but this did not happen because Chen's appeal was sua sponte dismissed.

1. Trial court refused to clarify the ambiguous order issued. Chen appealed seeking an answer at Court of Appeals. (also see Appendix L, *Brief of Appellant* at 9-14)

Chen *pro se* sought legal redress against Respondent physicians for the misdiagnosis and misrepresentation that caused her wrongful prosecution and the one-year wrongful removal of her children. No guardian ad litem was appointed, two complaints were unsigned, Chen's request for Discovery in opposition to summary judgment was denied by trial court [3] who instead granted Respondent physicians' summary judgment against all plaintiffs (including minors) based upon 20 pages' records submitted by Respondents. The order was silent as to whether the dismissal was with or without prejudice.[4] Chen sought clarification that the order be without prejudice due to the absence of appointment of guardian ad litem and the minors' disabilities. Trial court declined to clarify the ambiguity in the order. Chen then appealed.

2. Court of Appeals' decision on December 31, 2018 was inconsistent with RAP 10.2 (b). Chen sought clarification; her appeal was sua sponte dismissed.

Chen's confusion at appeal initiated from Division One's December 31, 2018 decision ruling on her motion to disqualify Respondents' appellate counsel at Smith Goodfriend, P.S. ("Goodfriend") with whom she previously consulted and shared substantial confidential information. Chen moved to disqualify Goodfriend at trial court due to the pending postjudment motion (App. D). Chief Civil Judge Ken Schubert granted Chen's motion disqualifying

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[3] Washington's notice pleading system allows plaintiffs to "use discovery process to uncover the evidence necessary to pursue their claims." ***Putman v. Wenatchee Valley Med. Ctr., P. S.,*** 166 Wn. 2d 974, 983, 216 P. 3d 374 (2009). The ***Putman*** court held, the right to discovery authorized by the civil rules is plaintiffs' right of access to the courts.

[4] CR 41 provides, "Unless otherwise stated in the order of dismissal, the dismissal is without prejudice." This Court should clarify and reaffirm CR 41.

Goodfriend with a finding of RPC 1.9 (a) at trial court on December 12, 2018 (App. E). Respondent physicians did not appeal this decision. Chen moved to disqualify Goodfriend at Court of Appeals for disqualifying Goodfriend as Respondent physicians' appellate counsel. Respondent physicians did not respond (App. F). Chen moved for relief as unopposed. [5] (App. G). Instead of addressing the issue at hand, on December 31, 2018 Court of Appeals entered a ruling staying only respondents' brief, inconsistent with requirement within RAP 10.2 (b). This ruling also directed parties to seek trial court's entry of findings, ignoring the existent finding of RPC 1.9 (a) entered by Judge Schubert. Commissioner also granted staying Respondents' brief, ignoring that Respondent physicians were represented by two law firms while Chen was unrepresented (App. A). Chen moved for clarification staying both sides' brief in light of 30-days' requirement under RAP 10.2 (b), and potential affect from decision on her pending postjudgment motion. Chen contended that staying only one party's brief is not in the interest of justice and fairness (App. H). Division One treated the motion for clarification as motion to modify (App. I). Despite the disagreement, Chen explicitly expressed her willingness to submit her brief (App. J). Instead of addressing issues in motion, Respondents largely misstated facts, alleging Chen did not timely file designation of clerks' papers and brief by selectively providing information to mislead the court [6]. On January 22, Chen moved for an ex parte order to file brief in light of the 30 days' requirement in RAP 10.2 (b) (App. K).

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[5] Chen's motion to disqualify was filed on December 12, 2018, which was the basis for Division One's December 31 ruling on limited remand, staying Respondents' brief. On January 27, 2019, Chen's motion for clarification on December 31 ruling was denied, and her appeal was dismissed at the same time but her December 12, 2018 motion was still pending before Division One.

[6] By withholding July 6 Ruling, Respondent physicians (falsely) alleged Chen did not timely file designation of clerks' papers and statement of arrangement. This is wrong. Division One confirmed that, "[t]he designation of clerk's paper is due August 10, 2018.". (App. N). Chen's submission was on August 10, 2018 (App. O).

On January 24, instead of addressing issues in Chen's motion, Court of Appeals sua sponte dismissed her appeal claiming the decision was based on Respondent physicians' misstatements (which were *irrelevant* to Chen's motion) in their responsive pleading. Chen's 45 pages' brief was filed on the same day (App. L). Chen moved for reconsideration arguing that she made good faith efforts to comply with the court's directive; the dismissal was unjustified because Respondents did not meet the threshold requirement in RAP 18.9 (c) for a showing of "abandoned and frivolous appeal", and Respondent Seattle Children's Hospital ("SCH") did not even seek relief dismissing her appeal. Chen requested that decision be made on the merit of the case and reinstate her right to appeal (App. M). Division One denied Chen's reconsideration.

3. Chen was confused by Division Ones' two decisions entered on December 14, and December 31, 2018. Chen was further confused by the inconsistency between December 31, 2018 decision and RAP 10.2 (b). Division One did not provide clarification but sua sponte dismissed Chen's appeal.

On December 14, 2018, in denying Chen's motion staying appeal pending her postjudgment motion before trial court, Division One ordered Chen to submit her brief on January 14, 2019 (*did not grant staying Respondents' brief).* On December 31, 2018, Division One entered a new decision, *granting staying Respondents' brief*. Chen was confused this decision was contrary to the 30-day requirement as set in RAP 10.2 (b). Chen believed that the December 31, 2018 decision superseded the December 14, 2018 decision because it was more recent, in addition to its addition and modification on terms. Chen sought clarification which was treated as modification. Division One did not address Chen's request but sua sponte dismissed her appeal, where Chen *pro se* perfectioned records on appeal, and prepared 45 pages' brief. In its order, Court of appeals states that the dismissal was "due to [Chen's] failure to *comply with,* or seek review of, this Court's December 14, 2018 order [to submit brief]…" (emphasis

added). This conclusion was not supported by a review of the whole record. Instead, Chen has demonstrated good faith in trying to comply with the order by requesting instruction to submit her brief. Specifically, Chen wrote,

> "if this Court decides that Appellants' understanding is incorrect and requires that Appellants need to submit their brief immediately, *Appellants will abide by the directive*, but respectfully request that this Court provide a detailed instruction that Appellants' brief will not disclose to Respondents at an earlier time, so that only 30 days are permitted for their response, consistent with RAP 10.2 and under Appearance of Fairness Doctrine." (emphasis added)

Appellants' Reply in support of their motion to modify filed on 1/17/2019, at P. 9, App. J.

Chen also wrote,

> "If this Court modifies Commissioner's Ruling to stay Appellants' brief as argued above, this issue is moot, and this Court need not reach this request for ex parte order to file brief. But if not, then on this motion, Appellants present to this Court that while motion to modify is pending before this Court, Appellants are willing to abide by this Court's Order and ready to submit their brief, the only relief sought is an ex parte order to file their brief so that their brief will not be disclosed to Respondents in more than 30 days, pursuant to RAP 10.2. Appellants can send their brief to the clerk and/or case manager, instead of filing online upon the grant on the motion."

Appellants' Request for ex parte order to file brief (supplemental submission re: motion to modify) at P. 3. App. K This filing was displayed adversely as "motion to extend time to file". Chen requested a correction on the docket error (App. P).

Chen moved for reconsideration on the dismissal, making the following arguments:

(1) RAP 18 (c) did not support dismissing appellants' good faith appeal, the dismissal was inconsistent with this Court's decision in ***state v. Ashbaugh***, 90 wn. 2d 432, 438, 583 P. 2d 1206 (1978);

(2) As a threshold matter, Respondent physicians did not meet the requirement of RAP 18.9 (c) of filing a motion to dismiss Appellants' appeal and further failed to show this is an "abandoned"

and frivolous appeal. Court of appeals lacked authority to sua sponte dismiss in favor of Respondent SCH since it did not seek relief dismissing appeal; and

(3) RAP 10.2 (i) only permits imposing sanctions (instead of dismissal) for untimely brief. ***State v. Blum***, 121 Wn. App. 185 P. 3d 373 (2004). "Typical sanctions are a fine or compensatory award." ***Ashbaugh***, 90 Wn. 2d at 438. See, Appendix M. *Appellants' motion for reconsideration*. Division One denied the motion for reconsideration. Chen petitioned for review.

E. WHY THIS COURT SHOULD ACCEPT FOR REVIEW

Review is merited here under RAP 13.4 (b)(1), (3) & (4) and RAP 13.5 because Division One's decisions are contrary to decisional law on the question of whether a good faith appeal absent of showing abandoned and frivolous should be dismissed without hearing the merits and whether Court of Appeals improperly exceeded its statutory authority under RAPs in sua sponte depriving a non-English speaking *pro se* of her right to appeal absent of showing a "voluntary, knowing, intelligent" waiver, completely ignoring her good faith efforts.

1. Division One's sua sponte dismissal exceeds its RAP authority, conflicts with this Court's decision in ***Bosteder***, violates appellants' due process rights, and raises an issue of substantial public interest that this Court should decide. RAP 13.4 (b) (1), (3) &(4), RAP 13.5.

Since 1976, the Washington Rules of Appellate Procedure (RAP), as the only effective court rules governing appellate procedure, provides the appellate courts with authority to review and decide appeals within its jurisdiction. Accordingly, appellate courts are required to comply with rules and guidelines in RAPs "[b]ecause courts 'have no inherent authority to [render judgment], they must rely on an authorizing statute or court rule.' " ***Bosteder v. City of Renton,*** 155 Wn.2d 18 , 117 P.3d 316 (2005) (citing ***City of Seattle v. McCready***, 123 Wn.2d 260, 272-76, 868 P.2d 134 (1994). In ***Pearce***, this Court held an order void, as being in excess of a court's jurisdiction,

when a trial court exceeds its statutory authority, ***Pearce v. Pearce***, 38 Wn. 2d 918, 922-23, 226 P.2d 895 (1951). In ***Bosteder***, this Court held that courts are required to "effectuate legislative intent" and "take into account all of the text in the statute that help discern legislative intent." Also, ***Sievers v. City of Mountlake Terrace***, 97 Wn. App. 181, 183, 983 P.2d 1127 (1999) (Division One held "[t]his court is obliged to give full effect to the plain language of the statute."). Legislative intent of RAP is to "promote justice and facilitate the decision of cases on the merits", RAP 1.2 (a), and to respect "appeal is a matter of right" RAP 6.1 & RAP 2.2.

First, RAP 18.9 does not authorize Division One's decision in this case. Consistent with the legislative intent of respecting "appeal is a right", RAP 18.9 (b) and 18.9 (c) specify grounds and requirements for dismissing appeal. RAP 18.9 (b) provides that an appellate court will, "on 10 days' ***notice***", dismiss an appeal if a party fail to timely file a notice of appeal, notice of discretionary review, motion for discretionary review of a decision, petition for review, or motion for reconsideration. And RAP 18.9 (c) allows the appellate court to dismiss an abandoned or frivolous appeal "on ***motion*** of a party." Requirements in RAP 18.9 (b) (notice) and RAP 18.9 (c) (motion) are consistent with Due Process that requires notice and meaningful opportunity for genuine adverseness and qualify advocacy through a motion and/or hearing.

But here, Division One's decision largely failed to meet the threshold requirement as set in RAP 18.9 (c): 1) none of the Respondents filed a RAP 18.9 (c) *motion* seeking relief (Respondent SCH did not even submit any response to Chen's motion); 2) There is no evidence to support that Chen abandoned the appeal. There is *no dispute* that Chen *pro se* perfectioned records for appeal and prepared 45 pages' brief within minutes as the dismissal order, and she made good faith efforts by seeking clarification. Failure to meet the required condition for issuing order renders judgment invalid. For example, a permanent protection order cannot issue

without the required finding, the issuing court exceeded its statutory authority when it issued the permanent protection order. "The failure to make such a finding is fatal to the validity of the order." ***State v. Dep't of Pub. Works***, 164 Wash. 237, 242, 2 P.2d 686 (1931). Here, because dismissal cannot issue without a showing of abandoned and frivolous appeal, Division One exceeds its statutory authority for failing to meet the threshold requirements as set in RAP 18.9, rendering the order invalid. Division One's sole reliance on Respondent physicians' *misstatement (irrelevant* to Chen's motion) absent of genuine adverseness from the affected party further violates Chen's Due Process Right.

Second, RAP 10.2 also does not authorize dismissing appeal on grounds of untimely brief. Division One stated in its order that the dismissal was due to Chen's failure to timely file the brief. This is wrong. There is *no dispute* that Chen's brief was well ready prior to the dismissal, and she *repeatedly* asked to file the brief but was not afforded such an opportunity (App. J & K). Even it is true that Chen did not timely file brief, RAPs still does not authorize appellate court to dismiss her appeal. RAP 10.2 governs the time for filing briefs. RAP 10.2 (i) states that "[t]he appellate court will ordinarily impose sanctions under rule 18.9 for failure to timely file and serve a brief." ***State v. Blum,*** 121 Wn. App 1, 85 P.3d 373 (2004). "Typical sanctions are a fine or compensatory award." ***State v. Ashbaugh,*** 90 Wn. 2d 432, 438, 583 P.2d 1206 (1978).

If the plain language of the court rule is unambiguous, we must give effect to that meaning. ***North Coast Elec. Co. v. Signal Elec., Inc.,*** 193 Wn. App. 566, 571, 373 P.3d 296 (2016). Here, languages in neither RAP 18.9 nor RAP 10.2 authorize Division One's dismissal in this case. The drafters' intent of RAPs is to "promote justice and facilitate the decision of cases on the merits", RAP 1.2 (a), to respect "appeal is a matter of right" RAP 2.2, and "reach the substance of matters so that it prevails over form." ***Weeks v. Chief of Washington State Patrol,*** 96 Wn. 2d

893, 639 P.2d 732 (1982). As held by this Court in ***Bosteder*** that the judgment invalid absent statute or court rule authorization. This Court should accept review of two important issues of first impression: Whether Division One's sua sponte dismissal absent RAPs authorization was invalid and whether Division One's sua sponte dismissal violated Chen's due process rights vested under RAP 18.9.

2. Division One's sua sponte decision improperly deprives appellant of right to appeal, conflicts with Court's long-standing decisions in ***Sweet***, ***White, Ashabugh*** and ***Scannell,*** and raises an issue of substantial public interest that this court should decide. RAP 13.4 (b) (1), (3) &(4).

As noted *supra*, appeal is a matter of right. e.g., ***State v. Sweet,*** 90 Wn. 2d 282, 286, 581 P.2d 579 (1979) (appeal is a constitutional right); ***Streater v. White,*** 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn. 2d 1014 (1980) ("a civil appellant has a right to appeal under RAP 2.2"). In ***Ashbaugh***, this Court held, "It must be remembered, however, that the right to appeal is a constitutional right. Consequently, any waiver of that right via the alleged abandonment of an appeal must be knowing, intelligent and voluntary." (internal citation omitted). "Waiver is the "act of waiving or intentionally relinquishing or abandoning of a known right or privilege." Webster's Third New International Dictionary 2570 (2002). When this right is involved, the asserted party is required to bear the burden to prove "an intentional relinquishment or abandonment." ***Johnson v. Zerbst***, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). But here, Chen did not waive her right to appeal.

Division One's decision also conflicts with this Court's long-standing rule of being lenient to the good faith/innocent mistakes. For example, in ***Ashbaugh***, this Court declined to dismiss the appeal when "the rules were confusingly worded" and "the mistakes were made in good faith". This Court applies leniency to good faith mistake to a *pro se* litigant. ***Scannell v. State***, 128 Wn.

2d 829, 831-32, 912 P2d 489 (1996). This Court was also lenient to the assistant attorney general, "the most sophisticated and experienced litigant". In ***re Pers. Restraint of Fero***, 190 Wn. 2d 1, 409 P.3d 214 (2018). In ***Scannell,*** for example, a *pro se* litigant filed a notice of appeal six weeks late due to confusion over recent changes to the Rules of Appellate Procedures. This Court reversed the Court of Appeals' decision dismissing the appeal, due to the following consideration. The Court found that the *pro se* litigant's confusion over recent amendments to the Rules of Appellate Procedures contributed to the delay in filling. 128 Wn. 2d at 834. Second, the *pro se* litigant's failure to timely file was an "innocent mistake." *Id.* Third, the *pro se* litigant made a good faith effort to comply. *Id*. Finally, the "end result [of dismissal] is drastic." *Id*.

Here, Chen was a *pro se* with language barriers. Like ***Scannell***, Chen made good faith efforts to comply with the court's directive. There is *no dispute* that Chen was confused by Commissioner's ruling staying one brief and 30-days' requirement in RAP 10.2. There is also *no dispute* that her 45-pages' brief had been prepared prior to the dismissal (largely complied with Division One's December 14, 2018 order), therefore absent the confusion caused by the later Commissioner's ruling, Chen would have submitted her brief. In viewing the record as a whole, Chen made a good faith effort compliance while the end result of dismissal was drastic. Dismissal "is an extraordinary remedy" and should "only as a last resort". ***City of Seattle v. Holified,*** 170 Wn.2d 230, 240 P.3d 1162 (2010). This court has stated unequivocally that trial court should consider "intermediate remedial steps" before ordering the extraordinary remedy of dismissal. *Id*. Here, Court of Appeals' sua sponte dismissal has departed from the accepted and usual course of judicial proceedings.

Division One's decision fails to respect legislative intent that appeal is a matter of right, wrongly dismissed Chen's appeal absent of "knowing, intelligent and voluntary" waiver,

conflicts with this Court's decisions. This Court should accept for review under RAP 13.4 (b) (1), (3) and (4).

3. Court of Appeals and trial court's refusal and failure to provide a clear order to the persons bound to the judgment violates their constitutional rights to access to the courts, and raises a significant constitutional question that this Court should decide RAP 13.4 (b) (1), (3) & (4).

Procedural Due Process requires "no individual should be bound by a judgment affecting his or her interests where he has not been made a party to the action." ***Hayward v. Hansen,*** 97 Wn.2d 614, 617, 647 P.2d 1030 (1982). Similarly, no individual should be bound by a judgment affecting his or her interests where the judgment was not made clear to him. A party's right to access justice is not only substantial, it is fundamental, ***Tennessee v. Lane***, 541 U.S. 509, 524, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). The U.S. Supreme Court held that the access must be "meaningful". Similarly, Article I, Section 10 of the Washington Constitution provides that access to the courts is a fundamental right in Washington. A meaningful access means barriers-free access. This right is materially affected when a disability (*e.g.*, language barriers) prevents a party from having equal, meaningful, and full access, and the court fails to provide a reasonable accommodation. See *Id*.; see also GR 33 cmt. 1. Washington Access to Justice Board wrote, "When justice is inaccessible, the simple result is injustice. The need to eliminate barriers preventing access to our courts is real and immediate." ***Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts*** (2006) [7]. Language barrier is one of the recognized disabilities that affects litigator's meaningful access to the courts. GR 11, RCW 2.42. Under Title II of the ADA and WLAD, public entities like the Courts must conduct an

[7] Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts (2006), online at https://www.kingcounty.gov/~/media/exec/civilrights/documents/WA courtaccess.ashx

individualized inquiry to determine whether a disability-related accommodation or modification is reasonable under the circumstances**.** ***Duvall v. Kitsap***, 260 F. 3d 1124, 1137-38 (9th Cir. 2001) (Stating, in a case where an individual requested an accommodation from a court for his hearing impairment, the ADA requests the Court to do an individualized and fact-specific evaluation of the effects of the applicant's disability on the ability to represent him or herself at hearing by qualified experts).

Here, trial court issued an ambiguous order dismissing Chen's claims (including minors), being silent in language as to whether it is a dismissal with or without prejudice. As a *pro se* with language barrier, Chen was reasonably expected to seek clarification. Trial court did not provide a clarification relief. Chen was therefore forced to go through an extremely difficult journey at Court of Appeals seeking clarification. This is not in the interest of judicial economy. ***Alwood v. Harper***, 94 Wn. App. 396, 400-01, 973 P.2d 12 (1999) (Judicial economy favors correction of mistakes as early as possible, before costly and time-consuming appeals begin).

Our court system is defined as the central mechanism for the orderly resolution of disputes that arise between citizens and between citizens and the government. ***Carter v. University,*** 85 Wn. 2d 391, 536 P.2d 618 (1975)**.** But Chen's concerns were never addressed, from trial court to Court of Appeals. As a party bound to the judgment, she is entitled to a clear judgment to ensure a "meaningful" access to the courts, particularly at trial court in the interest of judicial economy. The trial court's unclear, ambiguous order had already triggered two years' disputes and ongoing litigation. This Court should accept for review to address this significant constitutional question.

4. Division One's decision on only staying brief of Respondents ignores the RAP 10.2 (b) timeliness requirement, violates fundamental fairness, and departed from the accepted and course of judicial proceeding that this Court should address. RAP 13.5 (b)(3)

Fundamental fairness is deeply rooted in the U.S. justice system. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." ***Marshall v. Jerrico, Inc.,*** 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). The United States Supreme Court has expressed the right to a "fair trial in a fair tribunal," ***Withrow v. Larkin***, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (internal citation omitted).

Similarly, Washington courts have long recognized the importance of fairness in courtroom. As this Court held over a century ago, "[t]he principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts." ***State ex rel. Barnard v. Bd. of Educ.,*** 19 Wash. 8, 17, 52 P. 317 (1898). Washington's Appearance of Fairness Doctrine not only requires a judge to be impartial, "it also requires that the judge *appear* to be impartial". ***State v. Madry,*** 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); ***State v. Finch,*** 137 Wn.2d 792, 808, 975 P.2d 967 (1999). The ***Madry*** court held, "our system of law has always endeavored to prevent even the probability of unfairness.'" (quoting ***In re Murchison,*** 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Within a year following the decision in ***Madry***, Washington Supreme Court adopted the Code of Judicial Conduct ("CJC"), requiring judicial officers to "act at all time in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary." Similarly, in ***Tatham v. Rogers***, 170 Wn. App. 76, 283 P. 3d 583 (2012), Division Three held, "Fairness of course requires an absence of actual bias .. our system of law has always endeavored to prevent even the probability of unfairness.' (internal citation omitted). The consequence of Appearance of Fairness Doctrine in the legal system could be substantial as held by ***Mardy,***

> The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

Like the protections of due process, Washington's Appearance of Fairness Doctrine seeks to prevent the problem of a biased judicial officer. To better assess Division One's December 31, 2018 decision, the following questions are accordingly raised:

(1) Does it *appear* to be fair to stay brief of *only* one party? Does it *appear* to be fair to stay brief of the party who was represented by two law firms, but the other party was unpresented? Does it *appear* to be fair to *only* stay brief of the party whose counsel was adjudicated to having obtained confidential information from the other side? Does it appear to be fair when the decision did not even meet the basic requirement as set within RAP 10.2 (b)?

(2) Does it *appear* to be unfair to refuse to stay brief for both sides? Does it *appear* to be unfair to refuse to also stay brief for the party who was unrepresented but stay the party who was represented by two firms? Does it *appear* to be unfair to refuse to stay brief for the party who was the victim of Attorney-Client Privilege but stayed the party who was the beneficiary of Attorney-Client Violation to the other side?

There is *no dispute* that Chen was the victim of the attorney-client privilege violation but was denied staying brief; while Respondent physicians were the beneficiary of this violation but were awarded staying brief. There is also *no dispute* that Chen was unpresented but Respondent physicians were represented by two firms (so Respondent physicians' interest will never be affected even if Smith Goodfriend was disqualified). A decision satisfies the Appearance of

Fairness Doctrine only if a reasonably prudent and disinterested person conclude that the decision is "fair, impartial and neutral". ***State v. Bilal,*** 77 Wn. App. 720, 722, 893 P.2d 674 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts." ***Sherman v. State,*** 128 Wn.2d 164, 205, 905 P.2d 355 (1995),128 Wn.2d at 206 (quoting ***In re Drexel Burnham Lambert Inc***., 861 F.2d 1307, 1313 (2d Cir. 1988)). Here, a reasonable person would have agreed that it appears to be fair to stay brief of both sides instead of only one side *even when both sides were similarly situation*. When examining the facts in a deeper level, a reasonable person would have agreed that it appears fair for staying the brief for unpresented instead of the represented, if only one-sided stay is allowed. Under such circumstances, a reasonable person would have concluded: **First,** staying appellants' brief will not prejudice Respondents because Respondents are always guaranteed 30-days' preparation under RAP 10.2 (b). But if staying only respondents' brief appellants would inevitably suffer prejudice because Respondents may benefit *more than* 30-days' preparation. **Second,** even Division One refused to also stay Chen's brief, a reasonable person would have expected an opportunity be provided for Chen to submit her prepared 45-pages' brief instead of sua sponte dismissing her appeal, particularly given the facts that Chen did not abandon her appeal but acted in good faith: Chen *pro se* perfection record on August 10, 2018 under Division One's July 6 ruling; and prepared 45-pages brief. Under the "reasonable person" standard, Chen should have been afforded (but haven't) an opportunity to be heard. **Third,** Division One's decision also directly conflicts with timeliness requirement in RAP 10.2 (b) ("The brief of a respondent in a civil case should be filed with the appellate court within 30 days after service of the brief of appellant or petitioner."). If the plain language of the court rule is unambiguous, we must give

effect to that meaning. ***North Coast Elec. Co. v. Signal Elec., Inc.,*** 193 Wn. App. 566, 571, 373 P.3d 296 (2016). Here, the language within RAP 10.2 (b) unambiguously imposes 30 days' requirement for respondents' brief. Instead of following "30-days" requirements in RAP 10.2 (b), Division One's December 31, 2018 decision creates a rule for providing Respondents over "30-days" to review and prepare brief, departing from the usual course of judicial proceedings.

"Court rules are interpreted in the same manner as statutes." ***North Coast Elec. Co. v. Signal Elec., Inc.,*** (quoting ***Jafar v. Webb***, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013)). "The purpose of statutory interpretation is to determine and give effect to the legislature's intent***." In re Marriage of Persinger***, 188 Wn. App. 606, 609, 355 P.3d 291 (2015). The Legislature's intent of RAPs was to "promote justice and facilitate the decision of cases on the merits." RAP 1.2 (a), and to respect "appeals is a matter of right". RAP 2.2, RAP 6.1. Division One's December 31, 2018 decision creates a new rule that improperly prejudices appellants, and negatively affects fundamental fairness. This Court should reverse.

5. <u>The cumulative effect of the above errors, in addition to unconstitutionality of RAP 18.9, requires review</u>

Appeal is a matter of right therefore the courtroom fairness is particularly critical at appellate level. When Commissioner only stayed brief of Respondents represented by two law firms but denied staying brief of *pro se* Appellants with non-English speakers, it *appears* to be unfair. It goes further when Court of Appeals sua sponte dismissed Chen's appeal on her motion seeking clarification on Commissioner's ruling. RAP 10.2 (b) provides Respondents 30 days' guarantee so even only staying Appellants' brief, Respondents suffer no prejudice, but not vice versa.

"Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the [Fourteenth [A]mendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." ***State v. Coria***, 120

Wn.2d 156, 169, 839 P.2d 890 (1992) (citing ***State v. Schaaf***, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. ***Zobel v. Williams,*** 457 U.S. 55, 60, 102 S. Ct. 2309, 72 L. Ed.2d 672 (1982). Here, Appellants' rights are not well protected under current version of RAP. For example, RAP 18.9 (c) permits the Court of Appeals to enter the most severe punishment, *i.e.*, dismissal against Appellants but no equivalent level of punishment provided against Respondents such as reversal relief for Appellant. This omission renders RAP 18.9 unconstitutional under Equal Protection Clause.

F. CONCLUSION

This Court should accept review to examine the important issues of first impression whether Court of Appeals' sua sponte dismissal exceeds its RAPs-authority, rendering its decision invalid and whether the ambiguous orders undermines Chen's rights to a meaningful access to the courts under Washington Constitution.

DATED this 22nd of April 2019

Respectfully submitted,

/*s/ Susan Chen*

Susan Chen, *pro se* petitioner
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CERTIFICATE OF SERVICE

I, Susan Chen, declare that on the 22nd day of April, 2019. I did send a true and correct copy of ***Amended Petition for Review*** to the following parties by the method indicated:

Bruce W. Megard, Jr. David M. Norman Bennett Bigelow & Leedom P.S. 601 Union Street, Suite 1500 Seattle, WA 98101-1363 bmegard@bbllaw.com dnorman@bbllaw.com	[ ] Hand Delivery [ ] U.S. Mail, postage prepaid [ ] Overnight Mail [ ] Facsimile [X] Via ECF/Electronic Mail
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DATED this 22nd of April, 2019

/s/ Susan Chen

Susan Chen, *Pro Se* Petitioner

P.O. Box 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

April 22, 2019 - 4:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97015-7
Appellate Court Case Title:	Susan Chen & Naixiang Lian v. Darren Migita MD, et al.
Superior Court Case Number:	16-2-26013-6

The following documents have been uploaded:

- 970157_Exhibit_20190422154756SC715094_6305.pdf
  This File Contains:
  Exhibit
  The Original File Name was appendices.pdf
- 970157_Petition_for_Review_20190422154756SC715094_6508.pdf
  This File Contains:
  Petition for Review
  The Original File Name was amended petition for review.pdf

A copy of the uploaded files will be sent to:

- Rando@jgkmw.com
- andrienne@washingtonappeals.com
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Comments:

This amendment was submitted pursuant to Deputy Clerk ruling dated on March 29 to incorporate arguments from motion for discretionary review. However, Petitioner still believed it is more appropriate to file motion for discretionary review therefore her motion to modify ruling seeking permission to file motion for discretionary review was before this Court.

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Note: The Filing Id is 20190422154756SC715094

No.97015-7

SUPREME COURT

OF THE STATE OF WASHINGTON

NO.77522-7-I

COURT OF APPEALS, DIVISION I

OF STATE OF WASHINGTON

SUSAN CHEN as parent and natural guardian of J.L., a minor and L.L., a minor, and Naixinag Lian, as parent and natural guardian of J.L., a minor and L.L., a minor

Appellants

v.

DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D., SEATTLE CHI'DREN'S HOSPITAL, REDMOND CITY POLICE DEPARTMENT, DETECTIVE NATALIE D'AMICO, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND

Respondents

APPENDICES TO AMENED PETITION FOR REVIEW

Susan Chen, *Pro Se* appellant

PO BOX 134, Redmond, WA 98073

Telephone: (323)902-7038

APPENDICE TO PETITION FOR REVIEW

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submission re: motion to modify) was mistakenly displayed in docket as "Motion to extend time to file"	
Chen's 9/6/2018 Amended Motion to vacate Summary judgment orders	Appendix Q
Chen's 9/1/2018 Declaration (review on J.L.'s 600 pages' medical records)	Appendix R
Declaration of John Green III, M.D.	Appendix S
Declaration of Twyla Carter, WSBA No. 39405	Appendix T

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 77522-7-I
Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on December 31, 2018:

"Susan Chen, pro se, appeals from a summary judgment dismissal of her claims against several doctors at Seattle Children's Hospital. At issue is Chen's motion to disqualify responding doctors' appellate counsel and the entire firm (Smith Goodfriend, P.S.) from this appeal for alleged conflicts of interest. Respondents Dr. Darren Migita, Dr. Ian Kodish, and Dr. James Metz filed a motion to confirm their counsel's representation in this case.

Chen has filed a motion to disqualify Smith Goodfriend, P.S. in the trial court as well. The trial court ordered the firm not to disclose any confidential information obtained from Chen to any party, including their counsel. The trial court stated that whether the firm can properly serve as appellate counsel in this Court is for this Court to decide.

There is a factual dispute on Chen's conflict of interest claim. She asserts that she consulted with three attorneys from Smith Goodfriend, P.S. "by phone and/or by email" and shared her privileged confidential information about this case. Attorneys Ian Cairns, Howard Goodfriend, Catherine Smith, and Valerie Villacin of the firm submitted declarations disputing Chen's assertions. The firm could identify only a single phone conversation between Chen and attorney Cairns and produced an email exchange between the two. The firm states Chen did not divulge any confidential information, did not send trial court orders on appeal to the firm, and did not even disclose the adverse parties in the case. The firm states that although Chen's brief conversation with attorney Cairns does not establish an attorney-client relationship, the firm has effectively screened attorney Cairns from the case.

This Court ordinarily does not resolve factual disputes. This matter will be remanded to the trial court to make factual findings on the disputed issues regarding the conflicts of interest. However, this limited remand will not affect or change the January 14, 2019 deadline for Chen to file appellant's brief set by a panel of this Court in the December 14, 2018 order. Under this Court's December 14, 2018 order, Chen's failure to file the brief by January 14, 2019 will result in dismissal of this appeal. The remand is limited to respondents' counsel's representation in this Court. During this limited remand, the deadline for filing the brief of respondent will be stayed. The parties shall promptly request the trial court to determine the issue and file a status report in this Court by February 4, 2019."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

c: Honorable Ken Schubert

SSD

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SUSAN CHEN as parent and natural guardian of J[redacted] L[redacted], a minor, and L[redacted] L[redacted], a minor, and NAIXIANG LIAN, as parents and natural guardian of J[redacted] L[redacted], a minor, and L[redacted] L[redacted], a minor, Appellants, v. DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D., SEATTLE CHILDREN'S HOSPITAL, REDMOND CITY POLICE DEPARTMENT, DETECTIVE NATALIE D'AMICO, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND, Respondents.	No. 77522-7-I ORDER DENYING MOTIONS TO MODIFY AND DISMISSING APPEAL

Appellants have filed a motion to modify the commissioner's December 31, 2018 ruling remanding her motion to disqualify counsel and Respondents' motion to confirm counsel's representation for resolution of factual disputes. Respondents have filed an answer seeking modification of the same ruling. They also move to dismiss Chen's appeal due to her failure to comply with, or seek review of, this court's December 14, 2018 order warning that failure to file the opening brief by January 14, 2019 "will result in dismissal of the appeal." We have considered the motions under RAP 17.7 and have determined that the motions to modify should be denied and the appeal should be dismissed. Now, therefore, it is hereby

No. 77522-7-I/2

ORDERED that the motions to modify the commissioner's December 31, 2018 ruling are denied; and it is further

ORDERED that the appeal is dismissed for failure to comply with this court's order dated December 14, 2018.

Done this 24th day of January, 2019.

Leach, J.

APPENDIX C

FILED
2/27/2019
Court of Appeals
Division I
State of Washington

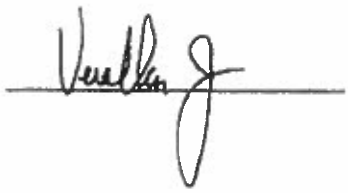
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

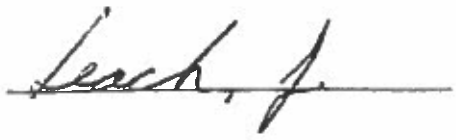
SUSAN CHEN as parent and natural guardian of J[redacted] L[redacted], a minor, and L[redacted] L[redacted], a minor, and NAIXIANG LIAN, as parents and natural guardian of J[redacted] L[redacted] a minor, and L[redacted] L[redacted], a minor, Appellants, v. DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D., SEATTLE CHILDREN'S HOSPITAL, REDMOND CITY POLICE DEPARTMENT, DETECTIVE NATALIE D'AMICO, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND, Respondents.	No. 77522-7-I ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING MODIFICATION AND DISMISSING APPEAL

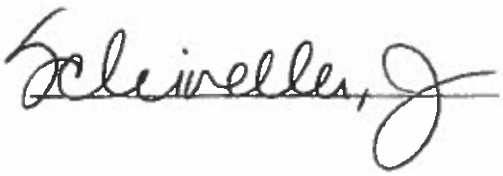
Appellants filed a motion for reconsideration of the court's January 24, 2019 order denying motions to modify the commissioner's December 31, 2108 ruling and dismissing this appeal for failure to comply with the court's December 14, 2018 order. Consistent with RAP 12.4(a), the court has determined the motions should be denied.

Now, therefore, it is hereby

ORDERED appellants' February 13, 2019 motion for reconsideration of the court's order denying modification and dismissing this appeal are denied.







APPENDIX D

THE HONORABLE KEN SCHUBERT

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

SUSAN CHEN, et al.,

Plaintiffs,

vs.

DARREN MIGITA, et al.

Defendants.

CASE NO. 16-2-26013-6 SEA

PLAINTIFFS' MOTION TO RECUSE SMITH GOODFRIEND, P.S. FROM THE CASE

I. RELIEF REQUESTED

Pursuant to Washington Rules of Professional Conduct ("RPC") 1.18; 1.7; RCW 5.60.060, Plaintiffs Susan Chen and Naixiang Lian respectfully move this Court for an Order to disqualify Smith Goodfriend, P.S ("Goodfriend") from representing Defendants Darren Migita, James Metz and Ian Kodish ("defendant physicians") of the current case and prohibiting it from any participation and involvement in the above-captioned matter because conflicts of interests are present and because it is required by laws. Plaintiffs further requested this Court enters an Order sealing any communication with Goodfriend (if such record is required to submit by this Court) under Attorney-Client Privilege. Plaintiffs also request this Court continue the hearing and briefing schedules for Motion to Vacate to allow Plaintiffs an opportunity to work out some remedial strategies for the Attorney-Client privilege violation.

Since early 2018, Ms. Chen consulted multiple times with three attorneys from Smith

Goodfriend ("Goodfriend") on the current case. by phone and/or by email. During these consultations, legal advice was sought and received and cases were discussed in depth. Due to the conflicts of interest, Goodfriend thus should be precluded from representing an adverse party, Defendant physicians of the current case. RPC 1.18 (b) and (c). If allowing Goodfriend to represent defendant physicians, attorney-client privilege is violated; Plaintiffs' interests will be significantly and adversely affected. Plaintiffs therefore respectfully request this Court disqualify Goodfriend's representation, prohibit any involvement and participation in this case at trial court.

II. STATEMENT OF FACTS

The current case was dismissed on March 3, 2017. Plaintiffs subsequently filed Notice of Appeals which was initially not accepted by Court of Appeals due to the other pending claims under the same caption. Plaintiffs later voluntarily dismissed all the remaining claims and filed a second appeal which is currently pending before Court of Appeals. *Pro se* Plaintiffs had been looking for potential representation for appeals and had been consulting with some attorneys and/or law firms. One of the law firms Plaintiffs consulted is Smith Goodfriend who has five lawyers (four partners and one associate).

As stated in Chen Decl., Since early 2018, Plaintiffs had multiple direct conversation with attorneys in Goodfriend for the purposed of seeking potential legal representation on appeals on the above captioned matter. Due to trust in attorneys and belief in Attorney-Client Privilege, Plaintiffs had been candid in sharing detailed information of the case and seeking legal advice from Goodfriend. The discussion includes pros and cons of the case, expected goal for the appeal, etc. On November 26, 2018, without any prior disclosure and without seeking consent from the Plaintiffs who had actually engaged heavily with Goodfriend through multiple consultation, Goodfriend filed Notice of Association on behalf of Defendants Darren Migita, James Metz, and Ian Kodish for purposes of Appeal.

On November 27, Ms. Chen sent an email (ccing affected parties/plaintiffs including Mr. Jason Anderson and Mr. Naixiang Lian) formally informing Goodfriend of the conflicts of interests and requested them promptly withdraw from the case. On November 28, Goodfriend responded *only* to Ms. Chen, acknowledging only some communication with Ms. Chen but arguing that the communication "are not privileged" and cannot create "expectation of confidentiality". Goodfriend agreed to withdraw Mr. Cairns (partner) but substituted Ms. Victoria Ainsworth (associate) of the same firm, and Sustitution was filed with both this Court and Court of Appeals.

Currently, Plaintiffs' CR 60 Motion to vacate orders and judgments were pending before this court and their appeals before Court of Appeals. Plaintiffs' interests will be significantly jeopardized if allowing Goodfriend's improper and unethical involvement with Defendants in the current litigation since through detailed consultation, Goodfriend learned pros and cons of the case as well as Plaintiffs' expected goals for the litigation, etc provided directly by Plaintiffs due to their trust and confidence in lawyers' highest possible degree of ethical conduct. With these information, Plaintiffs' interests will signficantly harmed and prejudiced.

III. EVIDENCE RELIED UPON

Declaration of Susan Chen and Naixiang Lian (and exhibit) in Support of Plaintiffs' Motion to recuse Smith Goodfriend from the case.

IV. DISCUSSION

A. Lawyers are required by law to "maintain the highest standards of ethical conduct".

Attorney-client relationship is critical in litigation. The attorney is required by laws to undertake the duties of a fiduciary to the client, bound to act with utmost fairness and good faith toward the client in all matters. *E.g.*, Perez v. Pappas, 98 Wn.2d 895, 840-41, 659 P.2d 475 (1983) (attorney

owes highest duty to the client); *VersusLaw v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, III P.3d 866 (2005)("highest duty"); *In re Beakley*, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940) ("one of the strongest fiduciary relationships known to the law"); *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977) ("'the punctilio of an honor the most sensitive'"); and *Van Nay v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 798 n. 2, 16 P.3d 574 (2001) (Talmadge, J., concurring) ("the law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them"). This fiduciary relationship between attorney and client is neither new, nor unique to Washington. Sir Francis Bacon thus wrote:

'[t]he greatest Trust, between Man and Man, is the Trust of Giving Counsell. For in other Confidences, Men commit the parts of life; their Lands, their Goods, their Children, their Credit, some particular Affaire; .But to such, as they make their Counsellors, they commit the whole: By how much the more, they are obligated to all Faith integrity. ", [1]

Attorney-client privilege statute

A litigant has a statutory right to attorney-client privilege. RCW 5.60.060 (2)(a) provides the rule in Washington:

> An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

As recognized by Washington Supreme Court in *Pappas v. Holloway*, "the attorney-client privilege is statutory in nature". Supreme Court wrote, "The central purpose of the rule is to encourage *free* and *open* discussion between an attorney and his client by assuring the client that

---

[1] *Ween v. Dow*, 35 A.D.3d 58, 822 N.Y.S.2d 257, 261 (2006), *quoting*, The Essays or Counsels, Civill and Morall 63 (Kierman ed. Oxford Univ. Press 1985), quoted in, Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship*, 43 Am. Bus. L.J. 173,244 (2006).

his information will not be disclosed to others either directly or indirectly". 114 Wn. 2d 198 (1990) 787 P. 2d 30. See, also, *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983).

The purpose of the attorney-client privilege "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others.'" *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404, 706 P.2d 212 (1985) (quoting *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983)); see also *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681, 16 A.L.R.3d 1021 (1964). The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents which contain a privileged communication. *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 517-18, 618 P.2d 1330 (1980), aff'd, 96 Wn.2d 416, 635 P.2d 708 (1981).

This same privilege afforded the attorney is also extended to the client under the common law rule. *State v. Emmanuel*, 42 Wn.2d 799, 815, 259 P.2d 845 (1953) (citing *State v. Ingels*, 4 Wn.2d 676, 104 P.2d 944, cert. denied, 311 U.S. 708 (1940)).

B. Smith Goodfriend, PS is not permitted by law to represent Defendants in this case

1. Smith Goodfriend, PS owes a duty to plaintiffs of this case

In its response (see Chen Decl at 12), by admiting part of the communication with Mr. Cairns, Goodfriend claimed that Ms. Chen's communication with Goodfriend "are not privileged" and "cannot create an attorney/client relationship or expectation of confidentiality", which is plainly wrong. Attorney-client privilege established between plaintiffs and Goodfriend when plaintiffs consulted with Goodfriend in their legal capacity and were seeking professional advice on litigation. As held in *State v. Dorman*, 30 Wn. App. 351, 359, 633 P. 2d 1340 (1981), Washington Court of Appeals, Division One pointed out that the attorney-client privilege is established when

there is a **belief by the client** that he is consulting a lawyer, either directly or through an agent, in his legal capacity and is seeking professional legal advice. Division One specially cited the statements from *E. Cleary, McCormick on Evidence* § 88 (2d ed. 1972:

"The privilege for communications of a client with his lawyer hinges upon the **client's belief** that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.... Payment or agreement to pay a fee, however, is not essential." (emphasis added)

See, also, 38 Wn. App. 388, 685 P. 2d 1109, *Heidebrink v. Moriwaki.* ("The essence of the attorney-client privilege is the ***intent* of the client** at the time the communication is made.") *In re: Eggers,* 152 Wn. 2d 393, 410, 98 P. 3d 477 (2004), *quoting, Bohn, supra*, 119 Wn. Ed at 363. (The "essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.").

Plaintiffs and Goodfriend had extensive communication, though did not sign a formal attorney-client agreement. However, this does not preclude Goodfriend from owing a duty of care, or a fiduciary duty to the plaintiffs of the current case because the existence of an attorney-client relationship "turns largely on the **client's subjective belief** that it exists…'[and] may be implied from the parties' conduct; it need not be memorialized. *Id.*

From the above, it is clear that whether there is an attorney-client relationship, it depends on clients' belief (instead of attorney's belief). In the current case, Plaintiffs were seeking legal advice, and looking for legal representation, it is Plaintiffs' belief that there was an attorney-client relationship identifying themseleves as "former clients". Goodfriend thus is not allow to represent Defendants and "use information relating to the representation to the disadvantage of the former client." RPC1.9 (c)(1). Further, communication between Goodfriend and plaintiffs are subject to Attorney-Client Privilege because Plaintiffs were seeking legal advice, and Goodfriend were

provided legal advice in legal capacity.

Even if Goodfriend refused to recognize Plaintiffs as its "former clients", RPC 1.18 discusses possible formation a client-lawyer relationship becomes "a prospective client". Therefore, even if the consultation does not ripen into an attorney-client relationship (as argued by Goodfriend int its response email), the attorneys nevertheless are required to undertake a duty of confidentiality as "former clients" because of Plaintiffs' belief; Goodfriend cannot be precluded from employment by an adverse client to act against "a prospective client" under RPC 1.18 (b) and (c), either. It is clear that the critical information disclosed by Plaintiffs and received by Goodfriend precludes it and its attorneys from representing Defendants of the current case. RPC 1.7 (a)(2).

In view of foregoing, whether defining Plaintiffs as "former client" or "prospective client", Goodfriend owes a duty to Plaintiffs of the current case. Due to conflict of interests, Goodfriend is not permitted by law to represent defendants in the current case.

2. Conflicts of Interests Prohibits Goodfriend From Representing Defendants

RPC 1.7 provides that an attorney "*shall not*" represent a client if the attorney has a conflict of interest, except that in some situations an attorney *may* represent a client if "**each affected client gives informed consent, confirmed in writing** (following authorization from the other client to make any required disclosures). RPC 1.7 (b) (4). See, e.g. *Valley/50th Ave, LLC v. Stewart*, 159 Wn. 2d 736, 747, 153 P. 3d 186 (2007) (law firm owes independent duties to both LLC and its managing member).

Under the context of attorneys' conflicts of interest under RPC 1.7, the attorney's fiduciary duty is recognized as in *Mallen & Smith*, Legal Malpractice, & 14.2, P. 588 (2007 ed):

A breach of the duty of "undivided loyalty" has been found in two basic situations. The first iswhen an attorney obtains a personal advantage, whether consisting of an acquisition from the client, a venture with the client, or usurpation of an interest in, or opportunity concerning, the subject matter of the retention. Second, the duty of undivided loyalty is imperiled when there are circumstances that create adversity to the client's interest. These circumstances may consist of an existing,

personal adverse interest of the attorney, an interest of a prior or subsequent client, or conflicting interests of present or multiple clients.

Eriks v. Denver, 118 Wn. 2d 451, 458-61, 824 P. 2d 1207 (1992).

As stated, when an attorney considers whether to undertake representation, the attorneys (not the clients, as the lower court reasoned) are required to determine whether potential conflicts of interest exist and, if so, whether those conflicts are waivable. RPC 1.7 (b). If the conflicts are not waivable, then the attorneys have no other choice but to refuse the representation. However, even for the waivable conflicts of interests, the "informed consent" is required from "**each** affected client" and "**confirmed in writing**". RPC 1.7 clearly prohibits that attorney to undertake the representation if the representation "**involve the assertion of a claim by one client against another client**" and "in the **same litigation**". Goodfriend has the burden to proof that Plaintiffs consented to or waived the conflicts of interests, if they desire to continue their representation for the adverse party in the same litigation.

C. Violation of attorney-client privilege and confidentiality

Upon undertaking the representation of Defendants in this case, Goodfriend violated Plaintiffs' attorney-client privilege. As held in *State v. Fuentes*, 179 Wn. 2d 808, 818, 318 P. 3d 257 (2014), "A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney." *State v. Fuentes*, 179 Wn. 2d 808, 818, 318 P. 3d 257 (2014). Prejudice from violating the attorney-client relationship can arise from Goodfriend's use of confidential information pertaining to the litigation strategy, giving the defendants an unfair advantage in litigation. *See, also, State v. Garza*, 99 Wn. App. 291, 301, 994 P. 2d 868 (2000). In several appellant decisions, violation of a defendant's attorney-client confidentiality resulted in the dismissal of the criminal charges against him. E.g. *State v. Cory*, 62 Wn. 2d at 372 (1963).

The attorneys who ignore conflicts of interests also risks potentially serious disciplinary exposure. E.g., *In re: Discipline of Holcomb*, 162 Wn. 2d 563, 173 P. 3d 898 (2007) (suspension); and *In re: Discipline of Egger*, 152 Wn. 2d 393, 409-13, 98 P. 3d 477 (2004) (suspension).

As discussed above, Goodfriend's current involvement and representation violates Plaintiffs' attorney-client privilege, and against the applicable laws. Plaintiffs' interests will be signficantly harmed since Goodfriend had learned the critical information of the case provided by Plaintiffs due to their unconditional trust in counsels, which included but not limited to Plaintiffs' desired goal for the case. Goodfriend is thus required to disqualify and withdraw from the current representation.

V. CONCLUSION

In view of foregoing, Goodfriend's violation of Rules of Professional Conduct is present. Plaintiffs are prejudiced by Goodfriend's representation for the directly opposed parties. Upon this motion, Plaintiffs respectfully request this Court enter an Order requiring Goodfriend withdraw from the current representation, prohibiting it (and all its five lawyers) from any involvement in further litigation in trial court, and any other reliefs this Court deems as just and fair.

Respectfully submitted DATED on this 28th of November , 2018.

/s/ Susan Chen

Susan Chen

I certify that this motion, not counting the caption or the signature block, contains 2570 words, in compliance with Local Civil Rules.

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

THE HONORABLE KEN SCHUBERT

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

SUSAN CHEN, et al.,

Plaintiffs,

vs.

DARREN MIGITA, et al.

Defendants.

CASE NO. 16-2-26013-6 SEA

DECLARATION OF SUSAN CHEN IN SUPPORT OF PLAINTIFFS' MOTION TO RECUSE

I, Susan Chen, am over the age of eighteen, am competent to testify to the matters stated herein, and make the following declaration based on my personal knowledge.

1. I am one of the Plaintiffs in the above-captioned case.
2. Since early 2018, I had consulted with three lawyers at Smith Goodfriend, P.S. ("Goodfriend") seeking legal advice and legal representation through phone and/or email.
3. During my phone conversation with Goodfriend, I was assured by Goodfriend that the communication/conversation was subject to Attorney-Client Privilege, and will be kept confidential under RPC 1.18. Goodfriend never asked if I consent to waive this privilege, and I never agreed to waive this privilege.
4. During these phone conversation, I provided detailed information about the case to Goodfriend who provided me legal advice. I had quite a few lengthy follow-up phone

conversation with Goodfriend. During these communication, I discussed the details of the case with Goodfriend as well as pros and cons of the case, I discussed one confidential document with Goodfriend, I also disclosed Plaintiffs' goal and expectation for the litigation with Goodfriend, etc.

5. I first talked with a young partner, and sometime later talked with two senior partners of Goodfriend based upon referral.

6. On November 26, 2018, it was my first time to realize Goodfriend's participation after receiving its "Notice of Association" for from Mr. Ian Cairns and Mr. Howard Goodfriend of Smith Goodfriend, P.S. who filed on behalf of Defendants Darren Migita, James Metz and Ian Kodish.

7. Prior to this filed Notice of Association, Goodfriend did not disclose to me that they were going to represent Defendants, clients with interests materially adverse to me in the same matter, nor did they ever ask if I consented to this represention.

8. On November 27, 2018, I emailed Goodfriend (*cc*ed affected parities including Mr. Jason Anderson and Mr. Naixiang Lian) formally informing it of the conflicit of interests which prohibits its representation on behalf of Defendants in the *same* litigation. I demanded that both Mr. Cairns and Mr. Goodfriend withdraw from the case.

9. On November 28, 2018, Goodfriend emailed its reponse *only* to me, acknowledging part of commuication between Goodfriend lawyer and me, and agreeing to withdraw Mr. Ian Cairns (a partner) from the case and substitutes with Ms. Victoria Ainsworth (an associate) from the same office.

10. In his response dated on November 28, 2018, Goodfriend did not explain why Goodfriend undertook the representation of a party with interests materially adverse to me when conflicts of interests were present, nor did they explain why Mr. Goodfriend did not withdraw and why this firm continues to represent Defendants when conflicts of interests

are present.

11. In his response dated on November 28, 2018, Mr. Goodfriend stated that "Mr. Cairns will have no *further* involvement in this matter". Mr. Goodfriend did not disclose to what extent Mr. Cairns had *already* been invovled in this matter prior to his withdrawal, and if Ms. Ainsworth and Mr. Cairns had had any prior discussion and/or communication about the case (there are four partners in Goodfriend, Ms. Ainsworth is the only associate in this firm). Goodfriend did not propose any remedial options and/or plans.
12. In his response dated on November 28, 2018, Goodfriend described that conversation between Goodfriend lawyer, Mr. Cairns and me as "not privileged" and "cannot create an attorney/client relationship or expectation of confidentiality", contrary to Washington Rules of Professional Conduct and Attorney-client Privilege Statute under applicable law.
13. In his resposne dated on November 28, 2018, Mr. Goodfriend did not explain why Goodfriend continues to represent Defendants when conflicts of interests are present, and after receiving my formal notice of conflicts of interests. Mr. Goodfriend did not ask if I agreed to and/or waived privilege to his representation for a party with *directly* adverse interest to me in the *same* litigation.
14. Lawyers, as guardians of the law, are required and expected to "maintain highest standard of ethical conduct". Based upon the trust and respect for lawyers, I had been candid and open to Goodfriend during the consultation and communication. It is unbelievable that Goodfriend is representing the *directly* adverse parties and continue to represent Defendants even after my formal notice.
15. I am severely prejudiced by Goodfriend's unethical misconduct and violation.

I declare under penalty of perjury pursuant to the laws of the State of Washington and under United States of America that the foregoing is true and correct.

Signed this 28th of November , 2018 in Seattle, Washington.

/s/ Susan Chen

Susan Chen

APPENDIX E

The Honorable Ken Schubert
Noted for Motion Calendar: December 10, 2018

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

SUSAN CHEN, as parents and natural guardians of J[redacted] L[redacted], a minor, and L[redacted] L[redacted], a minor, and NAIXIANG LIAN, as parents and natural guardians of J[redacted] L[redacted], a minor, and L[redacted] L[redacted], a minor, Plaintiffs, v. DARREN MIGITA, M.D.; IAN KODISH, M.D.; JAMES METZ, M.D.; SEATTLE CHILDREN'S HOSPITAL; REDMOND CITY POLICE DEPARTMENT DETECTIVE NATALIE D'AMICO; THE CITY OF REDMOND; and STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Defendants.	No. 16-2-26013-6 SEA ORDER ON PLAINTIFFS' MOTION TO RECUSE SMITH GOODFRIEND, P.S. AND ORDERING SMITH GOODFRIEND, P.S.

Plaintiffs move to recuse Smith Goodfriend, P.S. as counsel representing defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D. Plaintiffs filed their motion shortly after Smith Goodfriend, P.S. filed a Notice of Appearance for Purposes of Appeal on November 26, 2018. Notably, Smith Goodfriend, P.S. has not filed a notice to appear as counsel at the trial court level.

The record does not support a finding that Smith Goodfriend, P.S.. represents a party at the trial court level. Notably, Smith Goodfriend, P.S. has filed a motion before the Court of Appeals to confirm its ability to serve as appellate counsel. Whether Smith Goodfriend, P.S. can represent Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D. on *appeal* is for the Court of Appeals to decide.

Plaintiffs' motion does present a related issue that is appropriate for this Court to decide: may Smith Goodfriend, P.S. share any confidential information that it obtained from plaintiffs with any party that has appeared at the trial court level in this action? The answer to that question turns on whether plaintiffs shared any such information in the course of seeking legal advice from one or more attorneys at Smith Goodfriend, P.S. related to this dispute. Considering that plaintiffs had no other reason to share any such information, this Court finds that plaintiffs did.

Based on that finding, this Court concludes that RPC 1.9(a) bars Smith Goodfriend, P.S. from sharing any confidential information obtained from plaintiffs with any party or that party's counsel who have appeared at the trial court level in this action. Accordingly, this Court orders Smith Goodfriend, P.S. not to disclose any such information to any party, including their counsel, who has appeared in this court in this matter.

DATED this 12th day of December, 2018.

E-signature on following page

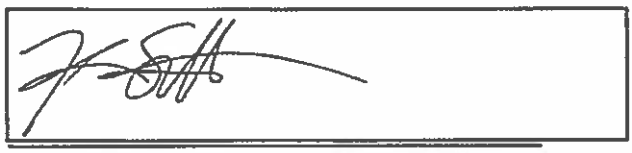
Chief Civil Judge Ken Schubert

King County Superior Court
Judicial Electronic Signature Page

Case Number: 16-2-26013-6
Case Title: CHEN ET AL VS MIGITA ET AL

Document Title: ORDER ON MOTION TO RECUSE

Signed by: Ken Schubert
Date: 12/12/2018 9:00:00 AM



Judge/Commissioner: Ken Schubert

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 20DA9CAD30E9A356B2B090778A254A4188865BEC
Certificate effective date: 11/13/2018 11:21:11 AM
Certificate expiry date: 11/13/2023 11:21:11 AM
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="Ken Schubert: EPj/VAvS5hGqrSf3AFk6yQ=="

APPENDIX F

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' MOTION TO DISQUALFY SMITH GOODFRIEND, P.S. FROM THE CURRENT APPEAL

Susan Chen

Pro Se appellant

PO BOX 134,

Redmond, WA 98073

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I. INTRODUCTION

Pursuant to Washington Rules of Professional Conduct ("RPC") 1.18; 1.7; RCW 5.60.060, Appellants/Plaintiffs Susan Chen and Naixiang Lian respectfully move this Court for an Order disqualifying Smith Goodfriend, P.S ("Goodfriend") from representation of Defendants Darren Migita, James Metz and Ian Kodish ("defendant physicians") of the current appeal and prohibiting it from any participation and involvement in the above-captioned matter at Court of Appeals because conflicts of interests are present and because Goodfriend's immediate withdrawal is required by Washington laws. Plaintiffs further requested this Court enters an Order sealing the email communication between Ms. Chen and Goodfriend under Attorney-Client Privilege, which had been improperly disclosured without Ms. Chen's consent.

Since early 2018, Ms. Chen consulted multiple times with three attorneys from Smith Goodfriend ("Goodfriend") regarding the current case, by phone and/or by email. During these in-depth consultations, legal advice was sought and received. Due to the conflicts of interest, Goodfriend thus should be precluded from representing an adverse party, Respondent physicians of the current case. RPC 1.18 (b) and (c). If allowing Goodfriend to represent defendant physicians, Attorney-Client Privilege is violated; Plaintiffs' interests will be significantly and adversely affected. Plaintiffs therefore respectfully request this Court disqualify Goodfriend's representation, prohibit any involvement and participation in this case at appeal.

II. EVIDENCE RELIED UPON

1) Appendix A

Plaintiffs' Reply in support of their motion to recuse Smith Goodfriend from the case at trial court ("Plaintiffs' Reply at trial court");

Exhibit A of Appendix A

Declaration of Susan Chen dated on December 8, 2018 ("*Chen Dec. Decl.*")

Exhibit 1 of Exhibit A

Declaration of Susan Chen dated on November 28, 2018 ("*Chen Nov. Decl.*")

Exhibit B of Appendix B

Some phone records with Goodfriend, defeating Defendants' assertion that there are only "one single phone" between Ms. Chen and Goodfriend (irrelevant phone numbers redacted);

Exhibit C of Appendix A

On November 26, 2018, Appellants were first made aware of Goodfriend's involvement with the opposed parties;

Exhibit D of Appendix A

On November 27, 2018, Appellants sent a formal notice to Goodfriend, demanding their immediate withdrawal due to the conflicts of interests:

Exhibit E of Appendix A

On November 28, 2018, Goodfriend filed notice of substitution, withdrawing Mr. Cairns (a partner) but sustituting Ms. Victoria Ainsworth (an associate)

2) Appendix B

Appellant Naixiang Lian's Affidavit of Prejudice dated on November 28, 2018

3) Appendix C

Appellants' motion to disqualify Smith Goodfriend filed with trial court on November 29, 2018

III. STATEMENT OF THE FACTS

The current case was dismissed on March 3, 2017. Plaintiffs subsequently filed Notice of Appeals which was initially not accepted by Court of Appeals due to the other pending claims under the same caption. Plaintiffs later voluntarily dismissed all the remaining claims and filed a second appeal which is currently pending before Court of Appeals. *Pro se* Plaintiffs had been looking for potential representation for appeals and had been consulting with some attorneys

and/or law firms. One of the law firms Plaintiffs consulted is Smith Goodfriend, P.S., a lawfirm of five lawyers (four partners and one associate).

As stated in *Chen Nov. Decl.*, Since early 2018, Plaintiffs had multiple direct conversation with attorneys in Goodfriend for the purposed of seeking potential legal representation on appeals on the above captioned matter. Due to trust in attorneys and belief in Attorney-Client Privilege, Plaintiffs had been candid in sharing detailed and confidential information of the case with Goodfriend. The discussion includes pros and cons of the case, expected goal for the appeal, etc. On November 26. 2018, without any prior disclosure and without seeking consent from the Appellants who had actually engaged heavily with Goodfriend through multiple consultation, Goodfriend filed Notice of Association on behalf of Respondents Darren Migita, James Metz, and Ian Kodish for purposes of Appeal.

On November 27, Ms. Chen sent an email (ccing affected parties/plaintiffs including Mr. Jason Anderson and Mr. Naixiang Lian) formally informing Goodfriend of the conflicts of interests and requested them promptly withdraw from the case. Exhibit D of Appendix A. On November 28, Goodfriend responded *only* to Ms. Chen, acknowledging only some communication with Ms. Chen but arguing that the communication "are not privileged" and cannot create "expectation of confidentiality". Goodfriend agreed to withdraw Mr. Cairns (partner) but substituted Ms. Victoria Ainsworth (associate) of the same firm.

On November 29, 2018, Plaintiffs filed with the trial court a Motion to disqualify Smith Goodfriend from any participation in the case at trial court due to the upcoming CR 60 motion before the trial court. Appendix C.

Given the fact that substantial confidential information had been disclosed through these consultation, Appellants' interests will be significantly jeopardized if allowing Goodfriend's improper and unethical involvement in the current litigation. Goodfriend learned pros and cons of the case as well as other confidential information provided directly by Appellants due to their

unconditional trust and confidence in lawyers' highest possible degree of ethical conduct. Appendix B.

IV. ARGUMENTS AND LEGAL AUTHORITIES

A. Lawyers are required by law to "maintain the highest standards of ethical conduct".

Attorney-client relationship is critical in litigation. The attorney is required by laws to undertake the duties of a fiduciary to the client, bound to act with utmost fairness and good faith toward the client in all matters. *E.g.*, Perez v. Pappas, 98 Wn.2d 895, 840-41, 659 P.2d 475 (1983) (attorney owes highest duty to the client); VersusLaw v. Stoel Rives, LLP, 127 Wn. App. 309, 333, III P.3d 866 (2005)("highest duty"); In re Beakley, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940) ("one of the strongest fiduciary relationships known to the law"); Bovy v. Graham, Cohen & Wampold, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977) ("'the punctilio of an honor the most sensitive'"); and Van Nay v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 798 n. 2, 16 P.3d 574 (2001) (Talmadge, J., concurring) ("the law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them"). This fiduciary relationship between attorney and client is neither new, nor unique to Washington. Sir Francis Bacon thus wrote:

'[t]he greatest Trust, between Man and Man, is the Trust of Giving Counsell. For in other Confidences, Men commit the parts of life; their Lands, their Goods, their Children, their Credit, some particular Affaire; .But to such, as they make their Counsellors, they commit the whole: By how much the more, they are obligated to all Faith integrity. ", [1]

Attorney-client privilege statute

A litigant has a statutory right to attorney-client privilege. RCW 5.60.060 (2)(a) provides the rule in Washington:

> An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

As recognized by Washington Supreme Court in *Pappas v. Holloway*, "the attorney-client privilege is statutory in nature". Supreme Court wrote, "The central purpose of the rule is to encourage *free* and *open* discussion between an attorney and his client by assuring the client that his information will not be disclosed to others either directly or indirectly". 114 Wn. 2d 198 787 P. 2d 30 (1990). See, also, *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983).

The purpose of the attorney-client privilege "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others.'" *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404, 706 P.2d 212 (1985) (quoting *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983)); see also *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681, 16 A.L.R.3d 1021 (1964). The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents which contain a privileged communication. *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 517-18, 618 P.2d 1330 (1980), aff'd, 96 Wn.2d 416, 635 P.2d 708 (1981).

This same privilege afforded the attorney is also extended to the client under the common law rule. *State v. Emmanuel*, 42 Wn.2d 799, 815, 259 P.2d 845 (1953) (citing *State v. Ingels*, 4 Wn.2d 676, 104 P.2d 944, cert. denied, 311 U.S. 708 (1940)).

A. Smith Goodfriend, PS is not permitted by law to represent Defendants in this case

1. Smith Goodfriend, PS owes a duty to plaintiffs of this case

---

[1] *Ween v. Dow*, 35 A.D.3d 58, 822 N.Y.S.2d 257, 261 (2006), *quoting*. The Essays or Counsels, Civill and Morall 63 (Kiernan ed. Oxford Univ. Press 1985), quoted in, *Anenson, Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship*, 43 Am. Bus. L.J. 173,244 (2006).

In Goodfriend response email to Ms. Chen's request for withdrawal (see, *Chen Nov. Decl* at 12), it admitted only part of the communication with Mr. Cairns. Goodfriend claimed that Ms. Chen's communication with Goodfriend "are not privileged" and "cannot create an attorney/client relationship or expectation of confidentiality", which is plainly wrong. Attorney-client privilege established between plaintiffs and Goodfriend when plaintiffs consulted with Goodfriend in their legal capacity and were seeking professional advice on litigation. As held in *State v. Dorman*, 30 Wn. App. 351, 359, 633 P. 2d 1340 (1981), Washington Court of Appeals, Division One pointed out that the attorney-client privilege is established when there is a **belief by the client** that he is consulting a lawyer, either directly or through an agent, in his legal capacity and is seeking professional legal advice (emphasis added). Division One specially cited the statements from *E. Cleary, McCormick on Evidence* § 88 (2d ed. 1972):

"The privilege for communications of a client with his lawyer hinges upon the **client's belief** that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.... Payment or agreement to pay a fee, however, is not essential." (emphasis added)

See, also, 38 Wn. App. 388, 685 P. 2d 1109, *Heidebrink v. Moriwaki*. ("The essence of the attorney-client privilege is the ***intent* of the client** at the time the communication is made.") (emphasis added). *In re: Eggers*, 152 Wn. 2d 393. 410, 98 P. 3d 477 (2004), *quoting, Bohn v. Cody*. 119 Wn. 2d 357. 365, 365, 832 P. 2d 71 (1992). (The "essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.").

Plaintiffs and Goodfriend had extensive communication, though did not sign a formal attorney-client agreement. However, this does not preclude Goodfriend from owing a duty of care, or a fiduciary duty to the plaintiffs of the current case because the existence of an attorney-client relationship "turns largely on the **client's subjective belief** that it exists...'[and] may be implied from the parties' conduct; it need not be memorialized. *Id.*

From the above, it is clear that whether there is an attorney-client relationship, it depends on clients' belief (instead of attorney's belief). In the current case, Plaintiffs were seeking legal advice, and looking for legal representation, it is Plaintiffs' belief that there was an attorney-client relationship identifying themselves as "former clients". Goodfriend thus is not allow to represent Defendants and "use information relating to the representation to the disadvantage of the former client." RPC1.9 (c)(1). Further, communication between Goodfriend and plaintiffs are subject to Attorney-Client Privilege because Plaintiffs were seeking legal advice, and Goodfriend were provided legal advice in legal capacity.

As discussed, Attorney-Client relationship was formed between Ms. Chen and Goodfriend where Ms. Chen identified herself as its "former client."based on her belief. Even if Goodfriend refused to recognize Appellants as its "former clients", RPC 1.18 discusses possible formation a client-lawyer relationship about "a prospective client". Therefore, even if the consultation does not ripen into an attorney-client relationship (as argued by Goodfriend in its response email), Goodfriend lawyers nevertheless are required to undertake a duty of confidentiality as "prospective client." Goodfriend is therefore precluded from employment by an adverse client to act against "a prospective client" under RPC 1.18 (b) and (c). It is clear that the critical and confidential information disclosed by Appellants and received by Goodfriend precludes Goodfriend and its attorneys from representing Respondents of the current case. RPC 1.7 (a)(2).

In view of foregoing, whether defining Appellants as "former client" or "prospective client", Goodfriend owes a duty to Appellants of the current case. Due to conflict of interests, Goodfriend is not permitted by law to represent Respondents in the current case.

2. Conflicts of Interests Prohibits Goodfriend From Representing Respondents

RPC 1.7 provides that an attorney "*shall not*" represent a client if the attorney has a conflict of interest, except that in some situations an attorney *may* represent a client if "each affected client

gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures) (emphasis added). RPC 1.7 (b) (4). See, e.g. *Valley 50th Ave. LLC v. Stewart*, 159 Wn. 2d 736, 747, 153 P. 3d 186 (2007) (law firm owes independent duties to both LLC and its managing member).

Under the context of attorneys' conflicts of interest under RPC 1.7, the attorney's fiduciary duty is recognized as in *Mallen & Smith*, Legal Malpractice, & 14.2, P. 588 (2007 ed):

A breach of the duty of "undivided loyalty" has been found in two basic situations. The first iswhen an attorney obtains a personal advantage, whether consisting of an acquisition from the client, a

venture with the client, or usurpation of an interest in, or opportunity concerning, the subject matter of the retention. Second, the duty of undivided loyalty is imperiled when there are circumstances that create adversity to the client's interest. These circumstances may consist of an existing, personal adverse interest of the attorney, an interest of a prior or subsequent client, or conflicting interests of present or multiple clients.

Eriks v. Denver, 118 Wn. 2d 451, 458-61, 824 P. 2d 1207 (1992).

As stated, when an attorney considers whether to undertake representation, the attorneys (not the clients, as the lower court reasoned) are required to determine whether potential conflicts of interest exist and, if so, whether those conflicts are waivable. RPC 1.7 (b). If the conflicts are not waivable, then the attorneys have no other choice but to refuse the representation. However, even for the waivable conflicts of interests, the "informed consent" is required from "**each** affected client" and "**confirmed in writing**". (emphasis added). RPC 1.7 clearly prohibits that attorney to undertake the representation if the representation "**involve the assertion of a claim by one client against another client**" and "in the **same litigation**". Goodfriend has the burden to proof that Appellants consented to or waived the conflicts of interests, if they desire to continue their representation for the adverse party in the same litigation. Due to substantial confidential

information received, Goodfriend's representation would be "signficantly harmful" to Appellants. RPC 1.18 (c).

In its motion to confirm representation, Goodfriend argued that Mr. Cairns' withdrawal satisfies RPC 1.18 (d), this argument was without merit and merely based upon mistatement of truth. As stated in Chen Nov. Decl. and Chen Dec. Decl., Ms. Chen had talked with three lawyers at Goodfriend, Mr. Cairns being only one of the lawyers.

As pointed out by Ms. Chen in her *Dec. Decl.*, at 3, Ms. Chen stated, "Many of the statement made in Goodfriend lawyers' declarations are not true." Contrary to Cairns' representation, Ms. Chen wrote, "Mr. Cairns claimed that he never assured Ms. Chen that our conversation would be kept confidential. If this is true, we would not have more than one conversation." *Chen December Decl.*, at 3. After reviewing Mr. Cairns' *Amended* declaration, Ms. Chen questioned how Goodfriend's inconsistent statements cannot pass the factfinder's reasonable test. For example, while claiming "I do not recall any details of my phone conversation with Ms. Chen," *Cairns Amended Decl.*, at 7, Cairns feels *confident* that "[Ms. Chen] did not share 'detailed information about the case'. *Id,* at 9. As stated in both its motion and Cairns Decl., Goodfriend insisted that there is only one pohone conversation with Ms. Chen, this was proven to be blatanly false at Ms. Chen's voluntary disclosure of part of phone records. Exhibit B of Appendix A.

B. Goodfriend's Violation of attorney-client privilege and confidentiality

Upon undertaking the representation of Respondents in this case, Goodfriend violated Appellants' attorney-client privilege. "A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney." *State v. Fuentes*, 179 Wn. 2d 808, 818, 318 P. 3d 257 (2014). Prejudice from violating the attorney-client relationship can arise from Goodfriend's use of confidential information pertaining to the litigation strategy, giving the defendants an unfair advantage in litigation. *See, also, State v.*

Garza, 99 Wn. App. 291, 301, 994 P. 2d 868 (2000). In several appellant decisions, violation of a defendant's attorney-client confidentiality resulted in the dismissal of the criminal charges against him. E.g. *State v. Cory*, 62 Wn. 2d 371, 374-75, 382 P. 2d 1019 (1963).

The attorneys who ignore conflicts of interests also risks potentially serious disciplinary exposure. E.g., *In re: Discipline of Holcomb*, 162 Wn. 2d 563, 173 P. 3d 898 (2007) (suspension); and *In re: Discipline of Egger*, 152 Wn. 2d 393, 409-13, 98 P. 3d 477 (2004) (suspension).

As discussed above, Goodfriend's current involvement and representation violates Appellants' attorney-client privilege, and against the applicable laws. Appellants' interests will be signficantly harmed since Goodfriend had learned the critical information of the case provided by Appellants due to their unconditional trust in counsels, which included but not limited to Appellants' desired goal for the case. Goodfriend is thus required to disqualify and withdraw from the current representation.

The Attorney-Client Privilege statue provides, "An attorney or counsel shall not, without the consent of his or her client, be examined as to *any communicaiton* made by the client to him or her, or his or her advice given thereon in the course of professional employment." (emphasis added). RCW 5.60.060 (2)(a); *Hangartner v. City of Seattle*, 151 Wn. 2d 439, 452, 90 P. 3d 26 (2004). The privilege applies to any information generated by a request for legal advice. See, e.g., *Dietz v. Doe*, 131 Wn. 2d 835, 846, 935 P. 2d 611 (1997). The Attorney-Client privilege can ordinarily be waived *only* by the client, to whom the privilege belongs. (emphasis added). *State ex rel. Sowers v. Olwell*, 64 Wn. 2d 828, 833, 394 P. 2d 681 (1964). There is no evidence that Ms. Chen ever consented to disclosing her email communication with Goodfriend, but Goodfriend unilaterally published the privileged communication, which is a clear violation. Appellants request this Court order sealing this improper disclosure, and further grant relief this Court deems as just and proper.

V. CONCLUSION

In view of foregoing, Goodfriend's violation of Rules of Professional Conduct is present. Plaintiffs are prejudiced by Goodfriend's representation for the directly opposed parties. Upon this motion, Plaintiffs respectfully request this Court enter an Order requiring Goodfriend withdraw from the current representation, prohibiting it (and all its five lawyers) from any involvement in further litigation in trial court, and any other reliefs this Court deems just and equitable.

Respectfully submitted DATED on this 12th of December , 2018.

/s/ Susan Chen

Susan Chen

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 12th day of December, 2018.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

December 12, 2018 - 3:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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APPENDIX G

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' REPLY TO MOTION TO DISQUALFY SMITH GOODFRIEND, P.S. FROM THE CURRENT APPEAL

Susan Chen

Pro Se appellant

PO BOX 134,

Redmond, WA 98073

COMES NOW Appellants respectfully move this Court an Order disqualifying Smith Goodfriend, P.S. ("Goodfriend") from representation from appeals pursuant to Attorney-Client Privilege and Washington Rules of Professional Conduct ("RPC").

A. Respondents failed to respond to Appellants' Motion to disqualify

Respondents Darren Migita, James Metz and Ian Kodish have failed to respond to Appellants' Motion to disqualify Goodfriend from representation from current appeals filed on December 12, 2018. Appellants' motion should therefore be granted.

B. Trial court orders prohibiting Goodfriend's activities in the case at trial court

At knowing Goodfriend's violation of Attorney-Client Privilege, Appellants asked Goodfriend to withdraw. Goodfriend did not do so. Appellants filed Motion to disqualify Goodfriend at trial court as well as this Court. Goodfriend subsequently filed a motion to confirm representation at this court. Goodfriend did not respond to Appellants' Motion to disqualify at appeals filed on December 12.

On December 12, trial court entered a finding that Appellants had shared confidential information with Goodfriend, and based upon finding the trial coourt ordered prohibiting Goodfriend from participating in trial court activities pursuant to RPC 1.9(a). Specifically, the trial court writes, "Based on that finding, this Court concludes that RPS 1.9(a) bars Smith Goodfriend, P.S. from sharing any confidential information obtained from plaintiffs with any party or that party's counsel who have appeared at the trial court level in this action." Goodfriend did not dispute trial court's finding, nor did its decision. *See*, EXHIBIT A for a true and correct copy of trial court's order signed by Chief Civil Judge Honorable Ken Schubert on December 12, 2018.

C. Goodfriend's failure to rebut undisputed facts

While Respondent physicians first filed their motion to confirm representation at this Court, Goodfriend's arguments were based upon the dishonest assertion that appellants only engaged in "*one single phone call.*" See, both respondent physicians' motion to confirm representation (and respondent physicians' later *amended* motion confirm representation), and Goodfriend's declaration (and Goodfriend's later *amended* declaration). In their response, Appellants voluntarily provided *part* of phone records to directly defeat Goodfriend's unfaithful assertion of "one single phone call". Goodfriend did not provide any innocent explanation why they alleged and *declared* that there was only phone conversation between Goodfriend and Ms. Chen, contrary to the undisputed facts.

In their Objection to motion to confirm, Ms. Chen provided name of an attorney witness, Ms. Lenell Nussbaum, Goodfriend did not dispute the authenticity of this witness, nor did it inquire about the time for the referral from Ms. Nussbaum. Instead, Mr. Goodfriend and Ms. Smith declarared that they did not talk with Ms. Chen on February 26 and 28 to support their purported conclusion that they never talked with Ms. Chen while in fact Ms. Chen did not state the conversation with these two Goodfriend lawyers happened on these two days. Therefore, Goodfriend's arguments are without merits.

Attorney-Client Privilege is fundamental in our legal system. Goodfriend's violation (and continuous and intentional misconduct) is unacceptable. Having known that Appellants have shared confidential information with Goodfriend, Respondent Physicians continued to retain Goodfrined. This is *outrageous*. Respondent physicians have failed to respond to Appellants' Motion to disqualify filed on December 12. Appellants' Motion should be therefore granted.

Respectfully submitted DATED on this 28th of December , 2018.

/s/ Susan Chen

Susan Chen

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 28th day of December, 2018.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

December 28, 2018 - 1:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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- 775227_Answer_Reply_to_Motion_20181228133949D1900604_0560.pdf
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APPENDIX H

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Petitioner/Appellant

v.

DARREN MIGITA et al

Defendants/Respondents

APPELLANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION OF THIS COURT'S RULING ON REQUIRING TRIAL COURT'S FINDINGS ON APPELLANTS' MOTION TO DISQUALIFY SMITH GOODFRIEND FROM REPRESENTATION DATED ON DECEMBER 31, 2018

Susan Chen

Pro Se petitioner/appellant

PO BOX 134,

Redmond, WA 98073

TABLE OF CONTENTS

I. RELIEF REQUESTED

Appellants respectfully request this Court to clarify or reconsider Commissioner Masako Kanazawa's Ruling dated on December 31, 2018 letter ruling on Appellants' Motion to disqualify Smith Goodfriend, P.S. ("Goodfriend") from representation in the following respects: (1) clarify that the Stay applies to both parties (Appellants *and* Respondents); (2) clarify that during the remand, the deadline for filing the brief of appellants will *also* be stayed. This Court's ruling on staying *only* respondents' brief is inconsistent with court rules and contrary to the meaningful and fair access to the court and justice which is the fundamental right provided in both U.S. and Washington Constitution.

A substantial change in circumstance gives the court adequate cause to modify its prior order, and allows stay for both parties. Staying only one party and granting more time for one party to prepare and respond is not in the interest of fairness and justice.

II. STATEMENT OF FACTS

Appellant Ms. Chen filed motion to disqualify Goodfriend at both trial court and this court based upon the undisputed facts that she had engaged *multiple* conversation with *multiple* lawyers at Goodfriend in their legal capacity. Respondent physicians subsequently filed motion to confirm representation at this court but failed respond to Appellants' Motion to disqualify at this court.

In its response to appellants' motion to disqualify at trial court (and its motion to confirm representation), Goodfriend asserted that there is only "one single phone and three emails" between Ms. Chen and Goodfriend. In their reply to plaintiffs' motion to disqualify at trial court (and appellants' motion to disqualify and appellants' objection to respondents' motion to confirm), Ms. Chen voluntarily provided part of her phone record to show that there are indeed ***more than one phone conversation*** between Ms. Chen and Goodfriend. Ms. Chen also provided an attorney witness. So far, Goodfriend was unable to provide an innocent explanation for its dishonest statement in its motion and declaration (and amended declaration). Goodfriend's dishonest statements raised additional questions about Goodfriend's credibility: **Having been unfaithful in providing misstatement (directly contrary to undisputed facts) to this Court both in its motion (and amended motion) and declarations (and its**

amended declaration), Goodfriend's credibility should be reasonably questioned. Plaintiffs' asserted facts should be treated as established.

On December 12, pursuant to RPC 1.9 (a), trial court entered an order prohibiting Goodfriend from sharing confidential information obtained from Ms. Chen at trial court.

On December 31, this court remanded the matter to the trial court to make factual findings on the disputed issues regarding the conflicts of interest. Based upon this remand, the Commissioner stays only the deadline for filing the brief of respondent but requires appellants to file their brief on January 14, 2019.

On December 14, a Show Cause Hearing on Appellants' motion to vacate summary judgment was held in trial court. The chief civil judge Honorable Ken Schubert believed that the erroneous orders should be vacated but was misled by Respondents that the issues could only be fixed at Court of Appeals. In the interest of judicial economy, appellants filed a motion for reconsideration, which is currently pending before trial court.

III. LEGAL AUTHORITIES AND ARGUMENT

A. Two pending decisions require Stay brief at appeal

1. Motion for reconsideration of Motion to vacate the disputed summary judgments

At the Show Cause Hearing held in trial court, Honorable Schubert states that the erroneous orders should be vacated but was misled by the Respondents that the erroneous orders could only be fixed at appellate court. Appellants filed a motion for reconsideration, which is currently pending before trial court. Requiring Appellants to file brief prior to the decision on motion for reconsideration on disputed summary judgments is not in the interest of judicial economy. See, *Alwood v. Harper*, 94 Wn. App. 396, 400-01, 973 P. 2d 12 (1999) (Judicial economy favors correction of mistakes as early as possible, before costly and time-consuming appeals begin).

2. *Decision on Motion to disqualify Defendants' Counsel at appeal*

Attorney-Client Privilege is critical in litigation. The attorney is required by laws to undertake the duties of a fiduciary to the client, bound to act with utmost fairness and good faith toward the client in all matters. e.g., *In re Beakley*, 6 Wn. 2d 410, 423, 107 P. 2d 1097 (1940) ("one of the ***strongest*** fiduciary relationship know to the law") (emphasis added). As evidenced by phone records, Goodfriend's statements were contrary to the undisputed facts. Goodfriend's dishonesty raised additional questions about Goodfriend's credibility. For instance, did Goodfriend share confidential information obtained from appellants with Defendants? How much and to what extent had Goodfriend shared the confidential information about the case with Respondents? Appellants shared all these confidential information with Goodfriend based upon their unconditional trust in attorneys and Privilege. If these information was misused by Respondents, this Attorney-Client Privilege violation will substantially prejudiced the Appellants' ability to prepare the brief. Trial court orders Goodfriend from sharing confidential information at trial court, Appellants' interests also need to be protected at this Court.

Decisions on the above two pending motions will significantly affect the appeal, and interests of the parties, therefore, a stay is necessary.

B. Commissioner's Ruling on staying only one party is not in the interest of Justice and Fairness

As recognized by this Court, "The court has inherent power to stay its proceedings where the interest of justice so requires." (emphasis added). *King v. Olympic Pipeline Company*, 104 Wn. App. 388, 348, 16 P. 3d 45 (2000).

When there is a dispute on the fundamental Attorney-Client Privilege, this Court has authority to stay the proceeding. However, this Stay should apply to <u>both parties,</u> instead of only one party because staying one party will lead to injustice and unfairness. It is not in the interest of justice to require Appellants to file their brief prior to the disputed conflicts of interests are resolved. It would, however, be an even more extreme miscarriage of justice to stay only respondents' brief.

The fundamental principle in our justice system is to provide a meaningful and fair access to the court and justice. Allowing only one party to stay is not a fair judicial decision, as stated in Washington Code of Judicial Conduct ("CJC") Rule 2.1.

C. Commissioner's Ruling is inconsistent with Rule of Appellate Procedure 10. 2(b)

This Court is required to comply with timing requirements as stated in Rule of Appellate Procedure ("RAP"). Staying only one party' brief is not supported by RAP 10.2 which governs timing requirement for filing briefs. Specifically, RAP 10.2 (b) provides,

"(b) Brief of Respondent in Civil Case. The brief of a respondent in a civil case should be filed with the appellate court within 30 days after service of the brief of appellant or petitioner."

Timing requirement for Appellants and Respondents is closely correlated per RAP 10.2 (b). Staying only Respondents' brief may provide Respondents a *longer* time to review, prepare and respond to Appellants' brief, which subsequently result in a violation of court rule and severe prejudice against Appellants.

D. Extraordinary circumstance warrants a stay for Appellants' brief

This Court's previous order requiring Appellants to submit brief on January 14, 2019 was a decision based upon appellants' motion filed *prior to* knowing Defendants' violation of Attorney-Client privilege. Thus, the decision did not take into account the disputed conflicts of interests. Further, when this Court requires Appellants to submit their brief on January 14, *it did not grant a stay for Respondents' brief.* A substantial change in circumstance gives the court adequate cause to modify its prior order, which includes but not limited to: (1) perceived, ***unresolved and ongoing*** Attorney-Client Privilege: trial court's pending findings on Smith Goodfriend, P.S.' conflicts of interest; and Appellants' pending motion to disqualify Smith Goodfriend, P.S.; this court's grant of stay for Respondents' brief; and (2) trial court's pending decisions on Appellants' motion for reconsideration on postjudgment motion.

IV. CONCLUSION

In view of forgoing, staying brief is in the interest of justice and judicial economy. However, this stay should apply to both parties. Staying one party is not supported by Rule of Appellate Rule and Appellants will be severely prejudiced if Staying deadlines only for Respondents. Appellants respectfully request this Court's clarification that the Stay applies to both parties; and both parties' brief stay pending trial court's findings and this court's decision on Appellants' Motion to disqualify.

Respectfully submitted this 2nd day of January, 2019

/s/ Susan Chen
Susan Chen
Pro se appellant

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134,
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of the filing to all counsel of record.

Dated this 2nd day of January, 2019.

/S/ Susan Chen
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SUSAN CHEN - FILING PRO SE

January 02, 2019 - 12:23 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

The following documents have been uploaded:

- 775227_Motion_20190102122204D1750928_3918.pdf
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APPENDIX I

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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January 3, 2019

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CASE #: 77522-7-I
Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on January 3, 2019:

"Appellant's motion for reconsideration and clarification filed on January 2, 2019 is treated as a motion to modify the December 31, 2018 ruling."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

SSD

APPENDIX J

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' REPLY IN SUPPORT OF MOTION TO MODIFY

Susan Chen

Pro Se appellant

PO BOX 134,

Redmond, WA 98073

I. RELIEF REQUESTED

By submitting this Reply, Plaintiffs want to bring to the attention of this Court that the first and foremost issue is that Smith Goodfriend, P.S. ("Goodfriend") is barred by Rules of Professional Conduct ("RPC") 1.9 (a) (trial court's findings[1] in its December 12, 2018 Order) to represent Respondents as of January 11, 2019, when the 30-day period of filing the notice of appeal expired, the Order has become final/unappealable and in effect due to the res judicata and collateral estoppel effects of the judgment on Goodfriend' conflicts of interests. Languages in RPC 1.9 (a) are clear that Goodfriend cannot represent Respondents whose interests are materially adverse to its former client, i.e., Appellants. Appellants thus respectfully request this Court strike Respondents' Response filed by Goodfriend lawyers, whose representation is barred by RPC 1.9 and Honorable Ken Schubert's December 12, 2018 Order (together with factual findings and conclusions of law). APPENDIX A, Judge Schubert's December 12, 2018 Order.

Appellants did demonstrate good cause for stay their brief as the actual victims of Goodfriend lawyers' betrayal. Confidential information disclosed will significantly compromise Appellants' strategical arguments in brief because Respondents likely had Appellants' confidential information but not the same for Appellants. Commissioner improperly stay brief of Respondents whose ability will not be affected because Respondents have *more than one firms* representing them – so, even if Goodfriend is disqualified, Respondents are not prejudiced. *If no attorneys is a good cause to stay brief, this reasoning should* ***also*** *apply to* ***pro se*** *Appellants.*

---

[1]Trial court's finding was also supported by RPC 1.18 that "prospective clients" refer to "*unilateral* communication" in *RPC 1.18, comment 2* but all communications between Ms. Chen and Goodfriend are ***mutual, two-sided.*** Part of phone record provided by Chen well proved ***more than one phone*** lengthy conversation with Goodfriend thus no reasons to believe only a small portion of information had been disclosed. *Trial court's proper finding that Ms. Chen is a former client under RPC 1.9 became final and unappealable as of January 11, 2019.*

Appellants do not object to Respondents' stay but this stay should be for two parties pursuant to RAP 10.2. If this Court eventually determines that Appellants' understanding is incorrect, Commissioner was correct in staying only Respondents' brief, then Appellants request the specific instruction to submit the brief that Respondents will not take advantage of longer time as set in RAP 10.2.

Respondents' Response is full of misinformation, irrelevant allegations and unlawful relitigation on issues that had been adjudicated by Honorable Schubert and are barred by Res Judicata. Respondents largely failed to rebut Appellants' grounds for reconsideration to also stay Appellants' brief because of two pending issues. One is the motion for reconsideration on denying vacation on judgments - Judge Schubert repeated stated at the Show Cause hearing that he believed that the erroneous orders should be vacated, and he stated that ***he believed that his three colleagues at Court of Appeals would agree with him***. However, Judge Schubert was misled by Respondents that the errors could only be fixed at Appellate Court. This is not true in light of judicial economy, Appellants therefore moved for reconsideration on December 24, 2018, which is pending before Judge Schubert. The decision will likely affect the appeal so a stay was reasonably requested. Respondents failed to rebut that stay brief pending reconsideration on the same dispute is improper. *Respondents' opposition failed to show cause why decision on reconsideration will not affect the appeal, and/or cannot warrant stay Appellants' brief.* Instead, they spent an inordinate time disputing *final* findings in Judge Schubert's Order. This briefing is not an appropriate vehicle to dispute a judicial final decision.

A change of circumstance requires a stay, but the stay shall not only for one party. The *only* Rule governing timing for filing brief is RAP 10.2, which clearly provides that timing for Respondents' brief completely depends upon the timing for Appellants' brief: Respondents' brief

is due "30 days" after Appellants' brief. In other words, timing for Appellants and Respondents' briefs are indispensably and closely related. RAP 10.2[2] does not provide an isolated consideration to stay for one party, even under examination of Appearance of Fairness Doctrine.

II. FACTS

On November 26, 2018, Appellants were first made aware that Smith Goodfriend, P.S. ("Goodfriend")' unlawful participation and representation in the current case, in violation with Attorney-Client Privilege. Appellants promptly informed Goodfriend of the violation, and demanded two attorneys' immediate withdrawal. Goodfriend did not withdraw, but only substitute one associate with one partner. On November 29, 2018,

On November 29, 2018, Appellants filed Motion to recuse Smith Goodfriend, P.S. ("Goodfriend") in trial court. Bennett, and Goodfriend were informed of this motion. Two responses filed by Respondents' lawyers from both Bennett, Bigelow & Leedom, P.S. and Smith Goodfriend, P.S., respectively.

On December 12, 2018, trial court entered an Order regarding Smith Goodfriend, P.S. ("Goodfriend")' perceived conflicts of interest. Notably, the trial court found that RPC 1.9 (a) applies, which refer to "duty to former clients". There is no evidence in court record that Respondents ever dispute this Order and/or its findings and conclusions of law: No motion for reconsideration was filed with trial court within 10 days; no appeal was filed with this Court

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[2] "When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature." *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P. 2d 971 (1993).

within 30 days. Therefore, the order (together with its findings) has become final and in effect as of January 11, 2019. Smith Goodfriend, P.S. is thus prohibited to represent Respondents by both Doctrine of Finality and RPC 1.9, any pleadings filed by Smith Goodfriend, P.S. is prohibited by laws, and subject to be stricken as non-compliance.

On December 24, Appellants moved for reconsideration on denying vacate judgments which trial court stated at the hearing that they should be vacated but was misled by Respondents that the error could only be fixed at Appeal. See, APPENDIX B & C.

On December 31, 2018, Commissioner entered a Ruling, instructing parties to seek trial court's entry of findings on conflicts of interests claims. Commissioner stayed only Respondents' brief during the remand, but stated that Appellants need to submit their brief on January 14, 2019 per this Court's previous ruling. On January 2, 2019, Appellants moved for Clarification/ Reconsideration, pointing out that this Stay should be to both parties, instead of only one party because only staying one party is inconsistent with timing requirements as set in RAP 10.2 (b) as well as Appearance of Fairness Doctrine. Appellants further contended that, this Court previous instruction requiring Appellants to submit their brief on January 14, 2019 did not take into account of Goodfriend's conflict of interest such that this extraordinary circumstances warrants a stay (for two parties). At minimum, *this Court's previous decision did not allow a stay for Respondents.* Appellants further informed this Court that a pending reconsideration on disputed judgments before the trial court that might significantly affect the appeal that requires a Stay in the interest of judicial economy.

On January 2, 2019, Appellants filed motion to request trial court's entry of findings on conflicts of interest per Court of Appeals' directive. APPENDIX D. Respondents filed response centering on disputes on trial court's December 12, 2018 decision, asking trial court deny Appellants'

request for entry of findings, and confirm their representation. APPENDIX E. Appellants replied, pointing out that trial court cannot deny entry of findings because this is the Appellate Court's instruction, and trial court cannot confirm Respondents' representation due to this request far exceeds scope of Appellate Court's directive remand. APPENDIX F.

III. ARGUMENTS

A. Smith Goodfriend, P.S. is barred to represent Respondents as of January 11, 2019 by RPC 1.9, any filings thereafter should be stricken

Trial Court's December 12, 2018 Order, together with its finding that Ms. Chen was Goodfriend's former client became final on January 11, 2019. As a general rule, "A party is entitled to claim the benefits of res judicata with respect to determinations made while he or she was a party." *Lejeune v. Clallam County*, 64 Wn. App. 257, 823 P. 2d 1144 (1992). Therefore, Appellants have rights to assert res judicata for the issues on conflicts of interest.

Once the trial court's December 12, 2018 decision was final that Ms. Chen was Goodfriend's former client, Appellants had standings to assert that it bars Goodfriend's further participation and representation for the Respondents in the current action due to the res judicata and collateral estoppel effects of the judgments on Goodfriend lawyers' perceived conflicts of interests.

On December 31, 2018, Commissioner Kanazawa properly remanded to the trial court to enter factual findings on Appellants' conflicts of interest claim when the trial court's findings were still within the 30-days period of filing the appeal. **But now**, due to the finality of Honorable Schubert's December 12, 2018 Order and findings as of January 11, 2019, and the available findings disputable on December 31 are now final. Commissioner Kanazawa's ruling thus shall be modify to "confirm trial court's findings" because "Res judicata ensures the finality of

decisions." *Pederson v. Potter,* 103 Wn. App. 62, 67, 11 P. 3d 833 (2000). **Res Judicata, also known as Claim preclusion is "first, and most important" and "is the integrity of the legal system."** e.g,. *Pederson v. Potter,* 103 Wn. App. 62 (2000).

B. Respondents' improper dispute on a final decision are barred by Res judicata

Instead of addressing the central issue in Appellants' motion requiring stay briefs, Respondents cited no authorities to rebut that staying briefing pending decision on reconsideration which might affect appeal. Instead, Respondents spent an inordinate amount of time arguing that Ms. Chen is Goodfriend's prospective clients, instead of former client. *Response,* P. 7-10. This was Respondents' *third* attempts to make the same and futile arguments. When Appellants filed motion to disqualify Goodfriend at trial court, Respondents were given notice, they actively contested to motion and the matter had been adjudicated. Had they lost the motion, they would have been treated as parties -they were required to appeal with 30 days, RAP 5.2, and upon not choosing to appeal, they would have been bound by the rules of res judicata. e.g., *Pederson v. Potter,* 103 Wn. App. 62, 67, 11 P. 3d 833 (2000) ("Res judicata ensures the finality of decisions"). "Res judicata, or claim preclusion, prohibits the relitigation of claims and *issues that were litigated, or could have been litigated*, in a prior action." *Id* (emphasis added).

If Respondents disagreed with trial court's decision and its findings, they could of course dispute, either through motion for reconsideration or appeal. But Respondents did neither of these two proper methods permitted by laws. Instead, they repeatedly made the same arguments in their most recent Response to *Appellants' Motion to request trial court's entry of findings per Court of Appeals' Directive*, asking trial court to confirm their representation, far exceeding the

scope of Commissioner's ruling that only instructed parties to seek entry of findings. Commissioner did not instruct parties to dispute trial court's prior findings, nor to seek confirm representation. Here, Respondents once again improperly disputed trial court's decision in a response pleading before this Court, which is not the right vehicle. This Court should strike this response as irrelevant, improper, non-compliant, prohibited.

C. RAP 10.2 is the *only* applicable court rule governing the timing for filing briefs

In their Response, Respondents argued that under RAP 18.8 (a) the court may "enlarge or shorten the time [for Appellants' Opening Brief]". This is false. RAP 18.8 (a) is "subject to the restrictions in section (b) and (c)" while RAP 18.8 (b) permits the court to modify the time in Notice of Appeal, Notice for discretionary review, a motion for discretionary review, a petition for review, or motion for reconsideration, and RAP 18.8 (c) applies only to RAP 12.7. Neither RAP 18.8 (b) or (c) applied here. Indeed, Respondents cited ***no*** authorities to support that the court can stay only brief for Respondents.

RAP 10.2 is the only court rule governing brief timing in Court of Appeals. Specifically, RAP 10.2 (b) provides,

> "(b) Brief of Respondents in civil cases. The brief of a respondent in a civil case should be filed with the appellate court within *30 days after* service of the brief of appellant or petitioner." (emphasis added)

When interpreting court rules, the court approaches the rule as though they had been drafted by the Legislature." *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P. 2d 971 (1993). The languages

in RAP 10.2 are clear that the timing brief cannot never be isolated. Staying only one party is based upon untenable grounds, inconsistent with RAP 10.2 and in violation of Appearance of Fairness Doctrine.

D. Appellants' brief should be stayed provided the extraordinary hardship caused by Goodfriend's Attorney-Client Privilege Violation

Respondents argued that Commissioner properly refused to stay Appellants' brief because "resolution of Respondent physicians' appellate representation has no bearing on the issues to be raised in appellants' opening brief." This is not true. As pointed out in Ms. Chen's November Declaration, she had provided "detailed information", "details of the case", "pros and cons of the case", "one confidential document", "goal and expectation for the litigation" through " a few lengthy conversation"(APPENDIX G). Apparently, Appellants' ability will be significantly affected by Goodfriend's representation given the fact that Appellants are the *actual victim* for this attorney-client Privilege violation. Respondents' interests are not affected since Goodfriend is currently representing them.

Respondents further suggested that, "the determination of Respondent physicians' appellate counsel clearly affects their ability to file their responsive brief." See, *Response,* P.7. This argument is without merits. If lacking counsel forms a good cause to file brief, then this reasoning *also* applies to Appellants who are *pro se*. Nevertheless, even if Goodfriend lawyers are disqualified, Respondents are still represented by lawyers from Bennett, Bigelow & Leedom, P.S.. who can prepare the brief for them: the only difference will be having only one law firm, instead of two firms. Respondents are not prejudiced, therefore no good cause to stay their brief.

IV. CONCLUSION

As stated, due to the finality of trial court's December 12, 2018 Order, the pleadings filed by Smith Goodfriend was inappropriate. Appellants respectfully request that this Court strike their Response, and grant a stay for Appellants to serve the end of fairness and justice, and in the interest of judicial economy pending decision on reconsideration motion for the same disputed issues.

If this Court decides that Appellants' understanding is incorrect and requires that Appellants need to submit their brief immediately, Appellants will abide by the directive, but respectfully request that this Court provide a detailed instruction that Appellants' brief will not disclose to Respondents at an earlier time, so that only 30 days are permitted for their response, consistent with RAP 10.2 and under Appearance of Fairness Doctrine.

Respectfully submitted DATED on this 17th of January , 2019.

/s/ Susan Chen

Susan Chen

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 17th day of January, 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

January 17, 2019 - 4:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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APPENDIX K

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' REQUEST FOR EX PARTE ORDER TO FILE OPENING BRIEF

(SUPPLEMENTAL SUBMISSION RE: MOTION TO MODIFY)

Susan Chen

Pro Se appellant

PO BOX 134,

Redmond, WA 98073

COMES NOW Appellants request the Court to consider their request for an *ex parte* Order to submit opening brief in connection with their pending Motion to modify Commissioner Masako Kanazawa's 12/31/2018 Ruling before this Court, as further expressed below:

On November 29, 2018, Appellants filed motion to disqualify Smith Goodfriend, P.S. at trial court due to their pending CR 60 motion at trial court, alleging Ms. Chen had shared substantial confidential information with Smith Goodfriend, P.S.. Respondents responded, arguing that the trial court cannot rule on their representation because they are appealing attorneys. Appellants replied, pointing out that trial court could make findings, and also could regulate their activities within trial court. On December 12, trial court Judge Ken Schubert ruled on the motion, making findings and applying RPC 1.9 (a) to the matter of conflicts of interests about Smith Goodfriend.

On December 3, 2018, Respondents filed motion to confirm representation at Appellate Court. Appellants responded. On December 17, Respondents replied, claiming that Smith Goodfriend "shall abide by [12/12/2018] Order." *Respondents' Reply,* at P. 8.

On December 12, Appellants filed motion to disqualify Smith Goodfriend, P.S. at appellate Court, alleging conflicts of interests barring Smith Goodfriend, P.S. from representing Respondents in the same matter in which their interests are materially adverse to the interests of Appellants. Respondents did *not* respond to the motion. On December 27, Appellants replied, asking this Court to grant their motion due to Respondents' failure to respond, and the perceived conflicts of interests.

On December 31, 2018, Commissioner Masako Kanazawa entered a ruling, directing parties to seek trial court's entry of findings on Smith Goodfriend's conflicts of interests[1], and stayed only Respondents' brief[2].

---

[1] Commissioner's ruling was acceptable on 12/31/2018 because on that day, Judge Schubert's 12/12/2018 Order was still appealable; Commissioner's ruling was subsequently subject to modification because as of 1/11/2019, Judge Schubert's Order became ***final*** under Doctrine of Res Judicata after 30 days' appealing period.

2. Commissioner's Ruling was actual a *modification* of this Court's 12/14/2018 Order because the 12/14/2018 Order did not allow staying Respondents' brief.

On January 2, 2019, Appellants moved for clarification seeking stay for both parties pursuant to RAP 10.2 (b), the *only* court rule governing timing for filing briefs. RAP 10.2 permits Respondents "30 days" to respond to Appellants' brief. Appellants argued that Respondents will not be prejudiced if staying Appellants' brief because Respondents always have "30 days" under RAP 10.2; but if only staying Respondents' brief Appellants may be prejudiced because Respondents may obtain more than "30 days" to review, and prepare their Response. Appellants' another ground to stay brief was because their Motion for Reconsideration on the same disputed issues on appeal was before the trial court – Judge Schubert said that these erroneous orders should be vacated and articulated at the Show Cause Hearing that he believed that his three colleagues at Court of Appeals would agree with him, and get this fixed.

In Response, Respondents were unable to rebut Appellants' argument that RAP 10.2 is the only court rule governing timing for brief. Instead, they made improper and irrelevant arguments, and misinterpreted court rule.

In their Reply, Appellants pointed out that Respondents had two law firms appearing on their behalf so even if disqualifying Smith Goodfriend will not affect their ability to file a Response. Further, without attorneys is not a reason to stay brief because Appellants were *pro se*. Appellants further informed this Court that Judge Schubert's Order (together with his findings on December 12, 2018) has become final as of January 11, 2019, so Commissioner Kanazawa' Ruling was subject to modified as "confirm findings" (instead of seek findings) because the disputed conflicts of interests had been adjudicated under Effects of Res Judicata and collateral Estoppel. Appellants also explicitly request this Court to provide an instruction for Appellants to submit brief (if this Court requires Appellants' immediate submission) so that "Appellants' brief will not disclose to Respondents at an earlier time, so that only 30 days are permitted for their response, consistent with RAP 10.2 and under Appearance of Fairness Doctrine."

On January 17, Judge Julie Spector signed an order, confirming Smith Goodfriend's Representation, far exceeding her legal authority (as *trial court* judge, she cannot confirm the representation *at appeal*), and applied RPC 1.18, contrary to a prior final judicial decision dated on December 12, 2018. Finality of judgment is a central value in the legal system as provided in U.S. Constitution since 1792, no matter should be re-litigated and re-adjudicated. This Court

should not consider Judge Spector's Order, which was inconsistent with Judge Schubert's prior order dated on December 12, 2018.

If this Court modifies Commissioner's Ruling to stay Appellants' brief as argued above, this issue is moot, and this Court need not reach this request for ex part order to file brief. But if not, then on this motion, Appellants present to this Court that while motion to modify is pending before this court, Appellants are willing to abide by this Court's order and ready to submit their brief, the only relief sought is an ex parte order to file their brief so that their brief will *not* be disclosed to Respondents in less than 30 days, pursuant to RAP 10.2. Appellants can send their brief to the clerk and/or case manager, instead of filing online upon the grant on the motion. This request is to show Appellants' sincerity, but not concession.

Respondents' irrelevant arguments on Judge Schubert's findings of application of RPC 1.9 were judicially estopped by all their prior statements that they "shall abide by that Order." Reply at P.8. The languages in Judge Spector's order was barred by Res Judicata because it contradicted with Judge Schubert's previous findings. Respondents could have appealed. They did not. This Court should affirm Judge Schubert's findings on 12/12/2018, and accordingly modify Commissioner's Ruling to "confirm findings" on 12/12/2018.

Respectfully submitted DATED on this 21st of January , 2019.

/s/ Susan Chen

Susan Chen

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 21st day of January, 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
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SUSAN CHEN - FILING PRO SE

January 22, 2019 - 9:23 AM

Transmittal Information

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Appellate Court Case Number:	77522-7
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APPENDIX L

NO.775227

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This is an extraordinary story. In 2013, without consulting with J.L.'s main treating physicians or, reviewing his medical history, three defendant physicians jumped to the conclusion that J.L. was abused by his mother, Ms. Chen who was subsequently arrested and criminally charged. J.L. and his brother, L.L. were removed out of home. Fortunately, both dependency proceedings and criminal prosecution were dropped when the State learned that the reports provided by the defendant physicians were *directly* contrary to the patient's medical record. Unfortunately, these rightful dismissals came far too late, after more than a year of the family having been torn apart and everyone in the family having suffered tremendous harm. This harm would not happened if the Defendant physicians had adequately investigated J.L.'s medical history, including the information in the files of their own institution, instead of providing a false diagnosis that was contrary to the medical facts and records.

The subsequent proceedings are also unusual. In 2016, Plaintiffs filed a *pro se* civil action against Defendant physicians seeking damages. Without answering the complaint, Defendants quickly and unilaterally moved for a procedurally barred CR 12 (c) judgment motion based upon 20 pages' highly misleading and false information to the Court. Plaintiffs were served the documents only one week before the hearing and were denied a continuance for discovery. Even though Defendants did not meet the initial burden of showing that there were no genuine issue of material facts, trial court granted their summary judgment; even while Defendant put another doctor's treatment record (rather his own) before the court, judgment was entered in his favor; even when it was pointed out to the court that the children were not appointed a guardian ad litem, the trial court entered summary judgment against them without making a good cause determination. For these and more, this Court should reverse the summary judgment.

To make matters worse, when Plaintiffs moved for clarification as to whether the dismissal was with or without prejudice, the trial court refused to clarify, leaving the issues unresolved and the judgments ambiguous. This Court should declare the orders to be "without prejudice" pursuant to CR 41 (a) (4), especially to minors whose statute of limitations will not expire for more than a decade. At minimum, the Court should make clear that these orders do not prohibit eight year old

J.L. who had lost all meaningful communication due to Defendants' misdiagnosis, from pursuing a case against Defendant doctors in the future, within the applicable statute of limitations.

Plaintiffs later obtained J.L.'s 600 pages' full medical records from Defendants' institution in a separate federal civil rights (#2:16-cv-01877-JLR), involving claims against the police and the department of social and health department, involving their actions following the Defendants' misdiagnoses. In that case, the federal court found sufficient merit to Plaintiffs' claims that counsel were assigned; assigned counsel (Dorsey & Whitney) were able to obtain the discovery that Plaintiffs were not able to obtain in this case. These records establish that Defendant physicians had full access to J.L.'s medical history at the time of their misdiagnoses. The records also establish that Defendant physicians were not acting in good faith and did not meet the standard care in their diagnosis when they did not consult with J.L.'s main treating physicians before jumping to the conclusion that J.L. was being abused. Plaintiffs moved to vacate judgments based upon 'newly discovered " evidence and procedural irregularities. Chief Judge Ken Schubert (original judge had retired) agreed that the erroneous orders should be vacated but was persuaded by Respondents that the errors could only be fixed by Court of Appeals. Judge Schubert articulated that he **believed that his three colleagues at Court of Appeals will agree with him, and get this fixed.** Plaintiffs timely moved for reconsideration, currently pending before the trial court.

Washington courts have 86 Civil Rules. This case involves a stunning number of procedural violation/irregularities that significantly affect public confidence in the judicial system. This Court should reverse.

II. ASSIGNMENT OF ERRORS AND ISSUES ON APPEAL

A. Assignments of Errors

1. The trial court (Judge Hollis Hill) erred in denying Appellants' very first request for a continuance to conduct discovery, when discovery cutoff was more than 6 months away. CP 121.
2. The trial court (Judge Hill) erred in ignoring Plaintiffs' factual allegations that the Defendant physicians fell below the standard care for "refusing to contact Plaintiff, J.L.'s parents, and Plaintiff, J.L.'s main treating physicians, and reviewing his full medical records". CP 3, 11, 18; and further failing to consider Plaintiffs' factual allegations that this was a false CPS referral, and that the dependency action was dismissed with the conclusion that "a full review of the records does indicate (contrary to the SCAN team report at Children's) that the mother did not refuse to admit [J.L.] to the hospital against medical advice on 10/20/13." CP 47, 56.

   The trial court further erred in granting summary judgement when Defendants did not meet their initial burden of showing that there is no genuine issue of material fact that warrants a judgment (CP 62-124; 125-258); when the record before the court showed that Plaintiffs did properly serve one defendant, SCH within 90 days (CP. 64; 381; 392; 33-40); and when the court was fully informed that the minors' claims are tolled under ***Schroeder v. Weighall***, 179 Wn. 2d 566 (2014) (CP 391-392) and they were not appointed guardian ad litem. (CP 368-369).
3. The trial court (Judge Hill) erred in granting Defendants' CR 12 judgment motion which was procedurally barred by CR 12 (c) since it was brought before closure of the pleadings, and Defendants ***never*** answered Plaintiffs' complaints. CP. 62-68; 125-

147; 131. Also, CR 8 (d) (failure to deny Plaintiffs' factual allegations should be treated as "admitted").

4. The trial court (Judge Hill) erred in dismissing the minors' claims when there was no evidence that the minors had been properly before the trial court because:

   (i) They were never appointed guardian ad litem to represent their best interests even after being called to its attention. CP. 294-296; 368-369.

   (ii) They were never personally served. e.g., CP 69; 148; 155; 249; 252; 255; 258; 272; 290; 321; 348; 354.

5. The trial court (Judge Hill) erred in entering an ambiguous judgment (language is silent as to whether it is with or without prejudice) in the following respects:

   (i) If the dismissal was based upon insufficient service upon three Defendants, this was an "oversight" because Plaintiffs did properly serve one Defendant within 90 days. CP. 64; 381; 392. Plaintiffs' statute of limitation was tolled to all unserved respondents due to proper service upon one defendant.

   (ii) If the dismissal was due to Plaintiffs' failure to produce an expert affidavit but the deadline for disclosing primary witnesses was more than 3 months away; and discovery cutoff is six months away. CP 121. In ***Putman v. Wenatchee Valley Med. Ctro,. P.S.***, 166 Wn. 2d 974, 983, 216 P.3d 374 (2009), Supreme Court held that requiring medical malpractice plaintiffs to provide expert affidavit prior to discovery violates Plaintiff' right to access to the court.

   (iii) If the dismissal was due to two unsigned complaints, CR 11 does not permit a dismissal with prejudice, but only allows striking pleadings after providing "reasonable time to cure the defect";

(iv) If the dismissal was on the merits, the court was required to enter written findings and conclusions of law, as required by CR 41 (b)(3) and CR 52 (a)(1). No written findings were ever entered. CP 291-293;

(v) If the dismissal was on jurisdictional or procedural grounds, the court should clarify that it was a dismissal without prejudice since the minors' statute of limitation will not expire for more than a decade; and adult plaintiffs' statute was tolled due to proper service upon on defendant within 90 days. CP 64; 391-392.

6. The trial court (Judge Hill) erred in denying Plaintiffs' timely motion for reconsideration, which raised multiple issues in dispute. For example, Plaintiffs notified the court of the absence of guardian ad litem for the minors. CP 294-296. Instead of addressing these issues and appointing a guardian ad litem for the minors, Judge Hill entered judgments against the minors without a finding of good cause for her failure to appoint a guardian ad litem. CP 457-458.

7. The trial court (Judge Hill) erred in failing to disqualify herself from presiding over the case because she presided over Plaintiffs' dependency matter in 2013, and had reviewed testimonies from multiple witnesses and had made multiple important decisions.

B. Statement of Issues

1. ***Standard of Summary Judgment.*** (AOE No. 1, 2 &3)

   a. *Are Plaintiffs obligated to produce facts to show the presence of an issue of material fact when Defendants had not met their <u>initial</u> burden of "showing the absence of an issue of material fact?"* (AOE No. 2)

CR 56. e.g., ***Young v. Key Pharm., Inc.***, 112 Wn. 2d 216, 225, 770 P. 2d 182 (1989).

b. *Did the Court err in granting summary judgment when the records show that there were genuine issues of material fact?* (AOE No. 2)

c. *Did the Court err in denying a continuance for Plaintiffs to conduct discovery and obtain expert affidavit in opposition to summary judgment under CR 56 (f), when Defendants suffered no prejudice since discovery cutoff was six months away, deadline for dispositive motion was seven months away*? (AOE No. 1)

d. *Did the Court err in granting summary judgment when Defendants failed to deny allegations in responsive pleading required by CR 8(d)? (*AOE No. 2)

e. *Did the Court err in granting summary judgment on a procedurally barred CR 12 (c) judgment motion?* (AOE No. 3)

f. *Did the Court err in granting summary judgment in Defendants when the allegations were admitted (under CR 8 failure to deny is treated as "admitted")?* (AOE. No. 2&3)

2. ***Due Process Rights, Guardian ad Litem Statute & RCW 4.08.050*** **(AOE No. 4&6)**

a. Were the minors parties to the action when they were not appointed (and represented) by guardian ad litem? (AOE No. 4 &6)

Procedural due process requires "no individual should be bound by a judgment affecting his or her interests where he [she] has not been made a party to the action." This right is fundamental that parties whose interests are at stake must have an opportunity to be heard "at a meaningful time and a meaningful manner." ***Olympic***

Forest Prods., Inc. v. Chaussee Corp., 82 Wn. 2d 418, 422, 511 P. 2d 1002 (1973) (quoting ***Armstrong v. Manzo***, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). To make minors party of the action, appointment of guardian ad litem is "mandatory". ***Mezere v. Flory***, 26_Wash. 2d_274, 278, 173_P.2d_776 (1946), citing ***Ball v. Clothier***, 34 Wash. 299, 75 P. 1099 (1904); In ***Newell v. Ayers***, the court held that, " the rule is that a minor **must** be represented by a guardian ad litem, or the judgment against him may be voidable at his option" (emphasis added). ***Newell v. Ayers***, 23 Wn. App. 767, 772 (1979). Failure to join the child as an indispensable party represented by a guardian ad litem divests the court of jurisdiction and renders all judgments made by the court void. ***McDaniels v. Carlson***, 108 Wn.2d 299, 312, 738 P.2d 254 (1987).

b. Were the minors properly before the Court where there was no evidence that minors were ever personally served? (AOE No. 4)

Procedural due process requires notice and an opportunity to be heard. To be bound to a judgment, a person is entitled to notice. e.g., ***State v. Douty***, 92 Wn. 2d 930 603 P. 2d 373 (1979) ("it should be noted that the child, though named in the action, was never served. Consequently, he is not before the court.")

3. ***CR 41 (a)(4), CR 41 (b)(3), CR 52 (a) (1) & CR 52 (d)*** **(AOE No. 5)**

a. Should the order be correctly interpreted as "without prejudice" under CR 41 (a)(4) when no language of "with prejudice" was included in the order?

CR 41 (a) (4) ("Unless otherwise stated in the order of dismissal, the dismissal is without prejudice…")

b. Should the Order be correctly interpreted as "without prejudice" under CR 41 (a)(4) when no entry of findings to support a dismissal on merits required by CR 41 (b)(3) and CR 52 (a)(1)?

CR 41 (b)(3) ("If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 51 (a)".) CR 52 (a)(1) (written findings are required for all disputed facts.). CR 52 (d) ('a judgment entered in a case tried to the court where findings are required, without findings of fact having been made, is subject to a motion to vacate..."), also, ***Little v. King***, 160 Wn. 2d 696 (2007).

c. Does CR 11 permit the Court to dismiss with prejudice or only strike the unsigned pleadings after having provided "reasonable time" to cure the defect? See, e.g., ***Biomed Comm., Inc. v. State Dep't of Health Bd. Of Pharmacy,*** 146 Wn. App. 929, 193 P. 3d 1093 (2008).

4. ***Statute of Limitation*** **(AOE No. 5)**

a. *Could the Court dismiss the minors' claim with prejudice*? ***Schroeder v. Weighall et al*** 179 Wn. 2d 566, 316 P.3d 482 (2014).

b. *Could the Court dismiss adult Plaintiffs' claims with prejudice if they properly served one defendant within 90 days*? See, RCW 4.16.170 (tolling of statute). also, ***Sidis v. Brodie/Dohrmann, Inc.,*** 117 Wn. 2d 325, 327, 815 P. 2d 781 (1991).

5. ***Code of Judicial Conduct Rule*** 2.11 (A)(6)(d) (AOE No. 7)

a. Should Judge Hill have disqualified herself from the case under Code of Judicial Conduct ("CJC") Rule 2.11 (A)(6)(d) since she "previously presided as a judge over the matter in another court."

III. STATEMENT OF THE CASE

A. J.L. is a minor with a complicated medical history. He was diagnosed with autism in 2012 and had a well-documented medical history of digestive distress before being wrongfully removed in October 2013

J.L.'s complicated medical history preceded October 20, 2013., when the Defendant physicians alleged that he was not autistic but was instead being abused by his mother - J.L. was diagnosed as autistic by the Lakeside Autism Center in September 2012, more than a year before this claim. CP 52, CP 220. He also had extensive gastrointestinal ("GI") and digestive problems, which are often associated with autism. His history of GI problems was well documented at Seattle Children's Hospital (SCH) well before his unlawful CPS removal on October 24, 2013. CP 220. He received care for autism and digestive issues from multiple providers, including Dr. John Green and Dr. Gbedawo, who specialize in these issues. With a variety of early interventions, including ABA (applied behavior and analysis), speech and occupational therapy, J.L. made significant progress – he was responsive and generally cheerful, he could communicate, and he could figure out how to solve problems. CP 194, 406. His GI problems were addressed by Dr. Green through an SCD diet, which is recognized in research by Dr. David Suskind, a pediatric gastroenterologist at SCH.[1]

[1] SCD is a dietary regime used to limit a certain type of carbohydrate to treat GI problems. In his 2013 publication in the Journal of Pediatric Gastroenterology and Nutrition, Dr. Suskind (doctor of Seattle Children's Hospital) and his colleagues wrote, "all symptoms were notably resolved at a routine clinic visit three months after initiating the diet [SCD]". In a 2018 publication, the authors concluded, "SCD therapy in IBD [inflammatory bowel disease] is associated with clinical and laboratory improvements as well concomitant changes in the fecal microbiome."

On October 20, 2013, JL appeared to be sick, and his parents sought medical care at SCH. CP 72-77. J.L. was released within hours by the ER doctor who determined that "He does not have hypertensive emergency at this time and does not meet the eminent risk criteria for medical hold. We will discharge him to his parents with close follow-up with primary care provider [PCP]." CP 76. On October 23, 2013, J.L. first followed up with Dr. Gbedawo, his PCP, who found that "[J.L.] is medically stable, only needs to follow up with her in 10 days". CP 193. That afternoon, J.L's parents took him to Dr. Halamay at Pediatric Associates, as advised by SCH. Dr. Halamay had seen Jason only three times for urgent care and was not familiar with his conditions.

When Ms. Chen complained about Dr. Halamay's rudeness, Dr. Halamay filed a CPS referral, alleging (falsely) that J.L. had "life threatening" kidney failure such that he needed to be urgently removed. She omitted that J.L. had just been released from SCH ER and that this was a routine follow up. CP 193, 215, 234. That night, a CPS social worker, Davis was assigned to remove the child from the family. Davis described J.L as "sleep peacefully and soundly." CP 193, 234. The parents agreed to take J.L. to SCH, where it was quickly determined that Halamay's allegation of "kidney failure" was baseless since his creatinine (the measure of kidney function) was normal. This was consistent with the determinations of the SCH ER doctor and Dr. Gbedawo.

B. The dependency court found Defendant Migita's below standard care to be "outrageous" and Assistant Attorney General David LaRaus concluded that Defendant Metz's report was "contrary" to the medical record

In the CPS removal action, the SCH physician defendants/respondents, operating in conjunction with the SCH SCAN (suspected child abuse and neglect) team, disregarded J.L.'s lab results, previous diagnoses and treatment plans. Instead, they alleged that J.L. was not autistic, that he did not have GI problems (though they prescribed GI medications), and that his conditions were caused

by abuse and/neglect by this mother. CP 406. Respondent Darren Migita, the attending physician (CP 3-4), refused to consult with J.L.'s parents, treating physicians or therapists, and misrepresented the laboratory reports and other findings. Respondent Metz provided a SCAN report (CP 78-83) that the Assistant Attorney General later determined was contrary to the medical records. CP 224. Respondent Kodish submitted a mental health evaluation based upon "largely unknown history" alleging that J.L. had reactive attachment disorder and that autism was low on the differential. CP 84-88. These misdiagnoses resulted in the removal of both children, almost a one year foster home stay for J.L. and the arrest of his mother, Ms. Chen. *Id.*

In foster care, J.L. was denied his prescribed therapy, and his autistic behaviors and GI problems worsened. Over almost one year, his health, behavior and skill declined precipitously, to the point where he lost virtually all skills, and no foster homes would keep him due to biting, screaming and similar behaviors. His treating doctors and therapists objected vigorously to the diagnoses of the physician respondents in statements to the social workers, investigators, and courts. CP 234-235. J.L. has not been able to regain the skills that he lost and at age 8 is still in diapers, cannot speak, and screams uncontrollably, sometimes for hours, at any actual or possible separation from his parents. The parents have sought treatment at Harvard and other medical facilities, at no avail. J.L. had none of these characteristics before the misdiagnoses of the respondent physicians and his stay in eight different foster homes, with little therapy and minimal contact with his parents and brother. CP 406-407; CP 44-.61; 405-412.

The dependency court judge found it "outrageous" that the SCH doctors never tried to talk with J.L.'s treating physicians or parents, and ordered respondent Migita to talk with Dr. Green. CP 235-236, 194. In September 2014, the dependency and criminal matters were dismissed on the merits, with the Assistant Attorney General noting that contrary to prior claims, "a full review of

the records does indicate (contrary to the SCAN team report at Children's) that the mother did not refuse to admit [J.L.] to the hospital against medical advice on 10/20/13." CP 56.

C. The trial court granted Defendants' CR 12(b)(2) motion (converted as CR 56 motion), inconsistent with this Court's decisions in *State v. LG Elecs., Gale v. C&K Remodel, Inc., Biomed Comm, Inc v. Dep't of Health. Bd. of Pharmacy.* etc

In October 2016, the parents filed a *pro se* lawsuit in King County Superior County alleging that the defendant physicians misdiagnosed J.L. and that their misrepresentations, below-standard care and false information led to the adverse out-of-home placement decision for J, causing severe and permanent damage to J.L. and his family. CP 1-8; CP 9-15; CP 16-23. *Defendants did not answer the complaint.* On February 2, 2017, defendant physicians filed a CR 12 judgment motion[2] on grounds that appellants did not properly serve them (there is no allegation that they did not receive the complaints, just that they were served by certified mail, and later through the sheriff at their workplace rather than their homes). CP 33-40; 205-210. Defendants Metz and Kodish also claimed that the complaints against them should be dismissed because they were unsigned[3]. All defendant physicians claimed that these technical defects could not be corrected, that they had immunity for their CPS involvement, and that Plaintiffs had provided no expert affidavit to support their claims and should not be permitted a continuance to obtain an attorney and/or expert affidavits. SCH joined in these claims but admitted that SCH was properly served within 90 days of filing.[4] CP 64, 381, 392. Defendants claimed immunity under RCW 26.44.060 with short (under 90 word)

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[2] Pursuant to CR 12 (c), a CR 12 judgment motion can only be brought after "after the pleadings are closed…"

[3] Unsigned pleadings do warrant a dismissal. In an unpublished opinion, ***Gale v. C&K Remodel, Inc.*** (2015), this Court held that "the trial court must provide a party that files an unsigned pleading *a reasonable time* within which to cure the signature deficiency before striking the pleading pursuant to CR 11" (emphasis added). *See also* ***Biomed Comm, Inc. v. Dep't of Heath. Bd. of Pharmacy***, 146 Wn. App. 929, 938, 193 P. 3d 1093 (2008).

[4] Statute of limitation was tolled in this case. See, ***Sidis v. Brodie/Dohrmann, Inc.,*** 117 Wn. 2d 325, 327, 815 P. 2d 781 (1991) (When service of process is achieved against one properly named defendant within 90 days, the statute of limitations is tolled as to all unserved defendants). See also RCW 4.16.170.

affidavits that did not address the specific allegations in the complaint, arguing that under ***Whaley v. State***, 90 Wn. App. 658, 956 P. 2d 1100 (1998), these were sufficient to establish good faith and to give immunity. CP145-146; 67-68.

Plaintiffs filed a response requesting a continuance on multiple grounds, including the need to conduct discovery, the need for a guardian ad litem to represent their children, and the need to obtain an attorney. CP 259-265. All Defendants objected to a continuance, citing ***Turner.*** CP 266, 288-289; ***Turner v. Kohler,*** 54 Wn. App. 688, 693, 775 P. 2d 474 (1989).

At the March 3, 2017 hearing, the Defendant physicians raised an additional issue about "absence of guardian ad litem." Plaintiffs indicated that if provided a continuance, they would be able to serve defendants at their homes; conduct discovery; and obtain an expert affidavit. Ms. Chen's former criminal defense attorney, Ms. Carter, appeared as a witness and advocated on the merits on behalf of access to justice. However, the judge articulated that, "No, I don't . . . need to hear the merits of her case." CP 389. The court denied a continuance and entered a dismissal order against all appellants, with no language as to whether it is an order "with prejudice" or "without prejudice". CP 291-293.

Plaintiffs moved for clarification/reconsideration, requesting the court clarify that the order against the children was "without prejudice." CP 294-296. Defendant physicians argued that the absence of "with prejudice" language in the order is a red herring by citing non-Washington authorities instead of CR 41, which provides that "Unless otherwise stated in the order of dismissal, the dismissal is without prejudice." Defendants further contended that the case was dismissed on the merits because the appellants did not provide an expert affidavit, the physicians were immune, and the dismissal was therefore with prejudice. CP 312-320; CP 336-347.

Plaintiffs' reply provided direct evidence from witnesses but the reply was struck at SCH's request. CP 444. The Plaintiffs appealed but the appeal was not accepted because there were other pending defendants and an "absence" of the findings required by CR 54 (b). App. A (this Court's letter directive dated on June 14, 2017). Plaintiffs later voluntarily dismissed the remaining defendants and filed this appeal.

D. Plaintiffs moved to vacate judgments based upon "newly discovered" 600 pages' medical record. Trial court judge articulated at the hearing that the erroneous orders should be vacated but was misled that the errors could only be fixed at appeal. Motion for Reconsideration is currently pending at trial court.

Sometime in 2018, *pro se* Plaintiffs were able to obtain J.L.'s 600 pages' full medical records at SCH (their previous request was denied by SCH, evidenced by Attorney witness, Ms. Heather Kirkwood), through a separate federal civil action. Plaintiffs filed a CR 60 motion to vacate based upon this "newly discovered" evidence which proved that multiple disputed genuine issues were present. By then the original presiding judge Hill had retired, and the Chief Civil Judge Ken Schubert heard the motion. He agreed that the erroneous judgments should be vacated but was persuaded by Defendants that the errors could only be fixed on appeal. Notably, Judge Schubert explicitly articulated that he believed that his three colleagues at the court of appeals would agree with him and get this fixed. Plaintiffs moved for reconsideration on the grounds that the trial court does have discretionary equitable authority in deciding a CR 60 motion on the merits and in the interests of judicial economy. That motion is currently pending before the trial court.

III. ARGUMENT

A. Standard of review

1. Judge Hill's March 3 Order should be reviewed on a CR 12 (b) motion under the De Novo standard

On February 2, 2017, Defendants filed a CR 12 (b) (2) motion for judgment (converted to summary judgment when introducing evidence beyond the motion). CP 131. Defendants/Respondents alleged the trial court lacked personal jurisdiction over them due to insufficient service. The introduction of evidence beyond the pleadings may cause a CR 12 (b) motion to be converted into a CR 56 motion but a different evaluation standard applied under such circumstances. In a published opinion in ***State v. LG Electronics, Inc.***, (Nos. 70298-0-I & 70299-8-I), this Court held,

"our case law does not prohibit the introduction of evidence in support of a motion brought pursuant to CR 12 (b)(2). However, when this occurs prior to full discovery, neither CR 12 (b) itself, nor controlling case law, provides that the motion be analyzed as if it were brought pursuant to CR 56. Instead, our case law sets out the particular requirements for evaluation of such a CR 12 (b) (2) motion".

Thus, even when the trial court has considered matters outside the pleadings, "[f]or purpose of determining jurisdiction, this court treats the allegations in the complaint as established." ***State v. LG Elecs. Inc.,*** 185 Wn. App. 394, 406, 341 P.3d 346 (2015) (alteration in original) (quoting ***Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC,*** 155 Wn. App. 643, 654, 230 P.3d 625 (2010)), aff'd, 186 Wn. 2d 169, 375 P.3d 1035 (2016). For matters outside the pleadings, this court draws reasonable inferences in the light most favorable to the nonmoving party. ***State v. AU Optronics Corp.***, 180 Wn. App. 903, 912, 328 P.3d 919 (2014).

2. Standard of review on a grant on summary judgment is reviewed de novo

An appellate court reviewing a summary judgment engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party and applying the standard of CR 56 (c). CR 56(c); ***Michak v. Transnation Title Ins. Co.***, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); ***Ellis v. City of Seattle***, 142 Wn. 2d

450, 458, 13 P.3d 1065 (2000) (quoting ***Trimble v. Wash. State Univ.***, 140 Wn. 2d 88, 92-93, 993, P.2d 259 (2000)). ***Wilson v. Steinbach***, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982).

*3. **Standard of review on Motion for reconsideration is reviewed for abuse of discretion***

A trial court's ruling on a motion for reconsideration is reviewed for abuse of discretion. ***Lindgren v. Lindgren***, 59 Wn. App. 588 (1990) (No. 24101-0-I). A trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons. ***Chuong Van Pham v. Seattle City Light***, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

*4. **Failure to comply with mandate of Guardian ad litem should be reviewed under Clearly Erroneous Standard***

Appointment of guardian ad litem is mandatory. Wash. Rev. Code & 4.08.050 (2002) (minor as a plaintiff/defendant in Superior court). Failure to comply with mandate of statute and Washington precedents constitutes a clear legal error. ***Newell v. Ayers,*** 23 Wn. App. 767, 772 (1979) ("appointment of a guardian ad litem is mandatory... the rule is that a minor ***must*** be represented by a guardian ad litem, or the judgment against him may be voidable at his option.") (emphasis added). ***In Re: the Dependency of: A.G.*** (Nos. 41553-1-I & 41554-9-I) (1998), this Court "imposed sanctions because both Department of Social and Health Services (DSHS) and the trial court failed to comply with the mandate of the guardian ad litem statute."

B. This Court should grant a new trial because the trial court abused its discretion in failing to grant a continuance to allow Plaintiffs to conduct discovery

1. The trial court deprived Plaintiffs of their right to a full record and an impartial tribunal

After *unilaterally* scheduling the March 3 hearing without asking the appellants' availability and without timely serving Plaintiffs, Defendants objected to Plaintiffs' request for a

continuance to conduct discovery under CR 56 (C) by citing ***Turner v. Kohler***, 54 Wn. App. 688, 693, 775 P. 2d 474 (1989) (CP 269; 289; 378), Defendants claimed that ***Turner*** does not allow Plaintiffs to continue to conduct discovery and that "a denial of a CR 56(f) continuance is proper if any one of the ***Turner*** factors are present." CP 269. This is not true. In ***Turner***, Plaintiffs argued that the trial court abused its discretion because it did not order a continuance. This Court affirmed the trial court's decision because Turner's lawyer's affidavit did not mention CR 56 (f) or explicitly requested a continuance. Further, Turner had been granted two continuance prior to dismissal.

But here, Plaintiffs explicitly articulated a continuance under CR 56 (f) both in their affidavits and at the hearing. CP 261-265, 391. Unlike ***Turner***, this is the *very first* request for continuance made by pro se Plaintiffs and it was made six months before the discovery cutoff. The ***Turner*** court especially noted that "leniency" and exception be afforded to parties appearing pro se. Unlike in ***Turner***, in the current case, Plaintiffs were appearing pro se. ***Haines v. Kerner***, 404 U.S. 519 (1972).

Whether the trial court may grant a continuance for the Plaintiffs, the primary consideration is justice. ***Coggle v. Snow,*** 56 Wn. App. 499, 508, 784 P. 2d 554 (1990); ***Butler v. Joy***, 116 Wn. App. 291, 199, 65 P.3d 671 (2003); ***Keck v. Collins***, 181 Wn. App. 67, 87-88, 325 P.3d 306 (2014). The Court's decision was based on untenable grounds.

2. *The trial court erred in failing to grant the first request for continuance since there was no prejudice to Defendants*

Justice is served by accepting a filing or granting a continuance in the absence of prejudice to the opposing party. See, ***Butler,*** 116 Wn. App. At 299-30; ***Coggle,*** 56 Wn. App. At 508.

Here, justice required continuing the summary judgment hearing to allow Plaintiffs an opportunity to obtain discovery, and to be represented by counsel. In this case, pro se Plaintiffs were hobbled by Defendants' untimely and defective service and, lacked the time and attention needed to ensure an adequate response to Respondents' summary judgment, which was brought prior to discovery. With the identification of main witnesses two and a half month away, discovery cutoff still six months away and the trial date almost eight months away, Respondents would have suffered no prejudice if the trial court continued the summary judgment hearing so the attorney Mr. Keith Douglass can appear and assist with the litigation, including obtaining affidavits from experts, including J.L.'s main treating physicians, who had made their positions clear in the underlying proceedings. Failure to consider the primary consideration -the interest of justice and the lack of prejudice to the Defendant physicians – is itself an abuse of discretion of discretion. ***State v. Sisouvank***, 175 Wn. 607, 623, 290 P. 3d 942 (2012) (abuse of discretion occurs when trial court applies the wrong legal standard).

In sum, Judge Hill's denial of a continuance for pro se litigants to conduct discovery was for untenable reasons, and on untenable grounds.

C. The trial court failed to clarify that the orders were without prejudice, leaving ambiguity unresolved.

1. The lack of factual findings confirms that this was not a dismissal on merits

Judge Hill entered judgments against all Plaintiffs but the language of the order was silent as to whether the dismissal was with or without prejudice. CP 291-293. Plaintiffs moved for reconsideration, seeking clarification that the dismissal was without prejudice, especially to the children since there was no guardian ad litem to represent their best interests, and their statutes of

limitation had not expired. CP 294-296. Judge Hill refused to provide a clarification, leaving the issues unresolved and causing ambiguity. CP 446-447.

Defendants argued that the dismissal should be with prejudice because it was on the merits. This argument is contrary to the evidence. At the hearing, Judge Hill explicitly articulated, "No, I don't...need to hear the merits of her case." CP 389; RP 34. Even if Defendants' assertion is accepted (which was denied), entry of written factual findings is required by CR 41 (b)(3) ("If the court renders a judgment on the merits against the plaintiff, the court shall make findings as provided in the rule 52 (a)"). CR 52 (a) (1) (written findings are required for all disputed facts.). see also, CR 52 (a)(4); ***State v. Kingman***, 77 Wn. 2d 551, 463 P.2d 638 (1970). Absence of findings undermines the conclusions of law. ***Sandler v. United States Dev. Co.***, 44 Wn. App. 98, 721 P. 2d 532 (1986); ***State v. Poirier***, 34 Wn. App. 893, 664 P.2d 7 (1983). Also, absence of a finding will be taken as a negative finding on the issue. Smith v. King, 106 Wn. 2d 443, 451, 722 P.2d 796 (1986); ***Golberg v. Sanglier*** 96 Wn. 2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982); ***Pilling v. Eastern & Pac. Enters. Trust***, 41 Wn. App. 158, 165, 702 P.2d 1232, review denied, 104 Wn. 2d 1014 (1985). It is the prevailing party's duty to procure formal written findings supporting its position. Prevailing parties must fulfill that duty or abide the consequences of their failure to do so. ***People National Bank v. Birney's Enters,*** 54 Wn. App. 668 (1989).

CR 52 (d) ("a judgment entered in a case tried to the court where findings are required, without findings of fact having been made, *is subject to a motion to vacate...*") (emphasis added). In ***Little v. King,*** the Supreme Court held in that lack of findings was an "irregularity in obtaining a judgment," thus can be vacated under CR 60 (b)(1). 160 Wn. 2d 696 (2007). Specifically, the Supreme Court stated that,

"the trial court could have reasonably concluded that the lack of findings and conclusions was an "irregularity in obtaining a judgment" for purpose of CR 60 (b)(1). "An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner."

In ***Chemstation of Seattle, LLC v. Donahoe***, (No. 77030-6-I) (unpublished), this Court held that, "the lack of adequate findings of fact requires that we reverse and remand." This Court pointed out that, "To facilitate appellate review, a trial court must enter findings of fact and conclusions of law and set forth its reasons…"

Where there are no findings as required under CR 52 (d), the record is "void," tantamount to "an invitation to read the evidence, consider it de novo, and second guess the trial court." ***State v. Kingman***, 77 Wn. 2d 551, 552, 463 P.2d 638 (1970) (declining the invitation). The lack of findings and conclusions is an "irregularity in obtaining a judgment" for purposes of CR 60 (b)(1). "An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner." ***Port of Port Angeles v. CMC Real Estate Corp.***, 114 Wn. 2d 670, 674, 790 P.2d 145 (1990) (internal quotation omitted) (quoting ***In re Ellern***, 23 Wn. 2d 219, 222, 160 P.2d 639 (1945); see also, ***Madera v. J.R. Simplot Co.,*** 104 Wn. App. 93, 15 P. 3d 649 (2001) (describing irregularities under CR 60 (b)(1) as concerning departures from prescribed rules or regulations); ***Philip A. Trautman, Vacation and Correction of Judgments in Washington***, 35 Wash. L.Rev. 505, 509 (1960) (noting that defects in the judgment itself may constitute an irregularity).

A review of overwhelming case laws requires entry of factual findings and conclusions of laws. Here, the trial court failed to enter *any* written findings and conclusions of law on its orders, confirming that this was not a dismissal on merits. This Court should at minimum clarify that the trial court never adjudicated on the merits of the case.

2. CR 11 only permits striking unsigned pleadings, not a dismissal with prejudice

Defendants argue that the dismissal must be with prejudice because Plaintiffs' two unsigned complaints "are void and are of no legal effect because they were not signed." CP 139. CR 11 permits the court to strike unsigned pleading but never suggests that the pleading automatically becomes "void" or can be dismiss with prejudice. Further, even if the complaints can be stricken, the court must provide the party a reasonable time to cure the defect. e.g., ***Biomed Comm., Inc., v. State Dep't of Health Bd. Of Pharmacy***, 146 Wn. App. 929, 193 P. 3d 1093 (2008) ("dismissal of the petition with prejudice [due to unsigned pleadings] was incorrect. The court should have allowed a ***reasonable time*** for curing the defect.") (emphasis added). In ***Biomed***, Division One repeated "**reasonable**" ten times to stress that the condition must be met prior to striking the pleading. Judge Hill did not give Plaintiffs a reasonable time (actually no opportunity at all) to cure the defect per CR 11. CR 11 only permits striking pleadings, but does not allow a dismissal with prejudice.

Defendants also suggested that "Plaintiffs' complaints against Dr. Kodish and Dr. Metz are unsigned, and this Court lack jurisdiction over them and no amendment could remedy the defects." *Id.* This assertion was inconsistent with Washington precedents. e.g., ***Griffith v. City of Bellevue***, 130 Wash.2d 189, 194, 922 P.2d 83 (1996); ***Biomed Comm., Inc. v State Dep't of Heath Bd. Of Pharmacy***, 146 Wn. App. 929, 193 P.3d 1093 (2008). In ***Biomed***, this Court held that, " Under *Griffith*, a missing signature was not a jurisdictional defect. Nor is it here. Thus, it

is subject to cure within a reasonable period of time." In light of Washington controlling precedents, this Court should reverse and make clear that this was not grouds for dismissal.

D. Judge Hill erred in granting Defendants' motion for summary judgment (actually a CR 12 (b) motion)

1. Defendants bore the initial burden of showing the absence of an issue of material fact

Plaintiffs dispute Judge Hill's pre-discovery and pretrial summary dismissal of their claims for medical malpractice and alleged bad-faith CPS referral. The statutes relating to CPS reporting are RCW 26.44.060 (1) (good faith reporting) and RCW 26.44.060 (4) (bad faith reporting). The elements of medical malpractice are set forth in RCW 7.70.040:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances; (2) Such failure was a proximate cause of the injury complained of.

This court has interpreted these elements as particularized expressions of the four traditional elements of negligence: duty, breach, proximate cause, and damage or injury. ***Harbeson v. Parke-Davis, Inc.,*** 98 Wn.2d 460, 468, 656 P.2d 483(1983); see also ***Harris v. Groth***, 99 Wn.2d 438, 444-45, 663 P.2d 113 (1983) (reasonably prudent practitioner is measure for standard of care). At trial, plaintiffs have the burden of showing each necessary element. But when Defendants move for summary judgment before trial. They "bear the initial burden of showing the absence of an issue of material fact" requiring trial by uncontroverted facts. CR 56; ***Young v. Key Pharm., Inc.***, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *review denied*, 118 Wn.2d 1023 (1992); ***Hartley v. State***, 103 Wn. 2d 768, 774, 698 P. 2d 77 (1985). ***Hash v. Children's Orthopedic Hosp.***, 49 Wn. App. 130, 741 P. 2d 584 (1987***); LaPlante v. State***, 85 Wn.2d 154,

158, 531 P.2d 299 (1975); ***Rossiter v. Moore,*** 59 Wn. 2d 722, 370 P. 2d 250 (1962); ***6 J. Moore, Federal Practice*** 56. 07, 56. 15 [3] (2d ed. 1948). Only if they meet this burden is the nonmoving party obligated to produce facts sufficient to show the presence of an issue of material fact. ***Young***, 112 Wn.2d at 225. If the moving party fails to sustain this burden, it is unnecessary for the nonmoving party to submit affidavits or other materials. ***Graves v. P.J. Taggares Co.,*** 94 Wn.2d 298, 616 P.2d 1223 (1980); ***Jacobsen v. State***, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). **If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.** ***Preston v. Duncan,*** 55 Wn. 2d 678 (1960); see also, ***Trautman, Motions for Summary judgment: their use and effect in Washington***, 45 Wash. L. Rev. 1, 15 (1970). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. ***Wilson,*** at 437. ***Trimble,*** 140 Wn. 2d at 93. The motion should be denied if reasonable persons could reach differing conclusions. ***Hansen v. Friend,*** 59 Wn. App. 236, 240, 797 P.2d 521 (1990), review granted, 116 Wn.2d 1007 (1991); ***Balise v. Underwood***, 62 Wn. 2d 195, 199, 381 P.2d 966 (1963).

Accordingly, the first issue here is whether Defendants bore their initial burden of showing the absence of a material issue of fact with respect to meeting requirements of proper care, and good faith – or whether it was evident as a matter of law, such that reasonable minds could not differ, that Plaintiffs did not have any basis for their claims. If Defendant physicians did not show clearly that they met the standard of care, and their CPS involvement was in "good faith" to satisfy RCW 26.44.060 (1) instead of "bad faith reporting" under RCW 26.44.060 (4), the presence of material facts must be decided by a trier of fact.

2. Since Defendants failed to meet their initial burden of showing that there are no issues of material fact, dismissal was improper

In their complaint, Plaintiffs alleged that Defendant physicians improperly participated in CPS actions and proceedings by delivering false information to CPS (also police and the court). CP 3-4; fell below the standard of care "by refusing to contact Plaintiff, J.L.'s parents, and plaintiff, J.L.'s ***main*** treating physicians, and reviewing his full medical records." CP 3, 11, 18. Trial Court also showed its awareness[5] that CPS referral made by an urgent care physician, Dr. Halamay falsely alleged that J.L. suffered from "kidney failure", "life-threatening" and "parents not following medical instruction sending [J.L.] to ER on Oct 20, 2013" (CP 215) and that both dependency and criminal cases were dismissed[6] with a specific finding that "the mother did not refuse to admit [J.L.] to hospital against medical advice on 10/20/13." CP 224.

Then, the trial court was required to make the inquiry, ***Had Defendants met their initial burden of showing that there were no issues of material fact requiring trial?*** That is to say, Defendants need to show that 1) they had met the standard of care and consulted with J.L.'s <u>*main*</u> treating physicians; 2) the information they delivered to CPS was true and consistent with the medical records; 3) they did not misdiagnose J.L.and that J.L. did not suffer from their negligence and physicians did not even attempt to do any of this: they failed to provide any evidence to show

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[5] In its Order on granting Defendants' summary judgment, CP 292, the trial court indicated that it had had considered the "attached exhibits" of "Declaration of Bruce Megard, Jr." Plaintiffs' complaint against DSHS was exhibit 8 of Megard Decl., CP 212-229. Complaint against City of Redmond was exhibit 9. CP 231-248.

[6] Dismissal on Dependency means that this was a false CPS referral since "a reasonable person" would have agreed that CPS would not have returned J.L. home if it the report of abuse was correct and Ms. Chen was found to be a child-abuser. The dismissal of the criminal charges further support Ms. Chen's innocence.

life-threatening kidney failure, etc. In their summary judgment, however, the Defendant their diagnoses were correct or within the standard of care. In light of the dismissal in the dependency action and its conclusion that Defendant physicians delivered false information, Defendant physicians needed to address why they provided false information to CPS and the court, whether they verified this information before their reports, etc. We could not find any answers to these questions in Defendants' summary judgment. Instead, Defendants claimed immunity in less than 90 words' affidavits without any factual evidence to support their "good-faith" assertion; CP 247-248; 250-251; 253-254. Defendants' motion did not show that Defendants did not misdiagnose J.L.. or J.L. did suffer from kidney failure, life-threatening; et al. Defendants' summary judgment did not resolve the disputed issues. They failed to provide any evidence to show whether or not J.L. suffered from kidney failure, life threatening at his removal. In light of the dismissal on Dependency action and its conclusion that Defendant physicians delivered false information, why did Defendants provide such information to CPS, did they ever verify this information before writing the report, et al.

We could not find any answers to all these questions in Defendants' summary judgment. Defendants merely claimed immunity in less than 90 words' affidavit without any factual evidence to support their "good-faith" assertion. CP 247-248; 250-251; 253-254. The limited medical record provided by Defendants do not, moreover, support their claims. In these records, James Metz recommended consulting with J.L.'s main treating physicians Dr. Green. CP. 81. Did he ever make this consultation, and if not, why he failed to do so? Again, the answer could not be found in Defendants' motion and affidavits. In addressing Defendants' claims, Defendant ***Darren*** Migita's treatment record was not even before the trial court- SCH provided the treatment records of three physicians: Defendant James Metz (CP 78-81); Defendant Ian Kodish

(CP 84-87); and ***Russell*** Migita (CP 72-77). Even though ***Darren*** Migita's treatment record was never before the trial court, the trial court entered an order of dismissal in his favor. A summary judgment motion should be granted only if the pleadings, affidavits, depositions on file demonstrate the absence of any genuine issues of material fact and that moving party is entitled to judgment as a matter of law. CR 56 (c); ***Hartley v. State***, 103 Wn. 2d 768, 774, 698 P.2d 77 (1985). Here, multiple disputed issues were present, and a grant of summary judgment was improper. This Court should reverse.

3. Procedural irregularities require setting aside summary judgment

Defendants' service was defective. They did not comply with "28 calendar days" service requirement for summary judgment, as required by CR 56 (c). Plaintiffs did not receive the 18 summary judgment documents until February 17 service through email. CP 286. 392. Even if Defendants did send the pleadings and documents on February as claimed (but Plaintiffs deny), they still did not meet CR 56 (c) requirement because when elected to serve by mail, CR 5(2)(A) determines that service is complete on February 6 (February 5 was Sunday), less than 28 days. If Defendants asserted that they served by overnight mail, they had the burden to show that the documents were indeed served Plaintiffs on the prescribed date by providing "Plaintiffs' acknowledged receipt with signature." See, Division II's unpublished opinion on ***Love et al v. State of Washington, Department of Correction***. 46798-4-II (2016).

4. When considering a CR 12 motion, the court was required to treat all the factual allegations as true. Since Defendants failed to specifically rebut the allegations, dismissal was improper

Defendants brought a CR 12 (b) (2) motion for lack of personal jurisdiction instead of a pure CR 56 motion. CP 131. When deciding a CR 12 (b)(2) motion, the court is required to treat all factual allegations in Plaintiffs' complaint as established and true. "When the trial court

considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, we review the trial court's ruling under the de novo standard of review for summary judgment." ***Columbia Asset Recovery Grp., LLC v. Kelly***, 177 Wn. App. 475, 483, 312 P.3d 687 (2013) (quoting ***Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I. LLC***, 155 Wn. App. 643, 653, 230 P. 3d 625 (2010)). When reviewing a grant of CR 12 (b)(2) motion for lack of personal jurisdiction, all the factual allegations should be treated as true and established, and the appellate court must review the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party, in this case the Plaintiffs. ***Freestone,*** 155 Wn. App. At 653-54.

Here, Plaintiffs adequately alleged that Defendants' conclusion was without consultation with J.L.'s main treating physicians, and lacked review of J.L.'s full medical history. CP 3, 11, 18. Plaintiffs further alleged that Defendants delivered false information to CPS (as confirmed in the dismissal of the cases). CP 3- 4; 11-12; 18-19. All these factual allegations were required to be treated as true and established when deciding a CR 12 (b)(2) motion, Defendants/Respondents did not provide factual evidence to rebut Plaintiffs' allegations. They did not deny the allegations in an answer (they never answered the complaint), nor did they provide an innocent explanation for not consulting with J.L.'s main treating physicians or reviewing his medical history before jumping to a conclusion that disrupted his treatment and destroyed his health.

Defendants argued that they were entitled to dismissal because Appellants failed to provide an expert affidavit to support their claim. CP 142-143. This argument is without merit. First, Washington law does not require Plaintiffs in medical malpractice claim to provide an expert affidavit prior to discovery. ***Putman v. Wentachee Valley Med. Ctr., P.S.,*** 166 Wn. 2d 974, 983, 216 P.3d 374 (2009) (requiring medical-malpractice plaintiffs to submit expert affidavit prior to

discovery violates Plaintiffs right to access to the court, which "includes the right of discovery authorized by the civil rules"). Under the Order setting civil case schedule (pursuant to LCR 4) (CP 121), the discovery cutoff was on 9/5/ 2017 and trial date wasscheduled on 10/23/2017. Judge Hill dismissed a claim on 3/3/2017, six months before the discovery cutoff and seven months before trial. CP . 291-293. Defendants' negligence are so obvious (provided simply false medical facts, i.e., J.L. was not seen at ER on 10/202013 which was not ture) that dependency court and criminal court dismissed the cases without expert affidavits. Under such circumstances, trial court should adopt *Doctrine of Res Ipsa Loquitur* ("the thing speaks for itself"). Supreme Court has enumerate three essential elements for *Res Ipsa Loquitur* to apply: A plaintiff may rely upon Res Ipsa Loquitur's inference of negligence if (1)the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. ***Curtis v. Lein***, 169 Wn. 239 2d P.3d at 1082 (2010) (citation omiited). Here, Plaintiffs' claims met all the criteria.

Defendants further claimed that they were acting in good faith when making the CPS referral and are therefore immune under RCW 26.44.060. CP 66-68; 145-146. RCW 26.44.060 (1) provides immunity for reporting alleged child abuse in good faith or testifying on alleged child abuse or neglect in judicial proceedings. It does not, however, provide immunity for outrageous misdiagnoses and mistreatments. RCW 26.44.060 (4) (bad faith reporting). In their summary judgment, Defendant physicians relied heavily upon ***Whaley v. State*** and claimed that Defendant doctors sufficiently established their "good faith" through a less than 90 words' statement. CP

247-248; CP 250-251; CP253-254. Did a short declaration not supported by any fact satisfy this Court who readily accepted it as "good faith"?

With this inquiry, Plaintiffs/Appellants dug into thousands of original court record in ***Whaley v. State,*** 90 Wn. App. 658, 668, 956, P. 2d 1100 (1998). What Plaintiffs found was that neither the ***Whaley*** court, nor any other courts, can grant a summary judgment only based upon a simple declaration containing several statements *without* specific factual evidence asserting good faith.

The current case and ***Whaley*** involve completely different factual background and significantly different procedural history. Whaley Defendants brought a pure CR 56 motion while Defendants in this current case brought a CR 12 (b) (2) motion (converted CR 56 motion) for lack of personal jurisdiction. In ***Whaley***, Plaintiffs (represented by counsel) were granted continuance to conduct discovery and obtain expert affidavit in opposition to summary judgment but no continuance at all for *pro se* plaintiffs in current case.

In ***Whaley***, Plaintiffs sued a daycare and its director Ms. Hupf, alleging Hupf's negligent report caused eight days' separation between Plaintiff and her son. To support their motion for summary judgment, Defendants submitted more than 50 pages of supporting documents, including affidavits from multiple witnesses as well as a seven page affidavit from Hupf. In her declaration, Hupf detailed her nearly six month investigation, consultation (with multiple professionals as well as the child's mother, Whaley), and repeated validation (through multiple witnesses who did and did not have prior knowledge about this allegation) concerning a sexual allegation *directly* from Whaley's son who was enrolled in this daycare for over one and a half year prior to this allegation. With this detailed and direct factual evidence from multiple witnesses, Hupf sufficiently demonstrated good faith. This was not similar to the several-sentence declarations without factual support offered in this case to demonstrate "good faith" and

justify a dismissal. Here, Defendant/Respondent physicians transmitted obviously false information to CPS (***directly contrary to medical facts in their possession)***, quickly and without talking with J.L.'s parents, consulting with J.L.'s main treating physicians, reviewing his full medical records, or having any prior knowledge of J.L. or his circumstances. Indeed, Kodish reached his diagnosis (directly contrary to J.L.'s prior diagnosis) based upon in just 40 minutes. CP 84-87.

Whether there is a good faith, it should be tested under specific facts. The standard of good faith is a state of mind indicating honesty and lawfulness of purpose. ***Tank v. State Farm,*** 105 Wash. 2d 381, 385, 715 P.2d 1133 (1986). The referrals from Hurf and from Defendants were both found to be false, but the difference is obvious. In ***Whaley***, the false CPS allegation was from Whaley's child, instead of from Hurf who had conducted nearly six months' investigation prior to her report. Here, the false information was **directly** from Defendants whose report was even *not* supported by J.L.'s medical records in their own institution, let alone by J.L.'s treating doctors. This did not support a finding of good faith. "Good faith is a state of mind indicating honesty and lawfulness of purpose." While nothing in the record suggests that Hupf was dishonest but in the current case, Assistant Attorney General explicitly pointed out that the SCAN report (by Defendant/Respondent James Metz) was contrary to the medical record, and it was equally well-established that Defendant/Respondent Darren Migita provided false information on the lab results, and alleged J.L. having no GI distresses (but prescribed GI medications for him). Without providing any evidence to establish good faith and honesty, a good faith defense fails. See, RCW 26.44.060 (4) (bad faith reporting). Defendants had failed to establish the good faith that is necessary to trigger immunity, and there were no grounds for Judge Hill to grant a dismissal in Defendants' favor. See, ***Clapp v. Olympic View Pub. Co.,*** 137

Wash. App. 470, 476, 154 P. 3d 230, 234 (2007) (quoting ***Tiffin v. Hendricks***, 44 Wash. 2d 837, 843, 271 P. 2d 683 (1954)) ("Pleadings are written allegations of what is affirmed on one side, or denied on the other, disclosing to the court or jury having to try the cause the real matter in dispute between the parties."). This Court should reverse the summary judgment in light of the clear evidence that the dependency and criminal actions were dismissed in Plaintiffs' favor when the State learned that the information on which they had relied was false[7]. CP 224; 239. This information was not provided to the State by the Defendant physicians. At no point in their several sentences' affidavit did Defendant address the false information in their reports or explain how these false reports met the standard of care as well as the requirement of good faith.

Without this information, a court cannot conclude that there are no material issues of fact relating to proximate cause and liability. **The record is simply deficient.** It does not tell us either by facts sworn to under oath or by admissible opinion, how the Defendant physicians met the standard of care, and requirement of good faith. ***Morris v. Mcnicol***, 83 Wn.2d 491, 496, 519 P.2d 7 (1974); ***Hall v. McDowell***, 6 Wn. App. 941, 944, 497 P.2d 596 (1972). A court may grant a motion for summary judgment only if, on the basis of the facts submitted, "reasonable [minds] could reach but one conclusion." ***Trimble v. Wash. State Univ.*** (quoting ***Clements v. Travelers Indemn. Co.,*** 121 Wn. 2d 243, 249, 850 P.2d 1298 (1993). In this case, the grant of summary judgment was based upon untenable grounds, and this Court should reverse.

[7] Defendants could not have and did not dispute these dismissals. As Defendant SCH wrote, "Charges against Chen were ultimately dropped in September 2014". CP 64.

5. *Defendants were not permitted to bring a CR 12 judgment motion "before the pleadings are closed" under CR 12 (c).*

Defendants' CR 12 motion that Judge Hill relied upon entering judgment against plaintiffs did not actually exist because the motion was procedurally barred by CR 12 (c) that it cannot be filed before the pleadings are closed. CR 12 (c). Defendants' procedural violation wiped the legal slate clean that their CR 12 motion ceased to exist. The rules are quite clear as to what constitutes a pleading. CR 7 (a) (A pleading is one of the following: a complaint and an answer); also, ***Lybbert v. Grant County,*** 141 Wn. 2d 29 (2000). Defendants never filed an answer. The language in CR 12 (c) is clear: the CR 12 judgment motion can only be brought "after the pleadings are closed." See also, P.E. Sys. LLC v. CPI Corp., 176 Wn. 2d 198, 203, 289 P.3d 638 (2012); ***Mey v. Dempcy***, 48 Wn. App. 798, 801, 740 P. 2d 383 (1987).

The CR 12 (c) requirement is logically supported by CR 8(d) (Failure to deny Plaintiffs' factual allegations should be treated as "admitted"). The reason is clear: if Defendants don't deny the allegation, they are not entitled filing a judgment motion against Plaintiffs. In other words, Defendants' *admission* for all allegations cannot provide a basis for Judge Hill to grant a dismissal in their favor. The basis in obtaining judgment was actually a procedurally-barred motion, this Court should reverse improper summary judgment.

E. Judge Hill abused her discretion in denying Plaintiffs' Motion for reconsideration on April 10, 2017 since she did not clarify her order or address absence of guardian ad litem for the children.

Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion. ***Perry v. Hamilton***, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 118 S. Ct. 1193 (1998); ***State ex rel. Carroll v. Junker,*** 79 Wn.2d 12, 26, 482 P.2d 775 (1971); ***Christian v. Tolmeh***, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), review denied, 185 Wn.2d 1035 (2016); ***In re the marriage of Homer,*** 151 Wash. 2d 884, 893, 93 P.3d 124 (2004).

The trial court abused its discretion in denying Plaintiffs' motion for reconsideration. They timely moved for reconsideration (CP 294-296), and sought clarification that the dismissal was without prejudice as to the children. There is no question but that J.L. will almost certainly require lifelong care, and there seems to be no explanation for this other than the misdiagnoses of the Defendant physicians. Plaintiffs' simple clarification request was reasonable in light of the statute of limitations for minors as well as CR 41 (a)(4) ("Unless otherwise stated in the order of dismissal, the dismissal is without prejudice…"). A reasonable person would expect the court provide a clarification upon such a request. However, Judge Hill simply denied the motion, without any explanation. CP. 444-445. Judge Hill further struck Plaintiffs' Reply at the request of Defendant SCH. CP 446-447.

In their motion for reconsideration on the summary judgment, Plaintiffs rightfully addressed the order insofar as it applied to the children. Plaintiffs advised the trial court that due to absence of a Guardian ad litem, the action on behalf of minors was a nullity, there was no action on behalf of minors for judicial consideration, and there was therefore no action to dismiss. CP 294-296. It was even more improper to dismiss the children's claim with prejudice (if that is what the

trial court did or attempted to do) since the statute of limitations for the children does not expire for many years. ***Schroeder v. Weighall et al.*** 179 Wn. 2d 566, 316 P.3d 482 (2014). Also, *Plaintiffs' Reply* (CP 405-419).

Since the harm to the children in this case was enormous and essentially undisputed, one would have thought that the Court would be concerned about them and eager to ensure that whatever rights they might have would be vindicated. Instead, the Court denied a simple clarification and declined to address the issue of guardian ad litem. Judge Hill did not address these issues or make any good cause determination for not doing so.

Discretion is abused if it is exercised on untenable grounds or for untenable reasons, considering the purposes for which the trial court is exercising discretion. A discretionary decision must be based on principle and reason. ***Coggle v. Snow,*** 56 Wn. App. 499, 784 P. 2d 554 (1990). The law is not designed to cause confusion. Here, Judge Hill issued an order that dismissed the children's claims but refused to clarify whether they could bring those claims later. She also refused to follow the guardian ad litem statute, disregarding that this meant that important rights were unresolved. Nor did she provide any findings to support that the order was with prejudice. When ambiguity is present, the rule of lenity requires the interpretation most favorable to the person affected. e.g., ***State v. McGee***, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Due to the ambiguity, innocent Plaintiffs are being forced to go through an unnecessary appeal to seek clarification. At minimum, this Court should clarify that the judgments against the children are without prejudice.

F. Judge Hill's failure to disqualify herself deprived Plaintiffs of a fair tribunal

The language in Code of Judicial Conduct Rule ("CJC") 2.11 (A)(6)(d) is clear. Specifically, it states that "A judge **shall** disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: ...(6) the judge: (d) previously presided as a judge over the matter in another court." (emphasis added).

As a general rule, the word "shall," when used in a statute, is imperative and operates to impose a duty that may be enforced, while the word "may" is permissive only and operates to confer discretion. ***Erection Co. v. Department of Labor & Indus.***, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) ("It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty. . . . The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent") also, ***Crown Cascade, Inc. v. O'Neal,*** 100 Wn.2d 256, 261, 668 P.2d 585(1983); ***State v. Q.D.***, 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing ***State v. Bryan***, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980)). This is consistent with the CJC 2.11 *comment* (2) which provides, "A judge's obligation not to hear or decide matters in which disqualification is required applied regardless of whether a motion to disqualify is filed." When conflicts of interests were present, Judge Hill was required to disqualify herself from the case, even the absence of a motion to disqualify.

Judge Hill presided over Plaintiffs' Dependency case, reviewed multiple testimonies from multiple key witnesses, and made multiple important decisions for the case including but not limited to denying Mother's motion to revise the order placing J.L. in foster care. Her harsh decisions continued until the State gave up and made clear that the evidence did not support the claims of the Defendant doctors. In 2016, Plaintiffs filed pro se civil action against physicians at Seattle Children's Hospital ("SCH") for their unlawful and bad-faith actions and their below-

standard-care negligence. Under these circumstances, Judge Hill was ***required*** to disqualify herself by CJC Rule 2.11 (A)(6)(d). but did not do so. Instead, she denied Plaintiffs' very first request to continue Defendants' pre-discovery summary judgment to allow Plaintiffs to conduct discovery under CR 56 (f) in opposition to summary judgment. Being fully informed of Defendants' defective service on pleadings and absence of appointment of guardian ad litem ("GAL") for the minors, Judge Hill dismissed all of Plaintiffs' claims at the hearing (failing to indicate whether the dismissal was with prejudice, as claimed by the defendants, or without prejudice, as supported by the plaintiffs and the case law), nor did she identify any good cause for failing to clarify the Order, particularly as it applies to the children, whose statutes of limitations do not expire for more than a decade. Judge Hill should have disqualified hereself from hearing the case and the cumulative effect of her errors deprived Plaintiffs of a fair tribunal. This alone warrants reversal.

G. Judge Hill erred in failing to appoint guardian ad litem for the minors

Under RCW 26.26.090, the child "shall be made a party to the action." A minor is to be represented by a general guardian or guardian ad litem. At least one court has held that the absence of the child, as an indispensable party, deprives the trial court of jurisdiction to enter a judgment. ***Custody of Brown,*** 77, Wn. App. 350 (1995).(holding that the absence of a guardian ad litem deprived the trial court of jurisdiction, and reversed the judgment).Washington has recognized the necessity of a guardian ad litem in litigation. See, e.g., Miller v. Sybouts, 97 Wn. 2d 445, 645 P.2d 1082 (1982) (failure of guardian ad litem to appear at the motion for summary judgment rendered the summary judgment of dismissal void); ***State ex rel. Henerson v. Woods***, 72 Wn. App. 544, 856 P.2d 33 (1994) (either the State must conduct a reasonable inquiry into the

identity of the nature father or the child must be represented by a guardian ad litem to ensure due process).

In Washington, any person 18 years of age or older may sue or be sued in a state court. A younger person may sue or be sued, but only through a duly-appointed guardian ad litem[8]. Washington recognizes that "the children's interests are paramount," and "the [guardian ad litem] statute is mandatory." In ***Re: the Dependency Of: A.G.***, (Nos. 41553-1-I, 41554-9-I) (1998). The appointment of a guardian ad litem is mandatory., ***Mezere v. Flory,*** 26 Wash. 2d 274, 278, 173 P.2d 776 (1946), citing ***Ball v. Clothier,*** 34 Wash. 299, 75 P. 1099(1904); ***State ex rel. Davies v. Superior Court,*** 102 Wash. 395, 173 P. 189 (1918), it is not jurisdictional. Rather, the rule is that a minor must be represented by a guardian ad litem, or the judgment against him may be voidable at his option. Whether the minor will be allowed to avoid the judgment or whether the judgment is allowed to stand depends upon whether the court finds that his interests were protected to the same extent as if a guardian ad litem had been appointed at the time the action was instituted. ***Newell v. Ayers,*** 23 Wash. App. 767, 598 P.2d 3 (1979). ***In re: the Dependency of A.G.***, this Court particularly pointed out that,

"the record before us shows that no attorney brought up the matter of an appointment of a guardian ad litem to any of the judges or commissioners who made numerous decisions. No court brought up the matter on its own, and no good cause determination was ever made." This court held that appointing guardian ad litem is "mandatory", and decided to impose sanction "because Department of Social and Health Services (DSHS) and trial court failed to comply with the mandate of the guardian ad litem statute."

Different from ***A.G.,*** Plaintiffs in this case informed the trial court of absence of guardian ad guardian ad litem]). CP 295 ("there was no appointment of guardian ad litem to prosecute the litem (and unrepresentation issue). CP. 286 (parents cannot represent children [due to absence of

[8] RCW 4.08.050 (minor as a plaintiff/defendant in superior court); RCW 12.04.140 (minor as a plaintiff in a district court); RCW 12.04.150 (minor as a defendant in a district court).

minors' claims"; "due to failure to appoint a GAL [guardian ad litem] to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of the minors for judicial consideration, and therefore no action to dismiss."). also CP 408. Being fully informed of absence of guardian ad litem, trial court neither appointed guardian ad litem, nor made any good cause determination prior to rendering judgments against minors.

The basic principles in this area of the law, almost universally followed, are stated thus, "While the appointment of a guardian ad litem …is not jurisdictional in the sense that failure to make such appointment deprives the court of power to act and renders such judgment void, a judgment rendered against an infant in an action in which he was not represented by a guardian ad litem or a general guardian is erroneous, and can be overthrown by writ of error coram nobis, or by motion in the same court, or by proper appellate proceedings, at least where the want of such representative affects the substantial rights of the infant." 27 Am. Jur., ***Infants,*** S. 121 P. 842.

Procedural due process also requires that the child be represented by guardian ad litem because "no individual should be bound by a judgment affecting his or her interests where he [or she] has not been made a party to the action." ***State v. Santos***, 104 Wn. 2d 142 (1985) (quoting ***Hayward v. Hansen***, 97 Wn. 2d 614, 617, 647 P.2d 1030 (1982). It is fundamental that parties whose interests are at stake must have an opportunity to be heard." at a meaningful time and in a meaningful manner." ***Olympic Forest Prods., Inc. v. Chaussee Corp.,*** 82 Wn. 2d 418, 422, 511 P.2d 1002 (1973), quoting ***Armstrong v. Manzo***, 380 U.S. 545, 552, 14 L. Ed. 2f 62, 85 S. Ct. 1187 (1965). Minors are unable to represent their interests, appointment of guardian ad litem is necessary to protect their best interests.

Due to the absence of guardian ad litem, whether minors had been properly before the trial court is at dispute. The Supreme Court had held in ***State v. Douty*** that "the child, though named in the action, was never served. Consequently, he is not before the court."). Here, none of the children were ever served. e.g., CP 69; 148; 155; 249; 252; 255; 258; 272; 290. The children were not properly before the trial court, any judgments against them should be void. This Court should reverse.

H. Plaintiffs' Motion for Reconsideration of the trial court's denial of Plaintiffs' Motion to Vacate the summary judgments is still pending before the trial court

After obtaining J.L.'s complete set of medical records at SCH, Plaintiffs brought a CR 60 motion to vacate the judgments entered by Judge Hill. Chief Civil Judge Honorable Ken Schubert entered a Show Cause Order. To support their motion to vacate, Ms. Chen submitted a Declaration[9] highlighting a number of examples that emerged for the first time in the complete Seattle Children's Hospital records. These examples support that Respondent/Defendant physicians provided false information to CPS, the dependency court and the criminal court that directly contrary to J.L.'s medical records at their own institution. Appellants moved for CR 60 motion to vacate the judgments which was heard by Chief Civil Judge Ken Schubert. At the Show Cause Hearing, Judge Schubert stated that he believed that the erroneous orders should be vacated but he accepted Defendants/Respondents' claim that these errors could only be fixed at

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[9] Ms. Chen 's September 1, 2018 Declaration is central to support that Plaintiffs had brought a meritorious claim. App. B.

the Court of Appeals. However, Judge Schubert articulated that he hope that his three colleagues at the court of appeals would agree with him. He then denied the Motion to Vacate but specifically noted that his order incorporated his oral comment. Appellants moved for reconsideration on the grounds that trial court may decide a Rule 60 motion by applying equitable principle that judicial economy favors early resolution before time-consuming and costly appeals began. The motion for reconsideration is currently pending before the trial court.

IV. CONCLUSION

As stated, multiple errors and procedural irregularities mandate a trial that addresses whether defendant physicians were negligent and/or in bad faith. To achieve that end, this Court should reverse the summary judgment and remand for trial on the merits.

DATED this 10th of January 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

s/ Naixiang Lian
Naixiang Lian
Pro se Appellant
PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 24th day of January, 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

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APPENDIX M

NO.77522-7-I

COURT OF APPEALS, DIVISION I

OF STATE OF WASHINGTON

SUSAN CHEN as parent and natural guardian of J.L., a minor and L.L., a minor, and Naixinag Lian, as parent and natural guardian of J.L., a minor and L.L., a minor

Appellants

v.

DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D., SEATTLE CHI'DREN'S HOSPITAL, REDMOND CITY POLICE DEPARTMENT, DETECTIVE NATALIE D'AMICO, STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND

Respondents

APPELLANTS' MOTION FOR RECONSIDERATION ON DEYING MODIFICATION AND DISMISSING APPEAL

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I. RELIEF REQUESTED

Pursuant to RAP 12.4, Appellants hereby submit this Motion for Reconsideration seeking this Court's reconsideration of the Order Denying Modification and Dismissing Appeal entered on January 24, 2019. Upon granting Respondents' relief to dismiss "Chen's appeal" asserted in responsive pleading, this Court overlooked and misapprehended the followings:

1) Respondents (*only* Respondent physicians)[1] did not meet their initial burden of filing a motion to seek dismissal by showing an abandoned and frivilous appeal required by RAP 18.9 (c)[2];

2) Respondent Seattle Children's Hospital ("SCH") never sought the relief for dismissal as a threshold matter, thus not entitled to relief;

3) Appellants' untimely filed brief was a "good faith" mistake[3] when seeking (and waiting for) clarification. **State v. Ashbaugh,** *90* Wn.2d 432, 438, 583 P.2d 1206 (1978) (Supreme Court declined to dismiss the appeal when "the rules were confusingly worded" and "the mistakes were made in good faith."). Here, Appellants acted in good faith via 1/17 *Reply* and 1/22 *filing, prior to* this Court's dismissal. Their brief was filed almost the same time as entry of dismissal;

4) Failure to timely file briefs is *not* grounds for dismissal. RAP 10.2 governs the timing for filing briefs. RAP 10.2 (i) provides, "[t]he appellate court will ordinarily impose sanctions under Rule 18.9 for failure to timely file and serve a brief." **State v. Blum**, 121 Wn. App. 1,85 P.3d 373 (2004). "Typical sanctions are a fine or compensatory award." **Ashbaugh**, 90 Wn. 2d at 438.

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[1] Currently, there are *two* respondents in the current appeal: Respondent physicians and Respondent SCH. Respondent physicians answered Appellants' motion, but respondent SCH never filed any response, or joinder seeking relief.

[2] Respondent physicians did not seek relief under RAP 18.9 (c), but RAP 18.9 (a). RAP 18.9 (a) only allows relief for sanction, not dismissal. "Typical sanctions are a fine or compensatory award." **Ashbaugh,** 90 Wn. 2d at 438. RAP 18.9 (c) requires "dismissal on motion of party" proving abandoned and frivolous appeal.

[3] App. A-1, *Chen Decl.*

In **Ashbaugh**, the Supreme Court held that, "It must be remembered, however, that the right to appeal is a constitutional right. Consequently, any waiver of that right via the alleged abandonment of an appeal must be knowing, intelligent and voluntary. **State v. Adams**, 76 Wn.2d 650, 458 P.2d 558 (1969)". Similarly, RAP 6.1 provides, "Appeal is a matter of right". There is no evidence that Appellants had "voluntarily, knowingly, intelligently" waived this right. Instead, Appellants had been acting in good faith, seeking this Court's clarification for staying their brief on grounds that 1) the timing requirements as set in RAP 10.2 provide basis to stay briefs for ***both*** parties. 2) Appellants' postjudgment motion on the same disputed issues were pending before the trial court (which was granted by trial court on January 28, 2019, Appendix A-2. Therefore, the reconsideration as to Respondent physicians will become moot after this trial court formally enters the Order vacating summary judgments. To that point, Appellants will only seek reconsideration for dismissing appeal as to Respondent SCH). RAP 18.9 is the only rule addressing dismissals at appellate court. Here, none of the requirements were met because Appellants did not abandon the appeal and had been in good faith. This Court should set aside its Order Dismissing Appeal entered on January 24, 2019.

II. STATEMENT OF THE FACTS

A. On December14, 2018, this Court ordered Appellants' brief submit in one month, did not rule about timing for Respondents' brief; On December 31, Commissioner stayed only Respondents' brief. Appellant Chen was confused requirements in RAP 10.2 (b), thus seeking clarification

On November 29, 2018, Appellants sought to disqualify Respondents' new counsel, Smith Goodfriend, P.S. ("Goodfriend') at trial court, on December 12, 2018, the trial court entered an

order prohibiting Goodfriend from sharing the confidential information obtain from Plaintiffs [Appellants] based upon RPC 1.9. Appendix B.

On December 14, 2018, this Court entered an Order requiring Appellants to submit their opening brief in one month (but did not stay Respondents' brief). Appendix C.

On December 27, 2018, Appellants moved for an Order disqualify Goodfriend at appeal because Respondents failed to respond to Appellants' motion to disqualify at appeal filed on December 12, 2018. Appendix D.

On December 31, Commissioner Kanazawa entered a Ruling, staying only Respondents' brief during a trial court remand for Goodfriend's conflicts of interests. Appendix E.

When this Court requires Appellants to file their brief on January 14, it did not stay Respondents' brief but Commissioner later stayed Respondents' brief. Appellants were therefore confused by the two order/ruling and decided to seek clarification.

On January 2, 2019, Appellants moved for clarification (reconsideration) because 1) two pending decisions (one being motion for reconsideration on the same disputed issues) requires staying appeals; and timing for Respondents' brief was bound by Appellants' brief under RAP 10.2 (b) (Respondents are required to submit response brief 30 days after Appellants' brief was filed), thus, it is proper to stay briefs for both parties. Appellants' motion for reconsideration was treated by this Court as motion to modify by this Court. See, *Appellants' Motion for Clarification.* Appendix F.

B. Prior to this Court's Order Dismissing Appeal entered on January 24, 2019, Appellants explicitly stated in their Reply that their brief was ready and willing to submit to this Court for review

In their Reply, Appellants once again informed this Court that their motion for reconsideration on the same disputed issues was pending before the trial court. They also explicitly stated that

the brief was ready to submit but sought a clarification and directive to file their brief so that Respondents will not have longer than 30 days to review and prepare their response. Specifically, Appellants wrote, "if this Court decides that Appellants' understanding is incorrect and requires that Appellants need to submit their brief immediately, Appellants will abide by the directive, but respectfully request that this Court provide a detailed instruction that Appellants' brief will not disclose to Respondents at an earlier time, so that only 30 days are permitted for their response, consistent with RAP 10.2 and under Appearance of Fairness Doctrine." See, *Appellants' Reply in Support of their motion to modify,* at P.9. Appendix G.

C. On January 22, 2019, Appellants requested an *Ex Parte* Order to submit their Brief. On January 28, 2019, trial court entered an Order Granting Plaintiffs' Motion for Reconsideration of Order Denying Plaintiffs' Motion to Vacate Orders on March 3 and April 10, 2017. Appendix A-2.

Again, in their 1/22/2019 submission, Appellants wrote, "If this Court modifies Commissioner's Ruling to stay Appellants' brief as argued above, this issue is moot, and this Court need not reach this request for ex part order to file brief. But if not, then on this motion, Appellants present to this Court that while motion to modify is pending before this court, Appellants are willing to abide by this Court's order and ready to submit their brief, the only relief sought is an ex parte order to file their brief so that their brief will *not* be disclosed to Respondents in less than 30 days, pursuant to RAP 10.2. Appellants can send their brief to the clerk and/or case manager, instead of filing online upon the grant on the motion". See, *Appellants' Request for ex parte order to file opening brief (supplemental submission re: motion to modify).* at P. 3. Also Appendix H.

On January 24, 2019 this Court entered an Order Denying Motion to Modify Commissioner's Ruling and Dismissing Appeal. Appendix I. Appellants' opening brief was filed within minutes and on the same day. Appendix J.

On January 24, 2019, trial court entered an Order Granting Plaintiffs' Motion for Reconsideration of Order Denying Plaintiffs' Motion to Vacate Orders on March 3 and April 10, 2017. Appendix A-2.

III. ARGUMENT

A. Rules of Appellate Procedure did not support dismissing Appellants' good faith appeal. As a threshold matter, Respondent physicians did not meet the requirement of RAP 18.9 (c) of filing a motion to dismiss Appellants' appeal and further failed to show an "abandoned" and frivolous appeal; and Respondent SCH did not at all seek relief dismissing appeal

It has now been more than forty-three years since the Rules of Appellate Procedure (RAP) became effective in 1976 and replaced all prior rules governing appellate procedure for Appellate Courts in Washington State. RAP 18.9 address dismissals. RAP 18.9 (b) provides that an appellate court will, in all but extraordinary circumstances, dismiss a proceeding if a party fails to timely file a notice of appeal, notice for discretionary review, motion for discretionary review of a decision of the Court of Appeals, petition for review, or motion for reconsideration. **Ashbaugh**, 90 Wn.2d at 438 . And RAP 18.9(c) allows Appellant Court to dismiss an abandoned or frivolous appeal on "**motion of party**". RAP 18.9 (c) set forth the procedure for dismissing appeal. It provides that the party seeking such relief *must file a motion* proving that appellants had abandoned the appeal, or the appeal was frivolous. Here, none of these grounds for dismissing appeals were present. Respondents (Respondent physicians) did not

file a ***motion*** to dismiss, nor provided any evidence to prove that this was an abandoned or frivolous appeal. Notably, Respondents (Respondent physicians) never sought relief under RAP 18.9 (c). Instead, Respondent physicians mentioned RAP 18.9 (a) in two places in their answer while RAP 18.9 (a) was ***not*** grounds for "dismissal" but only for "sanction".

While Appellants' failure to timely file brief were due to seeking (and waiting for) clarification, their mistake, as non-attorneys, was an innocent mistake made in good faith, in light of the undisputed facts that their briefs were ready to submit (and they did submit within minutes of this Court's dismissal order). RAP 10.2 governs the time for filing briefs. And RAP 10.2(i) states that "[t]he appellate court will ordinarily impose sanctions under rule 18.9 for failure to timely file and serve a brief." RAP 10.2 permits sanction for untimely filing. The **Ashbaugh** Court defines sanction as "fine" or "compensatory award." **Ashbaugh,** 90 Wn. 2d at 438. Also, **State v. Blum**, 121 Wn. App. 1, 85 P. 3d 373 (2004). Respondent physicians did not seek this relief under RAP 18.9 (c). **Respondent SCH did not *at all* seek relief.** Neither Respondent physicians nor Respondent SCH met this threshold requirement of RAP 18.9 (c), therefore, dismissing appeal is improper.

B. This Court should not dismiss Appellants' appeal unless Appellants had "voluntarily, knowingly, and intelligently" waived their rights to appeal

Pursuant to Washington precedents, "Appeal is a constitutional right". e.g., **State v. Sweet**, 90 Wn. 2d 282, 286, 581 P.2d 579 (1978). Similarly, RAP 6.1 provides that "appeal is a matter of right". These rights cannot be deprived unless having been waived "voluntarily, knowingly, intelligently". *Id.* Here, there is no evidence that Appellants ever waived their rights to appeal. Instead, they actively sought for clarification when rulings/orders were confusingly worded.

Appellants further demonstrated their good faith by writing that, "...if this Court decides that Appellants' understanding is incorrect and requires that Appellants need to submit their brief immediately, Appellants will abide by the directive..."

RAP 6.1 provides that "appeal is a matter of right." This right cannot be deprived unless a "voluntary, knowing, and intelligent waiver of the right to appeal" had been provided. e.g., **State v. Sweet**, 90 Wn. 2d 282, 286, 581 P.2d 579 (1978); accord *State v. Tomal,* 133 Wn. 2d 985, 989, 949 P.2d 833 (1997).

Waiver is the "act of waving or intentionally relinquishing or abandoning of a known right or privilege. Webster's Third New International Dictionary 2570 (2002). When constitutional rights are involved, the asserted party is required to bear the burden to prove "an intentional relinquishment or abandonment." **Johnson v. Zerbst,** 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938);

Here, Respondents bore the burden to prove that Appellants made a voluntary, knowing and intelligent waiver of their right to appeal and Respondent physicians did not meet the burden **(and Respondent SCH did not *at all* seek relief)**. Indeed, Appellants never waived their right to appeal. Instead, in their filings (both on January 17 and January 22, 2019), Appellants *repeatedly* made it explicitly that their brief was ready and willing to submit. This can never be considered as a waiver when Appellants were ready to submit their brief for this Court to review. And their brief had been well ready, and was filed with this Court on January 24.

In **State v. Sweet**, the Supreme Court held that, "The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court. Hence, we decline to dilute the right by application of an analysis which differs in any substantial respect from that which is applicable to other constitutional rights. " In order to obtain relief on dismissing

Appellants' appeal, Respondents are required to file ***"motion"*** required by RAP18.9 (c), instead of only raising the issue in the answer or response. Nevertheless, as a threshold matter, ***Respondents were required to seek relief by filing a motion under RAP 18.9 (c), and they didn't. Respondent SCH did not even seek relief, therefore, a relief should not be granted, especially as to SCH.***

As this Court recognized in **Hoirup v. Empire Airways**, "the failure to comply with [procedural requirements] will ***not*** generally result in dismissal. **Ashbaugh**, 90 Wn. 2d at 438 (failure to pay the filing fee not grounds for dismissal)". 69 Wn. App 479, 848 P.2d 1337 (1993). (emphasis added). Therefore, this Court cannot dismiss Appellants' appeal if Appellants did not "voluntarily, knowingly, and intelligently" waive their rights to appeal.

C. Washington case law does not support dismissing Appellants' appeal due to "innocent mistake"

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Washington case laws do not support dismissing appeal for "innocent mistake" **Scannell v. State,** 128 Wn. 2d 829, 831-32, 912 P.2d 489 (1996).

In **Weeks v. Chief of Washington State Patrol**, 96 Wn.2d 893, 639 P.2d 732 (1982), an Appellant filed the notice of appeal with the wrong court. The Supreme Court affirmed the Court of Appeals' granting of an extension of time to file the notice of appeal, noting that "[i]t has been 'apparent that the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.'" **Weeks,** 96 Wn.2d at 896 (quoting **First Federal Savings & Loan Ass 'n of Walla Walla v. Ekanger**, 22 Wn. App. 938, 944, 593 P.2d 170 (1979)).

The **Weeks** Court concluded that "substance should prevail over form. [Respondents] had notice. Applying strict form would defeat the purpose of the rules to 'promote justice and facilitate the decision of cases on the merits.'" 896 Wn.2d at 896 (quoting RAP 1.2(a)).

Similarly, in **State v. Ashbaugh**, the Supreme Court reversed the Court of Appeals' dismissal of the appeal, noting that

> The record indicates that the failure to timely pay the $25 filing fee in the instant case was a mere oversight on the part of petitioner's attorney. This oversight was corrected as soon as it was brought to his attention. It is difficult to visualize how "the demands of justice" would be served by dismissing petitioner's appeal under the facts of this case.

Finally, in **Scannell v. State,** the petitioner filed a notice of appeal six weeks late due to confusion over recent changes to the Rules of Appellate Procedure. Scannell, 128 Wn.2d 829, 831-32, 912 P.2d 489 (1996). The Supreme Court reversed the Court of Appeals' decision dismissing the appeal, due to several factors. The **Scannell** Court found that the petitioner's confusion over recent amendments to the Rules of Appellate Procedure contributed to the delay in filing. 128 Wn.2d at 834. Second, the petitioner's failure to timely file was an "innocent mistake." *Id.* Third, the petitioner made a good faith effort to comply. !d. Finally, the "end result [of dismissal] is drastic." *Id.*

Here, **Weeks, Ashbaugh** and **Scannell** do not support dismissing appeal due to an "innocent mistake." Chen was confused with wordings in the two orders/rulings, and RAP 10.2 just as the petitioner in **Ashbaugh** who were confused with the rules. As in **Weeks**, Chen made good faith seeking clarification: she filed Motion for clarification (treated as motion to modify by this Court), sought *Ex Parte* Order to file brief; she served all Respondents and filed the brief with

this Court just minutes when the appeal was dismissed. This is an innocent mistake made by Chen, not two minors, L.L. and J.L. who should not be punished for being dismissing appeal.

D. This Court should decide the case on the merits

In Washington, there is a strong policy favoring the finality of judgments on the merits. **Lane v. Brown & Haley,** 81 Wn. App. 102, 106, 912 P.2d 1040 (1996). Similarly, the Appellate Court upheld in **Keck v. Collin** that "Denying a continuance under these circumstances… would untenably elevate **deadlines over justice and technicalities over the merits**, and thus, deny [plaintiff] an opportunity to try [her] case to a jury." (emphasis added). Here, if Appellants missed the deadline, it was because they were confused by the two orders/rulings as non-native English pro se, they were in good faith seeking clarification, and they were waiting clarification. Even while waiting for clarification, they presented to this Court in good faith that they were willing to submit the brief. If the Court decides that Appellants' understanding was inaccurate, a chance to submit should be afforded to the Appellants whose *brief had been ready to submit* so that the Court can decide on the merit of the case, instead of dismissing the appeal for technicalities and Appellants' confusion.

In **Hoirup**, this Court held that, "RAP 1.2(a) generally requires a liberal interpretation of the rules, indicating a preference for decisions on the merits rather than on the basis of technical noncompliance with the rules."

1. **Trial Court's multiple assignments of error should be corrected by this Court. Chief Civil Honorable Ken Schubert hoped that the errors could be adequately fixed by this Court**

This is an extraordinary story. In 2013, without consulting with J.L.'s main treating physicians or, reviewing his medical history, three Respondent Physicians (Darren Migita, M.D., Ian Kodish, M.D., James Metz, M.D.) jumped to the conclusion that J.L. was abused by his mother, Ms. Chen

who was subsequently arrested and criminally charged. J.L. and his brother, L.L. were removed out of home. Fortunately, both dependency proceedings and criminal prosecution were dropped when the State learned that the reports provided by the Respondent Physicians were *directly* contrary to the patient's medical record. Unfortunately, these rightful dismissals came far too late, after more than a year of the family having been torn apart and everyone in the family having suffered tremendous harm. This harm would not happened if the Respondent Physicians had adequately investigated J.L.'s medical history, including the information in the files of their own institution, instead of providing a false diagnosis that was contrary to the medical facts and records.

The subsequent proceedings are also unusual. In 2016, Plaintiffs filed a *pro se* civil action against Respondent Physicians and SCH seeking damages. Without answering the complaint, Respondents quickly and unilaterally moved for a procedurally barred CR 12 (c) judgment motion based upon 20 pages' highly misleading and false information to the Court. Appellants were served the documents only one week before the hearing and were denied a continuance for discovery. Even though Respondents did not meet the initial burden of showing that there were no genuine issue of material facts, trial court granted their summary judgment; even while Respondent Darren Migita put another doctor (Russell Migita)'s treatment record before the court, judgment was entered in his favor; even when it was pointed out to the court that the children were not appointed a guardian ad litem, the trial court entered summary judgment against them without making a good cause determination. Trial court's failure to comply with guardian ad litem statute, which is at variance with Washington precedents, is untenable. e.g., **Newell v. Ayers**, 23 Wn. App. 767, 598 P.2d 3 (1979); **Dependency of A.G.**, 93 App. 268, 968 P.2d 424 (1998). RCW 4.08.050.

To make matters worse, when Appellants moved for clarification as to whether the dismissal was with or without prejudice, the trial court refused to clarify, leaving the issues unresolved and the judgments ambiguous. This Court should declare the orders to be "without prejudice" pursuant to CR 41 (a) (4), especially to minors whose statute of limitations will not expire for more than a decade. At minimum, the Court should make clear that these orders do not prohibit eight year old J.L. who had lost all meaningful communication due Respondents' misdiagnosis, from pursuing a case against Respondent physicians in the future, within the applicable statute of limitations.

Appellants later obtained J.L.'s 600 pages' full medical records from Defendants' institution in a separate federal civil rights (#2:16-cv-01877-JLR), involving claims against the police and the department of social and health department, involving their actions following the Respondent physicians' misdiagnoses. In that case, the federal court found sufficient merit to Appellants' claims that counsel were assigned; assigned counsel (Dorsey & Whitney) were able to obtain the discovery that Appellants were not able to obtain in this case. These records establish that Respondent physicians had full access to J.L.'s medical history at the time of their misdiagnoses. The records also establish that Respondent physicians were not acting in good faith and did not meet the standard care in their diagnosis when they did not consult with J.L.'s main treating physicians before jumping to the conclusion that J.L. was being abused. Appellants moved to vacate judgments based upon 'newly discovered " evidence and procedural irregularities. Chief Judge Ken Schubert (original judge had retired) agreed that the erroneous orders should be vacated. Judge Schubert articulated that he **believed that his three colleagues at Court of Appeals will agree with him, and get this fixed.** Appellants timely moved for reconsideration, and Judge Schubert granted vacating summary judgment as to Respondent physicians, pending this Court's permission to formally entry of order.

2. **This Court should set aside dismissing appeal because this is a meritorious case. Trial court's decision is at variance with Washington precedents**

Washington Notice Pleading System allows plaintiffs to "use the discovery process to uncover the evidence necessary to pursue their claims," tempers this aspiration. **Putman v. Wenatchee Valley Med. Ctr., P.S.**, 166 Wn. 2d 974, 983, 216 P.3d 374 (2009). "The notice pleading rule contemplates that discovery will provide parties with the opportunities to learn more detailed information about the nature of a complaint." **Bryant v. Joseph Tree, Inc.,** 119 Wn. 2d 210, 222, 829 P.2d 1099 (1992). This is particularly true because in medical malpractice claim, the reality is that the vast majority of critical medical information was in medical facilities and/or

medical providers' *sole* custody. The plaintiff, with no access to this information, is therefore not in a position to fully discover without engaging in extensive discovery. Therefore, "[t]his is true even when a plaintiff exercises utmost care to discover all negligent health care providers with due diligence and dispatch. Not infrequently, the particular acts or omissions of other, non-party health care providers fail to surface despite vigorous investigation and discovery." **Winbun v. Moore,** 143 Wn. 2d 206, 18 P.3d 576 (2001).

Here, Respondents brought a CR 12 (b)(2) motion prior to full discovery taking place (**discovery cutoff is more than six months away**), attempting to avoid discovery. In State v. **LG Elecs.,** Inc., 185 Wn. App. 394, 406, 341 P.3d 346 (2015), this Court explicitly pointed out that, "Were we to embrace [defendants'] position [of bringing CR 12 (b)(2) motion prior to discovery], we would create a false world – one existing solely as the result of litigation strategies…the purpose of our liberal notice pleading regime – to facilitate a proper decision on the merits." In the current action, Appellants (who were *pro se*) had exhausted their reasonable diligence to request J.L.'s medical records from SCH but were denied (witnesses include Ms. Chanele Brothers and Ms. Heather Kirkwood).

When a CR 12 (b)(2) was brought prior to full discovery, this Court held in **LG** that all the factual allegations in the complaints are required to be treated as verities and Respondents had failed to largely rebut the factual allegations but an Order in their favor was entered. Through a pre-discovery CR 12 (b) (2) motion, Respondents argued that they were entitled to summary judgment because Appellants did not provide expert affidavit to support their claim, which is at variance with **Putman** Court's holding that requiring medical malpractice plaintiffs to provide an expert affidavit prior to discovery violated plaintiffs' right of access to the court, which "includes the right of discovery authorized by the civil rules." 166 Wn. 2d at 979 (quoting **John Doe v.**

Puget Sound Blood Ctr., 117 Wash. 2d 772, 780, 819 P.2d 370 (1991)). Respondents further claimed that they were immune under **Whaley v. State**, 90 Wn. App. 658, 668, 956 P.2d 1100 (1998) through less than 90 words' affidavit without providing any factual evidence. Did a less than 90 words' affidavit establish satisfy this Court as "good faith" triggering immunity?

The Current case and Whaley involve completely different factual background and significantly different procedural history. Whaley brought a pure CR 56 motion while Respondents in the current case brought a pre-discovery CR 12 (b)(2) motion. Whaley sued a daycare and its director Hupf, alleging Hupf's negligent report caused eight days' separation between Whaley and her son. Hupf moved for summary judgment by submitting affidavits from multiple witnesses and herself. In her declaration, Hupf detailed her six months' investigation, consultation (with multiple professionals as well as the child's mother, Whaley), and repeated validation (through multiple witnesses who did and did not have prior experience about this allegation) concerning a sexual allegation directly from Whaley's son who enrolled in this daycare over one and a half year prior to this allegation. With this detailed and direct factual evidence from multiple witnesses, Hupf sufficiently demonstrated good faith. But here, Respondent physicians provided directly false information to CPS and Dependency Court. For example, Darren Migita told Dependency Court that J.L. did not have digestion problem but he himself prescribed digestive medication for J.L.. Another example, James Metz knew J.L. was seen at SCH ER on 10/20/2013, but stated in his SCAN report that J.L.'s parents refused to have him admitted in ER. Notably, Respondent physicians failed to consult with J.L.'s main treating physicians before jumping to a medical conclusion.

Whether there is a good faith, it should be tested under undisputed facts. The standard of good faith is a state of mind indicating honesty and lawfulness of purpose. **Tank v. State Farm**, 105

Wash. 2d 381, 385, 715 P.2d 1133 (1986). While Hupf honestly passed over the allegations from Whaley's son but Respondents in the current case dishonestly described J.L.'s condition, which was even not supported by J.L.'s medical records in their own institution. Hupf spent six months for investigation but Respondents did not even consult with J.L.'s treating physicians. RCW 26.44.060 (1) provides immunity for reporting alleged child abuse in good faith or testifying on alleged child abuse or neglect in judicial proceedings. It does not, however, provide immunity for outrageous misdiagnoses and misstatements. RCW 26.44.060 (4) (bad faith reporting). Washington court favors deciding cases on their merits. **Vaughn v. Chung**, 119 Wn. 2d 273, P.2d 668 (1992). The "newly discovered" medical records well established that these three Respondent physicians fell below the standard care for not contacting J.L.'s main treating physicians, and acted in bad faith for providing plainly wrong information to CPS, law enforcement, 2013 Dependency Court, 2017 &2018 Civil Court. In light of these clear and undisputed evidence, this is a meritorious case.

The situation in current case was very similar to the willful withholds in **Roberson v. Perez,** 123 Wn. App. 320 (2004). The **Roberson** court held that, "in this case there is material, very important material…that was not given to the plaintiffs…that would have been very important in preparation of the case. They were blinded, and they were. I believed, misled, and I believed the court was misled." While Defendants in **Roberson** argued that plaintiffs never asked for Detective Perez's medical file or his Labor and Industries file, the court rejected this argument, and imposed sanction upon Defendants. Specifically, the court finds that (1) Defendants were willful and deliberate and (2) Defendants' withholds substantially prejudiced Plaintiffs' ability to prepare for trial. The reviewing court, Division Three affirmed **Roberson** Court's decision and held that,

> "When a trial court grants a new trial on the ground that substantial justice has not been done, the favored position and sound discretion of the trial court is accorded the greatest deference by a reviewing court, particularly when the trial court's decision involves an assessment of occurrences…that cannot be made a part of the record." *Id* (quoting **Olpinski v. Clement,** 73 Wn. 2d 944, 951, 442 P.2d 260 (1968)).

Evidence is material if it was J.L.'s medical records. The credibility of the newly discovered medical records cannot really be doubted because the records were provided by Attorney General's Office through a separate federal civil litigation. Respondents did not dispute the authenticity of these newly discovered medical records but had willfully withheld the critical evidence from plaintiffs. In litigation, parties are required to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." **Gammon v. Clark Equip. Co.**, 38 Wn. App. 274, 279-80, 686 P.2d 1102 (1984).

Here, Appellants were substantially prejudiced by SCH Respondent's intentional withholds. This Court should allow them an opportunity to be heard on the merits, instead of dismissing appeal for technicalities. On appeal the central issues involve (1) seeking review for the undisputed fact that Respondent physicians did misdiagnose J.L without consulting with his main treating physicians. and caused irreparable harm to him; and (2) seeking clarification for trial court's ambiguous order because(the language was silent was to whether the dismissal order was with or without prejudice and signing judge refused to provide clarification. It is particularly important because two minors' statute of limitations will not expire for more than a decade. The damage to Appellants was real, the negligence of the Respondents was true. Therefore, it is not in the interest of justice to dismiss Appellants' appeal before hearing the merits.

E. Appellants should be afforded a meaningful opportunity to be heard under Due Process Clause

Both the United States and Washington State Constitutions declare that no person may be deprived of life, liberty, or property without due process of law. "The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life." **Hunter v. North Mason High School**, 85 Wn. 2d 810, 539 P.2d 845 (1975). Appellants thus have a protected property interest in their claims against Respondents. In any proceeding to deprive them of this property interest, procedural due process must be afforded.

Essential elements of procedural due process include notice and a meaningful opportunity to be heard. "A meaningful opportunity to be heard means 'at a meaningful time and in a meaningful manner." **Morrison v. Dep't of Labor & Indus.,** 168 Wn. App. 269, 272, 277 P.3d 675 (2012) (citing **State v. Shultz,** 138 Wn.2d 638, 642, 980 P.2d 1265 (1999)). Here, Appellants were not afforded a meaningful opportunity to be heard because their opening brief had not been reviewed by this Court prior to being dismissing appeal.

IV. CONCLUSION

Washington case laws did not support dismissing Appellants' appeal for untimely filed brief, particularly when there is no evidence to support that Appellants had "voluntarily, knowingly and intelligently" waived their right to appeal. RAP 18.9 is the only appellate court addressing dismissal on appeal. In their Answer, Respondents (respondent physicians) did not provided any evidence of showing that this is an abandoned or frivolous appeal.

This Court should set aside its January 14, 2019 Order dismissing Appellants' appeal and hear the appeal on the merits. Procedural Due Process requires notice and a *meaningful* opportunity to be heard but Appellants' appeal was dismissed before their opening brief was even heard.

Appellants respectfully request this Court reconsider its decision dismissing Appellants' appeal and provide Appellants a meaningful opportunity to be heard under Procedural Due Process. At minimum, Respondent SCH should not be granted a relief because it did not seek relief dismissing appeal, and its intentional withholds had misled the trial court and led to this unnecessary appeal.

DATED this 10th of February 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmon, WA 98073

s/ Naixiang Lian
Naixiang Lian
Pro se Appellant
PO BOX 134, Redmon, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM/ECF system which will send notification of the filing to all counsels of record.

Dated this 13th day of February, 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmon, WA 98073

APPENDIX A-1

Declaration of Susan Chen

I, Susan Chen, am over the age of eighteen, am competent to testify to the matters stated herein, and make the following declaration based on my personal knowledge:

1. I speak a regional dialect of Chinese as my first language. My verbal and written communication skills in English are limited.
2. I do not have any legal training or experience in the legal profession.
3. I had finished the preparation of the opening brief re: Chen et al v. Darren Migita et al. sometime during Christmas period, was ready to submit on January 14, 2019.
4. I was confused by Commissioner's 12/31/2018 ruling because she stayed only Respondents' brief, which I thought it might possibly be an oversight because in the 12/14/2018 order, this Court did not stay Respondents' brief. I thus moved for clarification which was treated as "motion for modification".
5. On January 17, 2019, I informed this Court that the brief was ready to submit.
6. I have been struggling to understand the wordings in the two orders. On January 22, I filed a submission requesting an *Ex Parte* order to submit the ready brief.
7. On January 24, this Court entered an order dismissing the appeal. We did file brief on the same day.
8. The occurrence of delay was due to my limited knowledge about comprehending the orders. This was my good faith mistake. J.L. and L.L. are two minors whose claims were dismissed (the order was silent as to whether it was with or without prejudice). They are innocent, and have relation with this delayed submission. They should not be punished for dismissing appeal.
9. I request this Court give appellants an opportunity to restore their rights for this appeal.

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

Signed this 10th of February, 2019 at Seattle, Washington.

/s/ Susan Chen

Susan Chen

APPENDIX A-2

SUSAN CHEN - FILING PRO SE

February 13, 2019 - 3:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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APPENDIX N

Gmail

Susan Chen <tannannan@gmail.com>

775227 Chen v. Migita

Dahlem, Susan <Susan.Dahlem@courts.wa.gov> Thu, Aug 9, 2018 at 9:26 AM
To: Susan Chen <tannannan@gmail.com>

The designation of clerk's papers is due August 10, 2018. The original is filed with the King County Superior Court and a copy with proof of service on opposing counsel is filed with the Court of Appeals.

Susan S. Dahlem

Court of Appeals - Division One

Phone 206-464-5387

susan.dahlem@courts.wa.gov

[Quoted text hidden]

APPENDIX O

FILED
Court of Appeals
Division I
State of Washington
8/10/2018 2:40 PM

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SUSAN CHEN, et al Plaintiffs, vs. DARREN MIGITA et al. Defendants.	Appeal Number: 775227 Trial Case No. 16-2-26013-6 SEA DESIGNATION OF CLERK PAPERS

Pursuant to RAP 9.6 and 9.7, appellant designates the documents listed below for transmission to the Court of Appeals, Division One.

The Clerk shall assemble the copies and number each page of the clerk's papers in chronological order of filing and prepare and alphabetical index to the papers. The clerk shall promptly send a copy of the index to each party.

CLERK'S PAPER

Sub	Date	Document
1	10-24-2016	COMPLAINT
6	10-28-2016	COMPLAINT
7	10-28-2016	COMPLAINT
8	11-09-2016	NOTICE OF APPERANCE
9	11-14-2016	DECLARATION
10	11-17-2016	NOTICE OF APPEARANCE
11	12-08-2016	SUMMONS
13	12-13-2016	SUMMONS
14	12-13-2016	SHERIFF'S RETURN OF SERVICE
15	12-13-2016	SHERIFF'S RETURN OF SERVICE
16	12-13-2017	SHERIFF'S RETURN OF SERVICE
17	12-15-2017	NOTICE OF APPEARANCE

DESIGNATION OF CLERKS PAPERS (Prepared with assistance of Jason E. Anderson, WSBA 32232 who is not appearing in this matter)

45	03-13-2017	SERVICE
46	03-13-2017	SERVICE
47	03-15-2017	ORDER
48	03-17-2017	NOTICE OF APPERANCE
52	03-21-2017	RESPONSE
53	03-21-2017	DECLARATION
55	03-21-2017	RESPONSE
56	03-21-2017	DECLARATION
58	03-24-2017	REPLY
59	03-30-2017	JOINDER
61	03-30-2017	MOTION
63	04-05-2017	REPLY
64	04-05-2017	JOINDER
65	04-10-2017	ORDER
66	04-10-2017	ORDER
74	05-08-2017	NOTICE OF APPEAL
79	06-16-2017	MOTION
99	09-22-2017	MOTION
100	09-22-2017	ORDER
102	10-20-2017	NOTICE OF APPEAL

DESIGNATION OF CLERKS PAPERS (Prepared with assistance of Jason E. Anderson, WSBA 32232 who is not appearing in this matter)

103	01-03-2018	MOTION
104	01-03-2018	MOTION
105	02-02-2018	ORDER
106	03-01-2018	MOTION
107	03-02-2018	MOTION
108	03-07-2018	RESPONSE
109	03-07-2018	JOINDER
110	03-07-2018	SERVICE
113	04-24-2018	EMAIL

DATED this 10th day of August 2018.

/s/ Susan Chen
Susan Chen, Pro Se Plaintiff
P.O. Box 134
Redmond, WA 98073

DESIGNATION OF CLERKS PAPERS (Prepared with assistance of Jason E. Anderson, WSBA 32232 who is not appearing in this matter)

SUSAN CHEN - FILING PRO SE

August 10, 2018 - 2:40 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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- 775227_Other_20180810143815D1101615_5208.pdf
  This File Contains:
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  The Original File Name was Exhibit A pdf
- 775227_State_of_Arrangements_20180810143815D1101615_0860.pdf
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  Statement of Arrangements
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- taftm@jgkmw.com
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APPENDIX P

March 12, 2019

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals – Division I
One Union Square
600 University Street
Seattle, WA 98101

Re: Chen v. Darren Migita et al, Court of Appeals, Div. I, Cause No. 775227-7-I

(Superior court case No. 16-2-26013-6 SEA)

Dear Mr. Johnson,

I am appellant in the above captioned matter. I am writing to request a correction of docket error. On January 22, 2019, I filed "Appellants' Request for ex parte order to file opening brief', Exhibit A, the docket was adversely displayed as "Motion to extend time to file". Exhibit B. Your assistance is greatly appreciated.

Very truly yours,

Susan Chen
PO BOX 134, Redmond, WA 98073
Email: tannannan@gmail.com
Tel: 323-902-7038

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of the filing to all counsel of record.

Dated this 12th day of March, 2019.

Susan Chen

Susan Chen
Pro Se Appellant
PO BOX 134, Redmond,
WA 98073

EXHIBIT A

NO.775227

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Appellants

v.

Darren Migita et al

Defendants/Respondents

APPELLANTS' REQUEST FOR EX PARTE ORDER TO FILE OPENING BRIEF

(SUPPLEMENTAL SUBMISSION RE: MOTION TO MODIFY)

Susan Chen

Pro Se appellant

PO BOX 134,

Redmond, WA 98073

COMES NOW Appellants request the Court to consider their request for an *ex parte* Order to submit opening brief in connection with their pending Motion to modify Commissioner Masako Kanazawa's 12/31/2018 Ruling before this Court, as further expressed below:

On November 29, 2018, Appellants filed motion to disqualify Smith Goodfriend, P.S. at trial court due to their pending CR 60 motion at trial court, alleging Ms. Chen had shared substantial confidential information with Smith Goodfriend, P.S.. Respondents responded, arguing that the trial court cannot rule on their representation because they are appealing attorneys. Appellants replied, pointing out that trial court could make findings, and also could regulate their activities within trial court. On December 12, trial court Judge Ken Schubert ruled on the motion, making findings and applying RPC 1.9 (a) to the matter of conflicts of interests about Smith Goodfriend.

On December 3, 2018, Respondents filed motion to confirm representation at Appellate Court. Appellants responded. On December 17, Respondents replied, claiming that Smith Goodfriend "shall abide by [12/12/2018] Order." *Respondents' Reply*, at P. 8.

On December 12, Appellants filed motion to disqualify Smith Goodfriend, P.S. at appellate Court, alleging conflicts of interests barring Smith Goodfriend, P.S. from representing Respondents in the same matter in which their interests are materially adverse to the interests of Appellants. Respondents did *not* respond to the motion. On December 27, Appellants replied, asking this Court to grant their motion due to Respondents' failure to respond, and the perceived conflicts of interests.

On December 31, 2018, Commissioner Masako Kanazawa entered a ruling, directing parties to seek trial court's entry of findings on Smith Goodfriend's conflicts of interests[1], and stayed only Respondents' brief[2].

---

[1] Commissioner's ruling was acceptable on 12/31/2018 because on that day, Judge Schubert's 12/12/2018 Order was still appealable; Commissioner's ruling was subsequently subject to modification because as of 1/11/2019, Judge Schubert's Order became *final* under Doctrine of Res Judicata after 30 days' appealing period.

2. Commissioner's Ruling was actual a *modification* of this Court's 12/14/2018 Order because the 12/14/2018 Order did not allow staying Respondents' brief.

On January 2, 2019, Appellants moved for clarification seeking stay for both parties pursuant to RAP 10.2 (b), the *only* court rule governing timing for filing briefs. RAP 10.2 permits Respondents "30 days" to respond to Appellants' brief. Appellants argued that Respondents will not be prejudiced if staying Appellants' brief because Respondents always have "30 days" under RAP 10.2; but if only staying Respondents' brief Appellants may be prejudiced because Respondents may obtain more than "30 days" to review, and prepare their Response. Appellants' another ground to stay brief was because their Motion for Reconsideration on the same disputed issues on appeal was before the trial court – Judge Schubert said that these erroneous orders should be vacated and articulated at the Show Cause Hearing that he believed that his three colleagues at Court of Appeals would agree with him, and get this fixed.

In Response, Respondents were unable to rebut Appellants' argument that RAP 10.2 is the only court rule governing timing for brief. Instead, they made improper and irrelevant arguments, and misinterpreted court rule.

In their Reply, Appellants pointed out that Respondents had two law firms appearing on their behalf so even if disqualifying Smith Goodfriend will not affect their ability to file a Response. Further, without attorneys is not a reason to stay brief because Appellants were *pro se*. Appellants further informed this Court that Judge Schubert's Order (together with his findings on December 12, 2018) has become final as of January 11, 2019, so Commissioner Kanazawa' Ruling was subject to modified as "confirm findings" (instead of seek findings) because the disputed conflicts of interests had been adjudicated under Effects of Res Judicata and collateral Estoppel. Appellants also explicitly request this Court to provide an instruction for Appellants to submit brief (if this Court requires Appellants' immediate submission) so that "Appellants' brief will not disclose to Respondents at an earlier time, so that only 30 days are permitted for their response, consistent with RAP 10.2 and under Appearance of Fairness Doctrine."

On January 17, Judge Julie Spector signed an order, confirming Smith Goodfriend's Representation, far exceeding her legal authority (as *trial court* judge, she cannot confirm the representation *at appeal*), and applied RPC 1.18, contrary to a prior final judicial decision dated on December 12, 2018. Finality of judgment is a central value in the legal system as provided in U.S. Constitution since 1792, no matter should be re-litigated and re-adjudicated. This Court

should not consider Judge Spector's Order, which was inconsistent with Judge Schubert's prior order dated on December 12, 2018.

If this Court modifies Commissioner's Ruling to stay Appellants' brief as argued above, this issue is moot, and this Court need not reach this request for ex part order to file brief. But if not, then on this motion, Appellants present to this Court that while motion to modify is pending before this court, Appellants are willing to abide by this Court's order and ready to submit their brief, the only relief sought is an ex parte order to file their brief so that their brief will *not* be disclosed to Respondents in less than 30 days, pursuant to RAP 10.2. Appellants can send their brief to the clerk and/or case manager, instead of filing online upon the grant on the motion. This request is to show Appellants' sincerity, but not concession.

Respondents' irrelevant arguments on Judge Schubert's findings of application of RPC 1.9 were judicially estopped by all their prior statements that they "shall abide by that Order." Reply at P.8. The languages in Judge Spector's order was barred by Res Judicata because it contradicted with Judge Schubert's previous findings. Respondents could have appealed. They did not. This Court should affirm Judge Schubert's findings on 12/12/2018, and accordingly modify Commissioner's Ruling to "confirm findings" on 12/12/2018.

Respectfully submitted DATED on this 21st of January , 2019.

/s/ Susan Chen

Susan Chen

/s/ Naixiang Lian

Naixiang Lian

PO BOX 134, Redmond, WA 98073

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing document to be electronically filed with the Clerk of this Court using the CM ECF system which will send notification of the filing to all counsels of record.

Dated this 21st day of January, 2019.

/s/ Susan Chen
Susan Chen
Pro se Appellant
PO BOX 134, Redmond, WA 98073

SUSAN CHEN - FILING PRO SE

January 22, 2019 - 9:23 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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- 775227_Other_20190122091946D1412117_5446.pdf
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EXHIBIT B

Appellate Court Case Summary

Case Number: 775227
Filing Date: 10-20-2017
Coa, Division I

Event Date	Event Description	Action
10-20-17	Notice of Appeal	Filed
10-23-17	Case Received and Pending	Status Changed
11-09-17	Other Ruling	Filed
11-09-17	Perfection Letter	Sent by Court
11-21-17	Filing fee	Waived
12-08-17	Motion to Extend Time to File	Filed
12-12-17	Ruling on Motions	Filed
01-09-18	Motion to Extend Time to File	Filed
01-10-18	Ruling on Motions	Filed
02-02-18	Order of Indigency in Superior Court	Filed
02-08-18	Ruling on Motions	Filed
02-08-18	Motion to Extend Time to File	Filed
02-14-18	Other Ruling	Filed
03-07-18	Motion to Modify Ruling	Filed
04-24-18	Designation of Clerks Papers	Filed
04-24-18	Statement of Arrangements	Filed
04-30-18	Other Ruling	Filed
05-17-18	Other filing	Filed
06-14-18	Motion to Extend Time to File	Filed
06-25-18	Ruling on Motions	Filed
07-05-18	Motion - Other	Filed
07-06-18	Ruling on Motions	Filed
07-11-18	Other filing	Filed
08-01-18	Order on Motions	Filed
08-10-18	Designation of Clerks Papers	Filed
08-10-18	Statement of Arrangements	Filed
08-10-18	Record Ready	Status Changed
08-21-18	Court's Mot to Dismiss for Fail to file	Filed
09-17-18	Motion for Stay	Filed
09-19-18	Other filing	Filed
09-19-18	Ruling on Motions	Filed
10-08-18	Response to motion	Filed
10-18-18	Other filing	Filed
10-18-18	Reply to Response	Filed
11-26-18	Notice of Appearance	Filed
11-28-18	Notice of Substitution of Counsel	Filed
11-30-18	Motion - Other	Filed
12-03-18	Motion - Other	Filed
12-12-18	Motion - Other	Filed

About Dockets

About Dockets

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If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

Coa, Division I
600 University St
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Seattle, WA 98101-1176
Map & Directions
206-464-7750(Clerk's Office)
206-389-2613(Clerk's Office Fax)

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You can contact the court in which the case was filed to view the court record or to order copies of court records.

How can I contact the court?

12-14-18	Order on Motions	Filed
12-17-18	Other filing	Filed
12-17-18	Court's Mot to Dismiss for Fail to file	Filed
12-17-18	Response	Filed
12-28-18	Reply to Response	Filed
12-31-18	Ruling to Remand	Filed
01-02-19	Response	Filed
01-02-19	Motion to Modify Ruling	Filed
01-03-19	Other Ruling	Filed
01-14-19	Response to motion	Filed
01-17-19	Reply to Response	Filed
01-18-19	Other filing	Filed
01-18-19	Objection	Filed
01-22-19	Motion to Extend Time to File	Filed
01-22-19	Letter	Filed
01-24-19	Order terminating Review	Filed
01-24-19	Decision Filed	Status Changed
01-24-19	Appellants brief	Filed
01-30-19	Clerk's Papers	Filed
02-13-19	Motion for Reconsideration	Filed
02-15-19	Notice of Substitution of Counsel	Filed
02-27-19	Order on Motion for Reconsideration	Filed
03-29-19	Mandate	Due

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Can I find the outcome of a case on this website?
No. You must consult the local or appeals court record.

How do I verify the information contained in the search results?
You must consult the court record to verify all information.

Can I use the search results to find out someone's criminal record?
No. The Washington State Patrol (WSP) maintains state criminal history record information. Click here to order criminal history information.

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SUSAN CHEN - FILING PRO SE

March 12, 2019 - 5:05 PM

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Appellate Court Case Number:	77522-7
Appellate Court Case Title:	Susan Chen & Naixiang Chen, Appellant's v. Darren Migita MD et al, Respondents
Superior Court Case Number:	16-2-26013-6

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Phone: (646) 820-8386

Note: The Filing Id is 20190312164605D1665259

APPENDIX Q

The Honorable Ken Schubert

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SUSAN CHEN et al, Plaintiffs, vs. DARREN MIGITA, et al Defendants.	CASE NO. 16-2-26013-6 SEA PLAINTIFFS' AMENDED MOTION FOR ORDER TO SHOW CAUSE AND ORDER TO VACATE JUDGEMENT/ORDERS

I. RELIEF REQUESTED

Plaintiffs Susan Chen and Naixiang Lian respectfully move the Court for: (1) an Order to Show Cause requiring Defendants Darren Migita, Ian Kodish, James Metz and Seattle Children's Hospital ("SCH") to show cause why the court should not grant Plaintiffs' Motion to Vacate Judgment/Orders; and (2) an Order vacating the Judgment/Orders dated March 3, and April 10, 2017. The motion to vacate ("motion") was originally filed with this Court on March 2, 2018[1] but the assigned judge has retired, Defendants did not respond to the motion, this court did not hear the motion. Pursuant to LCR 60 (e) (2), this amended motion is brought before Chief Civil Judge, Honorable Ken Schubert. Under RAP 7.2, the trial court *has jurisdiction* to hear this CR 60 motion.

[1] DKT 107

The motion is brought on both procedural and substantive grounds. "Newly discovered" SCH record indicates orders were obtained through Defendants' "fraud" and "misrepresentation" for cherry-picking twenty (20) pages (mostly entered by defendants) from five hundred nine-one (591) pages' record. By denying Plaintiffs' access to full record[2], and further withholding critical evidence, Defendants' misconduct has wrongfully deprived plaintiffs of their legal rights to due process of law by, *inter alia*, depriving them of an unbiased tribunal with a full and fair record of evidence pertaining to the civil action.

The orders are void upon Defendants' defective service and procedural defects for mistakenly denying plaintiffs opportunity to provided by CR 26 and CR 56. As held by Washington Supreme Court in *Schroeder*, dismissing minors' claims with prejudice violates article1, section 12 of the Washington Constitution. Notably, failure to comply with mandate of the guardian ad litem statue renders judgments against minors voidable. *See, e.g., In Re: the Dependency of: A. G.*

II STATEMENT OF FACTS

This case arises from the unlawful arrest and prosecution of Ms. Chen and related unlawful removal of minors J.L and LL, which were premised on Defendants' false allegations that J.L had been mistreated by Ms. Chen, while in fact J.L. suffered from well-documented medical issues. Plaintiffs were harmed by Metz's false report containing materially misleading statements and omitting significantly exculpatory information; Darren Migita's misrepresentation; and Kodish's misdiagnosis/conclusion. The harm would not have happened if Defendants had engaged in adequate consultation with JL's treating physicians prior to a wrong conclusion/diagnosis and not pre-arranged an unlawful removal.

---

[2] Chen Decl., 69; Lian Decl., 6-8

Following the dismissals, Plaintiffs made two attempts to appeal. The first one was considered "discretionary review" (#768247) instead of "appeal" because "the other pending claim under the same caption". Plaintiffs then voluntarily dismissed the remaining defendants and appealed which is currently pending (# 775227)[3].

SCH's full record does not support a child abuse/neglect case but the contrary. The "newly discovered" record reveals significant omissions and concealment from the previous medical record submitted by defendants:

1) Prior to October 24, 2013, JL has been repeatedly seen by multiple SCH providers: occupational therapist, physical therapist, Audiologist, GI specialist, nutritionist, endocrinologist, nephrologist, otolaryngologist, ER and urgent care providers. All providers *directly* witnessed J.L.'s gastrointestinal symptoms but nobody ever suspected child abuse/neglect[4].
2) Defendants fell below the standard care for not consulting with J.L.'s treating physicians before jumping to a conclusion. Prior to October 24, 2013, none of defendants *directly saw* J.L. and/or his family. Defendants knew that J.L. sees Dr. Green and Dr. Gbedawo but did contact them prior to a child abuse/neglect conclusion, though Metz made this recommendation in report. Commissioner Hillman found this "outrageous", and ordered Darren Migita talk with Dr. Green but Darren Migita only spent less than five minutes informing Dr. Green of a child abuse decision but refused to learn J.L.'s medical history[5].

---

[3] DKT 102

[4] Chen Decl., 12-17

[5] In his email, J.L.'s physician Dr. Green wrote, "...I think it's damning that Dr. Magita did not bother to obtain the previous evaluation records before jumping to his conclusions about autism and abuse/neglect".

The Court also requires Darren Migita to meet with parents, but he didn't comply up till today.

3) Prior to October 24, 2013, J.L. has been *repeated* seen at SCH GI clinic for gastrointestinal distresses: diarrhea, gas, constipation, distended belly, failure to thrive.[6] No providers ever concerned that parents starve J.L.

4) SCH record indicates that J.L.'s weight fluctuates under his parents' care as well as during hospitalization, (and also in foster homes)[7]. J.L.'s weight on October 24, 2013 (at removed) was the same as on November 20, 2013 (after removal). Five (5) "increased" and seven (7) "decreased [weight]" were observed during hospitalization but defendant Darren Migita told the Court that J.L. gained weight in hospital but lost weight under parents' care.

5) On October 28, 2013, Kodish conducted a forty (40) minutes' "Mental Health Evaluation" and concluded JL has no autism but "reactive attachment Disorder"[8] Family history is recognized a major risk factor for most psychiatric disorder[8] but Kodish's conclusion relies upon "largely unknown" family history and without interviewing parents.

6) Metz was aware that JL was seen and released by Dr. Russell Migita but stated differently in his report. Defendant Metz has full access to J.L's medical record but was deliberately indifferent to Ms. Chen's innocence.[9]

7) Darren Migita provided multiple false information to the Court[10], e.g. claiming J.L.

---

[6] Chen Decl., 12, 15, 18-24.

[7] Chen Decl., 21-24.

[8] Chen Decl., 40-46.

[9] Chen Decl., 30-34

[10] Chen Decl., 35-39

"kidney failure" by citing an old lab, and further omitting the material fact that J.L. was seen but discharged by Dr. Russell Migita; claiming "J.L. has no GI distress" but prescribed GI mediations for J.L. during hospitalization and at discharge even after having told Court that J.L. has no GI problems[10].

8) In dismissing criminal charges, King County Prosecutors wrote, "In the Scan team consult report dated 10/27/13, Dr. Metz wrote that [Ms. Chen] refused to follow Dr. Russell Migita's advice on 10/20/13 by leaving the ER against medical advice...Dr. Migita's ER report does not support this statement...Dr. Migita further told [Ms. Chen] to take [J.L.] to see Dr. Halamay again in 1-3 days which [Ms. Chen] did...The State will be unable to sustain its burden in this case. The evidence shows that [Ms. Chen] took [JL] to the ER when instructed to do so. Perhaps most significantly, the SCH SCAN team's written report regarding [J.L.]'s medical history was not accurate....[Ms. Chen] will also be able to show that [J.L.] had a distended abdomen for 6+ months and no doctor or nurse ever called CPS or requested a medical hold before 10/24/13."

III. STATEMENT OF ISSUES

1. Should the Court vacate the Judgement under CR 60 (a) caused by clerical mistakes? *YES.*
2. Should the Court vacate the Judgement under CR 60 (b) (1) for "excusable neglect and irregularity"? *YES.*
3. Should the Court vacate the Judgment under CR 60 (b) (3) due to "newly discovered" evidence? *YES.*
4. Should the Court vacate the Judgment under CR 60 (b) (4) due to Defendants' "fraud" "misrepresentation"? *YES.*

5. Should the Court vacate the Judgment under CR 60 (b) (5) because the judgment is void? *YES.*

6. Should the Court vacate the Judgment under CR 60 (b) (11) for any other reasons justifying relief from the operation of the judgment? *YES.*

IV. EVIDENCE RELIED UPON

1. The pleadings, papers previously filed herein and court email correspondence.
2. The declarations of Susan Chen, Naixiang Lian and the "newly discovered" full record from SCH and DSHS through Federal Court Civil action. (See, Chen Decl., Exhibit A, Exhibit B and Exhibit C).

V. LEGAL AUTHORITY AND ARGUMENT

A. Orders entered with procedural defects are subject to vacate under CR 60 (a)

Plaintiffs *pro se* filed this civil action on October 24, 2016 and not provided a notice of Rule Requirement under LCR 11 (a) (3). On December 8, defendants filed a pre-discovery Motion for Summary Judgment seeking a dismissal with prejudice against *all* plaintiffs (including minors). Ms. Chen requested a continuance for discovery under 56 (f) in her response, DKT 36 and also March 3 Hearing but was denied. Notably, the claims were dismissed with prejudice before defendant DSHS filed Notice of Appearance[11].

Pre-discovery summary judgment was premature, as Discovery is frequently permitted in litigation - a summary judgment is only appropriate after adequate time for discovery. By law in most jurisdictions, no summary judgement motion can be granted until discovery is complete.

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[11] DKT 48

Because a party moving for summary judgment must demonstrate the absence of any issue of material fact, a court should only grant summary judgment after the parties have been given an adequate opportunity for discovery. *See, e.g.,* Anderson, 477 U.S. at 250 n.5, 257 (noting that summary judgment should be refused "where the nonmoving party has not had the opportunity to discover information that is essential to his Case 1:10-cv-00651-JDB Document 36 Filed 09/08/10 Page 3 of 17 4 opposition," and that the nonmoving party should have "a full opportunity to conduct discovery").

Courts routinely reject motions for a pre-discovery summary judgment. *See,* e.g. Loughlin v. United States, 230 F. Supp. 2d 26, 51 (D.D.C. 2002) (denying summary judgment where non-moving party had no opportunity for discovery). "Courts have noted that pre-discovery summary judgment motions are premature and should only be used for exceptional circumstances." Barry, 2005 WL 1026703.

In opposing to Defendants' motion for summary judgment, Plaintiffs rightfully asserted that summary judgment should not be granted until they had an opportunity to obtain discovery. *See* CR 56 (e). After the commencement of an action, parties are generally allowed to obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26 (b) (1). CR 26 provides for a "right to discovery" without requiring a good cause showing. *Cook v. King County*, 9 Wn. App. 50, 51-52, 510 P. 2d 659 (1973).

As discussed in Ms. Chen's declaration, Plaintiffs learned, through discovery in a separate legal proceeding, that the complete set of medical records in Defendants' possession included records that support Plaintiffs' theory of their case – documents that were omitted from the selective record provided by Defendants in support of their motion for summary judgment. These records, at the very least, raise genuine factual disputes regarding Defendants' knowledge, motives, and intent in

participating in CPS action at issue in the case. Judge Hill's failure to grant Plaintiffs' request for discovery deprived Plaintiffs of opportunity to discover this information prior to entry of the Order and constitutes another clear procedural error.

Summary judgement was otherwise inappropriate on the merits. If addressing the merits, CR 41 (b) (3) applies, findings were required under CR 52 (a) but no findings were included in the order.

Judge Hill is required to disqualify herself from hearing the case by Code of Judicial Conduct 2.11 (A)(6)(d) due to her role as the judge presiding over plaintiffs' related dependency case and making multiple important decisions, especially J.L.'s out-of-home placement. Judge Hill's failure to disqualify herself constitutes another clear procedural error.

B. Orders entered with defective service are subject to vacate under CR 60 (b) (1)

Defendants did not satisfy the service requirement for motion for summary judgment defined in CR 56 (c), CR 5 (2) (A), CR 6 (e). CR 56 (c) requires not later than 28 calendar days' notice for both the motion and supporting documentation to be served before the hearing. Defendants did not serve Plaintiffs on the claimed date but through later email. *See*, Exhibit 2. Even if the claimed service date is true (which is denied by plaintiffs), Defendants still did not satisfy the "28 calendar days" requirement, as explained below.

In an unpublished opinion on *Coast Real estate services for Greetree apartment in King county, Jeanetta Walston v. Wayne R. Richardson*, 2015, Court of Appeals held, "CR 56 (c) requires a party moving for summary judgment to serve the motion 'not later than 28 calendar days' before the hearing." CR 5 (2) (A) states that when a party ***elects to serve by mail***, such service is "complete upon the **third day** following the day upon which [relevant documents] are placed in the mail..." CR 5 (2) (A)" (emphasis added). In this case, Defendants elected to serve by mail then CR 5 (2) (A) applies. If Defendants mailed on February 2, the service is deemed complete the third day, i.e.

February 5, which is Sunday resulting the service to be complete on February 6, less than 28 days before March 3 Hearing, non-complying with CR 56 (c). CR 6 (e) requires "3 days shall be added to the prescribed period" when served by mail.

"Any judgment entered on the basis of defective service of process is void". See, *Allstate Insurance v. Khani,* 75 Wn. App. 317. Defendants' defective service and non-compliance with CR 56 (e) and CR 5 (2) (A) is fatal, rendering order void.

C. An unconstitutional order is void and subject to vacate under CR 60 (b) (5)

In *Schroeder,* Washington Supreme Court declared RCW 4.16.190 (2) unconstitutional because "RCW 4.16.190 (2) *eliminates* tolling for minors in medical malpractice actions." and "limits the ability of certain plaintiffs – those whose injuries occurred during childhood – to bring medical malpractice claims". The Court held that, "there is no reasonable ground for limiting and deprived the trial court of its personal jurisdiction over the children. malpractice defendants' liability to patients injured during minority." The *Schroeder* decision is to remove "burden" from "particularly vulnerable population.", and to protect their fundamental rights of access to the court[12].

Undisputedly, Defendants' conclusion is made before consulting with J.L's main treating doctor primary physicians and reviewing a full medical history is not "meeting the standard of care" and "in good faith" in *any* countries. A medical conclusion/diagnosis without input from patient's Indeed, the Dependency Court was "outrageous" for Darren Migita's below standard care. Attorney Kirkwood was "shocked" at Defendants' "kindergarten medicine".

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[12] As an experienced attorney working on medical malpractice for over 30 years, Spokane Attorney Mr. Keith Douglass believes dismissing minors' claims with prejudice under *Schroeder* is unconstitutional since state Supreme Court's intention was not to deprive minors' opportunity. Mr. Douglass further believes failure to appoint GAL rendering action "null".

This is a meritorious case: Defendants failed to provide standard of care, and JL was harmed by her misconduct and negligence. The rights to access to the courts is fundamental to our justice system protected by U.S. and Washington Constitution. JL is entitled to his court day before reaching majority of age, and to have his case fully presented with the assistance of a competent attorney. Dismissing minors' claims with prejudice is in violation of Constitution.

D. Orders obtained through "fraud" are subject to vacate under CR 60 (b) (3) and (4)

1. The case is well pled and has merits, Defendants' arguments are based on significant withholds and concealment

Pro se Plaintiffs brought this lawsuit in good faith. As the Federal Panel found, her claims have merit, as conceded by the State and prosecutors in three previous proceedings, and the damage to JL and family is real. The elements for a medical negligence claims are: (1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and resulting injury. *Pedroza v. Bryant,* 101 Wn. 2d 226, 228, 677 P. 2d 166 (1984).

In this case, plaintiffs adequately allege that Defendant misdiagnosed J.L., failed to provide the standard of medical care, and breached the standard of care by refusing to contact his main treating physicians, and reviewing his full medical history, but delivering false information to the court. Complaint at 10-17. Plaintiffs further alleged that J.L was damaged by separating him from his family for eleven months, arresting his mother unlawfully, and preventing his ongoing and successful treatment for autism and GI issues. Plaintiffs alleged that "That all of the injuries and damages sustained by the plaintiffs were the direct and proximate result of the negligence actions of [defendant]..." Complaint at 19.

Whether plaintiffs can ultimately prove their allegations will be a matter for the factfinder, but if

the allegations are true – and at this very early stage (discovery had not been commenced) they must be both taken as true and interpreted in the light most favorable to the plaintiffs – defendants did not provide standard care for J.L and J.L. consequently suffered and continues to suffer due to defendants' negligence and misdiagnosis. If the Court determines that the facts must be pled with greater specificity, the proper resolution would be to afford *pro se* plaintiffs an opportunity to reallege these claims with additional facts, and not dismiss with prejudice at this stage. See *Bini*, 290 F. Supp. 3d at 1204.

"Newly discovered" evidence well establish its merit. A dismissal with prejudice against minor children under these circumstances is "illogical and inconsistent with other recognized instances of 'extraordinary circumstances' and "fails to respect the solicitude the law affords minors." *See, AT v. M. Cohen*, 2017. Minors are entitled to their court day with assistance of a competent counsel. "In a fair system, victory should go to a party who has the better case, not the better representation".

2. Defendants were not immune for "pre-arranged removal" and "bad faith" CPS participation under RCW 26.44.060

Defendants repeatedly claimed that they are immune under RCW 26.44.060 but could not provide an innocent explanation why they did not consult with J.L.'s doctors before a conclusion. This statute does not apply to a bad-faith "pre-arranged removal" by Metz whose twisted reports were recognized by Assistant attorney General Mr. David LaRauss and prosecutors. Defendants' conclusion without input from JL's primary physicians for a minor patient with complex medical situation is not "in good faith" but "doing kindergarten medicine". Darren Migita's misrepresentation was contrary to medical evidence. Kodish's psychiatric diagnosis was relied upon "largely unknown history". Defendants are "in bad faith" – their CPS participation are with

malice[13].

E. Failure to appoint GAL does not make the children parties of the case, rendering actions on behalf of minors "null" and void under CR 60 (b) (5)

Under RCW 26.26.090, the child "shall be made a party to the action." A minor child is to be represented by a general guardian or a GAL. At least one court has held that the absence of the child, as an indispensable party, deprives the trial court of jurisdiction to enter a judgment under the California version of the UPA. SEE PEREZ v. DEPARTMENT OF HEALTH, 71 Cal. App. 3d 923, 138 Cal. Rptr. 32 (1977). Washington has recognized the necessity of a guardian ad litem in paternity actions in which the identity of the father was an issue or the child's rights were adversely affected by dismissal of the action. *See, e.g.,* Miller v. Sybouts, 97 Wn.2d 445, 645 P.2d 1082 (1982) (failure of guardian ad litem to appear at the motion for summary judgment rendered the summary judgment of dismissal void); State ex rel. Henderson v. Woods, 72 Wn. App. 544, 865 P.2d 33 (1994) (either the State must conduct a reasonable inquiry into the identity of the natural father or the child must be represented by a guardian ad litem to ensure due process); In77 Wn. App. 350. *Custody of Brown*, The Court of Appeals held that the absence of a GAL deprived the trial court of jurisdiction, and reverses the judgment.

Procedural due process also requires that the child be represented by GAL in a private paternity action because "'no individual should be bound by a judgment affecting his or her interests where he [or she] has not been made a party to the action.'" Santos, at 147 (quoting Hayward, at 617). It is fundamental that parties whose interests are at stake must have an opportunity to be heard "at a meaningful time and in a meaningful manner." Olympic Forest Prods., Inc. v. Chaussee Corp., 82

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[13] Chen Decl., 30-52.

Wn.2d 418, 422, 511 P.2d 1002 (1973), quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). Because a child cannot represent his/her own interests, appointment of GAL is necessary to protect their interest.

In Washington, any person 18 years of age or older may sue or be sued in a state court. *See,* Wash. Rev. Code § 26.28.015 (2002). A younger person may sue or be sued, but only through a duly-appointed GAL.[14] Washington courts long recognized that "the children's interests are paramount." *See,* In Re: the Dependency of: A.G.. **The appointment of a guardian ad litem is mandatory"**, *Mezere v. Flory,* 26_Wash. 2d_274, 278, 173_P.2d_776 (1946), citing *Ball v. Clothier,* 34 Wash. 299, 75 P. 1099(1904); *State ex rel. Davies v. Superior Court,* 102 Wash. 395, 173 P. 189 (1918), it is not jurisdictional; rather, **the rule is that a minor must be represented by a GAL, or judgments against her may be voidable at her option.** Whether the minor will be allowed to avoid judgments or whether judgments are allowed to stand depends upon whether the court finds that the minor's interests were protected to the same extent as if a GAL had been appointed at the time the action was instituted. *See Newell v. Ayers*, 23 Wash. App. 767, 598

In current action, if the judge had appointed GAL *prior to* entering a dismissal order then the Court can determine if the children consented to a lawsuit represented by *pro se* parents with language barriers; and if being represented by *pro se* parents was in the best interest of the children. As pointed out by Mr. Khong, Court-appointed GAL for a different case that Ms. Chen is cannot provide competent representation due to her lacking "legal knowledge and/or language capability".

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[14] Wash. Rev. Code § 4.08.050 (2002) (minor as a plaintiff/defendant in superior court); Wash. Rev. Code § 12.04.140 (2002) (minor as a plaintiff in a district court); Wash. Rev. Code § 12.04.150 (2002) (minor as a defendant in a district court).
P.2d 3 (1979).

Mr. Khong wrote, "Ms. Chen's *pro se* attempts to help shepherd the case along … are simply not sufficient to address the matter in a proficient manner." Minors had been severely prejudiced by judgment against them since no investigation was conducted to determine if they understood and/or consented to filing a pro se litigation by non-attorney parents.

In Re: the Dependency of: A.G., the Court found that, "the record before us shows that no attorney brought up the matter of an appointment of a guardian ad litem to any of the judges or commissioners who made the numerous decisions. No court brought up the matter on its own, and no good cause determination was ever made." The appellate court held that appointing guardian ad litem is "mandatory", and "also imposes sanctions because both the Department of Social and Health Services (DSHS) and trial court failed to comply with the mandate of the guardian ad litem statute".

Plaintiffs made at least two attempts to caution the Court by proof in the record: *See*, DKT 36 (parents cannot directly represent the children (for lacking GAL)); *See, also*, DKT 44. in motion for reconsideration, plaintiffs explicitly cautioned the court on failure to appoint GAL. Plaintiffs wrote, "due to failure to appoint a Guardian ad litem ("GAL") to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of the minors for judicial consideration, and therefore no action to dismiss". Different from *In Re: the Dependency of: A.G.*, plaintiffs in this case **did actually raise the issue of failure to appoint GAL** but the court neither appointed GAL nor made any good cause determination **prior** to dismissing minors' claims with prejudice.

The basic principles in this area of the law, almost universally followed, are stated thus: "While the appointment of a guardian ad litem for an infant defendant is not jurisdictional in the sense that failure to make such appointment deprives the court of power to act and renders such judgment

void, a judgment rendered against an infant in an action in which he was not represented by a guardian ad litem or a general guardian is erroneous, and can be overthrown by writ of error coram nobis, or by motion in the same court, or by proper appellate proceedings, at least where the want of such representative affects the substantial rights of the infant." 27 Am.Jur., Infants, s. 121, p. 842. Due to the absence of GAL both L.L and J.L were not properly before this Court, any judgement against them should be set aside upon this motion.

III. CONCLUSION

For the reasons stated, "newly discovered" evidence clearly establish that there is a factual dispute of whether defendants acted in good faith. Summary judgment was clearly improper in light of this and many other genuine disputes of material fact. Failure to comply with the mandate of the guardian ad litem statute has rendered orders voidable. Plaintiffs respectfully move this Court for an order to Show Cause why Plaintiffs should not be granted a motion to vacate judgments.

Respectfully SUBMITTED this 6th of September, 2018.

/s/ Susan Chen

Susan Chen
Pro Se Plaintiff
P.O. Box 134
Redmond, WA 98073

I certify that this motion, not counting the caption or the signature block, contains 4193 words, in compliance with Local Civil Rules.

/s/ Naixiang Lian

Naixiang Lian
Pro Se Plaintiff
P.O. Box 134
Redmond, WA 98073

APPENDIX R

The Honorable Ken Schubert

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SUSAN CHEN et al, Plaintiffs, vs. DARREN MIGITA, et al Defendants.	CASE NO. 16-2-26013-6 SEA DECLARATION OF SUSAN CHEN IN SUPPORT OF MOTION TO VACATE SUMMARY JUDGMENT AND DENIAL OF MOTION FOR RECONSIDERATION

I, Susan Chen make the following declaration based on my personal knowledge:

1. I am over the age of eighteen.
2. I am mother of two minor children, J.L. and L.L. I speak a regional dialect of Chinese as my first language. My verbal and written communication skills in English are limited.
3. Other than the aforementioned proceedings, I do not have any criminal history nor any record for *suspected* child abuse/neglect.
4. As a result of Defendants Darren Migita, Ian Kodish, James Metz's malicious CPS involvements, I was the subject of wrongful dependency and subsequent criminal proceedings initiated in late 2013. Both proceedings were dismissed in September 2014.
5. I do not any legal training or experience in the legal profession.

6. My younger child, J.L has complex medical condition. He was diagnosed as autism by Lakeside Autism Center in 2012 and has been working with a team of providers including autism specialists (Dr. Green and Dr. Gbedawo), as well as therapists (occupational therapist, speech therapist, physical therapist, ABA therapist, etc.) for behavioral modification. He also sees other specialists (e.g. gastroenterology, nutrition, feeding, etc.) when necessary. He occasionally sees urgent care.

7. Prior to bringing the motion to vacate, I only read the limited 20 pages' medical record provided by defendants Darren Migita et al and Seattle Children's Hospital ("SCH"). Most recently, I am able to read an *original* and *complete* medical record for J.L. in SCH provided through discovery in a federal civil action (#16-CV-01877-JLR).

8. I have attached as Exhibit A, a true and correct copy of medical record (minors' personal information redacted) in support of motion to vacate. This second set of medical records ("original medical record") reveal significant omissions from the medical records provided by Defendants before. (Page numbers were added for easy reference)

9. A comparison on two medical record reveals Defendants Darren Migita et al and SCH withholds five hundred seventy-one (571) pages' critical medical information from this Court; The complete medical record also supports the fact that all defendants knew J.L see Dr. Green and Dr. Gbedawo but none of them ever contact Dr. Green or Dr. Gbedawo before making a diagnosis and/or conclusion of child abuse. *See,* P. 582-585; P. 587-589. Defendant Metz indicated in his SCAN report that he would obtain records from Dr. Green and Dr. Gbedawo but this never actually happened. Even with 2013 Dependency Court Order him talking to Dr. Green, Darren Migita only spent less than five minutes

informing Dr. Green of his child abuse conclusion instead of listening to J.L.'s medical history.[1]

10. In late 2013, J.L.'s parents were accused of starving J.L and caused his failure to thrive. When making these statements, Defendants knew this is not true but were deliberately indifferent to the available facts in SCH medical records. Defendants' misrepresentation to the Dependency Court led to J.L. and his brother being removed, and Ms. Chen being criminally prosecuted. Both dependency and criminal cases were eventually dismissed - the state and prosecutors concluded that it was SCH SCAN team's wrong information that caused this tragedy. For example, in his report, Defendant James Metz claimed parents refused to send J.L. to ER on October 20 but J.L. was seen at SCH ER and was released on the same day by Dr. Russell Migita as "medically stable". Defendant Darren Migita testified at Dependency court that J.L has no GI distress such that his parents were starving him but Darren Migita *himself* actually prescribed GI medications for J.L. Defendant Ian Kodish diagnosed J.L having "reactive attachment disorder" based on a "largely unknown history" and without observing interaction between J.L. and his parents, a key element for the diagnosis.

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[1] In his email, J.L.'s treating physician Dr. John Green wrote, "...I think it's damning that Dr. Magita did not bother to obtain the previous evaluation records before jumping to his conclusions about autism and abuse/neglect".

11. Prior to October 24, 2013, none of these three defendant physicians ever *directly* saw J.L and his family. After J.L was removed into SCH and up till today, none of these three defendants ever tried to contact and/or meet with J.L.'s family to understand his medical history even required by the 2013 Dependency Court.

J.L's multiple visits to SCH prior to his removal

12. Prior to October 24, 2013, J.L. has been *repeatedly* seen by *multiple* SCH providers including but not limited to occupational therapist ("OT"), physical therapist ("PT"), Audiologist, GI specialists, nutritionist, endocrinologist, otolaryngologist, ER and urgent care providers, etc. All these providers *directly* witnessed J.L.'s gastrointestinal symptoms like distended belly, passing gas, etc. None of the providers ever raised the concerns of possible child abuse/neglect and/or called CPS.

13. In 2012, J.L. saw multiple SCH providers. For example, on September 10, 2012, J.L. was seen at Nutrition Clinic at SCH. *See,* P. 139-141. *Also See*, P. 516-518. On September 14, 2012, J.L. was seen at GI Clinic at SCH. *See,* P. 135-138. On September 15, 2012, J.L. was seen at Audiology Clinic at SCH. *See,* P. 132-134. On November 15, 2012, J.L. was seen by Physical therapist ("PT"), *See,* P. 495-P. 496; J.L. was seen at urgent care at SCH for fever. *See,* P. 222-223.

14. In 2013, J.L. saw multiple SCH providers. For example, on May 4, 2013, J.L. was having an abdominal X-ray at SCH Imaging Department and the results indicate "marked gastric distention". *See,* P. 226-227 and P. 544-545. On May 10, 2013, J.L. was seen at SCH GI Clinic. *See,* P. 127-131. On May 15, 2013, J.L. was seen at Endocrinology Clinic at SCH. See, P. 123-126. On June 14, 2013, J.L. was seen at SCH GI Clinic. *See,* P. 118-122. On

July 18, J.L. was seen at SCH Otolaryngology Clinic for "speech delay". *See*, P. 115-117. On September 5, 2013, J.L. was seen at SCH Nephrology Clinic. *See*, P. 111-114. J.L. was also seen for developmental challenge: Hearing test for auditory concern. *See*, P. 132-134. Seeing physical therapist to explore more ways for early intervention. *See*, P. 495-496.

15. Prior to October 24, 2013, J.L. has been *repeatedly* seen in SCH GI clinic for his gastrointestinal distresses including but not limited to diarrhea, gas, constipation, distended belly, failure to gain weight. Per medical record in SCH, as early as his visit to SCH GI clinic on September 14, 2012, J.L. already presented with a distended belly. *See*, P. 135-138. The provider did not show any concern for child abuse/neglect, nor ever suspected that parents were starving J.L.

16. Prior to October 24, 2013, J.L. conducted multiple testing results in SCH, including but not limited to providers in SCH. e.g. See, P. 583-585 labs ordered by Dr. Gbedawo; See, P. 587-589 labs ordered by Dr. Green. These testing includes but not limited to blood work, abdominal X-ray, abdominal ultrasound, stool tests, etc. *See*, P. 51-110, P. 226-227, P. 228-253, P. 544-545, P. 548-549. SCH has possessed the test results for these tests, and all three defendants have full access to these records but was deliberately indifferent to parents' innocence.

17. A complete medical record at SCH well supports parents' diligence and innocence: they always followed doctors' instruction and took JL to numerous providers to trying to help the child. In her letter to King County Prosecutor's Office, Ms. Chen's criminal defense attorney, Ms. Twyla Carter wrote, "Ms. Chen did not starve [J.L.]. [J.L.] has a well-

documented history of his nutritional and weight difficulties. [J.L.] has complicated medical symptoms that did and continue to affect his ability to gain weight. Ms. Chen took [J.L.] to numerous doctors to try to figure out why [J.L.] could not (and still cannot) gain significant amount of weight".

J.L.'s digestive distress history

18. In 2012, J.L. had been repeatedly seen at SCH Clinics. His digestive distress is the main complaint. e.g., "Medical diagnosis includes feeding problem, developmental delay, constipation/diarrhea." *See,* P. 139-141. "Reason for referral: Evaluation of abdominal pain, constipation and diarrhea". *See,* P. 135-138.

19. In 2013, J.L. saw multiple SCH providers. For example, on May 4, 2013, J.L. was having an abdominal X-ray at SCH Imaging Department and the results indicate "marked gastric distention". *See,* P. 226-227 and P. 544-545. On May 10, 2013, J.L. was seen at SCH GI Clinic. *See,* P. 127-131. On June 14, 2013, J.L. was seen at SCH GI Clinic. *See,* P. 118-122.

20. In 2013, J.L. had been repeated seen at SCH clinics. The main concerns are GI problems. e.g., "chief complaint: abdominal distention, eructation" which doctor suggests eructation and abdominal distention "due to delayed gastric emptying secondary to constipation. Differential diagnosis includes: constipation, food intolerance or celiac disease." *See,* P. 127-131. The doctor suggests that poor weight gain is "possibly GI and absorptive problem". *See,* P. 123-126. "reason for referral: evaluation of abdominal distention and poor weight gain." *See,* P. 118-122.

J.L's weight fluctuation history

21. J.L. has a history of weight fluctuation under his parents' care as well as during hospitalization in SCH, and in foster homes. Per Child Health and Education Tracking Screening Report ("CHET") and "Parent/Child/Sibling visit service" provided by Department of Social and Health Services ("DSHS"), *See,* Exhibit B and Exhibit C. J.L.'s weight on 11/20/2013 (after removal, hospitalization and in foster home) was the same as on 10/24/2013 (at the time of removal), though during this period he experienced both "increased" and "decreased" as what had displayed under his parents' care.

22. Prior to October 24, 2013, J.L. has demonstrated a pattern of weight fluctuation. e.g. on September 14, 2012, his weight was 12.6 kg, *see* P. 135-138; On May 15, 2013, his weight was 12.4 kg. *see,* P. 123-126; On July 18 5, 2013, his weight was 13.2 kg. *See,* P. 115-117. On September 5, 2013, his weight was 12.8 kg, *See,* P. 111-114. He was 29 lb (=13.2 kg) when he was removed on October 24, 2013. *See,* Exhibit C for DSHS record.

23. After he was removed into SCH, J.L. continues to demonstrate a pattern of weight fluctuation, contrary to a "simply weight loss" claimed by defendants. *See,* P. 319-356. During hospitalization, J.L. was weighed every day by SCH staff. Overall, five (5) "increased [weight]", seven (7) "decreased [weight]" together with one (1) "unchanged [weight]" weight fluctuation were observed in hospitalization record. e.g. J.L's weight was recorded as "increased 0.2 kg" on 10/25/2013. *See,* P. 324; on 10/27/2013, J.L.'weight was detected as "unchanged" from 10/26/2013. *See,* P. 328. On 10/28/2013, J.L. was recorded as "decreased 0.2 kg from 10/27/2013. *See,* P. 330. On 10/29/2013, J.L. was detected as "decreased 0.5 kg from 10/29/2013". *See,* P. 332.

24. After he was placed in foster homes, J.L. continues to demonstrate "weight fluctuation", on 11/20/2013 well-child exam, he was observed having dropped two pounds two weeks after being placed in the first foster home. When asked about the two pound weight loss by DSHS employee Ms. Jill Kegel, DSHS-selected physician, Dr. Hal Quinn from Mercer Island Pediatrics indicated that, "he is not concerned about [the 2lb weight loss] at this time because weight can fluctuate daily." On May 15, 2013, Dr. Roja Motaghedi pointed out that, "the measurement was very unreliable as he was fighting exam", and "he was very uncooperative.". *See,* P. 124.

J.L's unlawful removal

25. On August 31, 2013, J.L. was seen by Kate Halamay at Pediatric Associates (Saturday Clinic) for requesting a recheck on labs recommended by Dr. Green. Labs were re-checked. See, P. 78-83. Dr. Halamay recommended J.L. follow up with SCH Nephrology Clinic and have ultrasound, which was done September 3, 2013. *See,* P. 109-110 and P. 228-253.

26. On September 5, 2013, J.L. followed up with Nephrology Clinic at SCH. See, P. 111-114. The doctor notes that the renal ultrasound on September 3, 2013 was normal. J.L. was weighed 12.8 kg=28 lb.

27. On October 19, 2013, Parents took J.L. to both Pediatric Associates and Mercer Island Pediatrics to request labs done because he was not feeling well. J.L. was later examined at Urgent Care Clinic at SCH. Parents requested lab technician contact them if any abnormal labs observed. No calls on that day.

28. On October 20, 2013, due to the concerns for lab results, J.L. was first seen at Urgent Care Clinic at SCH (at Bellevue), later at SCH ER (at Seattle). J.L. was re-checked labs and released as "medically stable". Dr. Russell Migita wrote, "He does not have hypertensive emergency at this time and does not meet the eminent risk criteria for medical hold." *See*, P. 150-157. J.L.'s parents were advised to follow up with Kate Halamay (1-3 days) and nephrology (1-2 weeks).

29. On October 23, J.L. followed up with Kate Halamay as recommended by Dr. Russell Migita. Due to a Dr. Halamay's poor service, J.L.'s parents complained her to the receptionist, and decided to make formal complaint to her superior on the next day. Dr. Halamay treated with a pre-emptive CPS referral. To formulate her opinion, Dr. Halamay called SCH SCAN team, and gained support from Defendant Metz. Metz and Halamay pre-arranged a removal.

Defendant James Metz

30. Without consulting with J.L's main treating physicians and without reviewing his *full* medical history, Defendant Metz jumped to conclusion that J.L.'s failure to thrive was solely caused by his parents, though he did not have any *direct* knowledge about J.L's parents. While acting as DSHS' witness and medical consultant, Defendant Metz provided plain wrong and/or highly misleading statements to the Court and prosecutor that led to the unlawful removal for J.L. and his brother, and Ms. Chen's criminal charges.

31. In his SCAN team report, Defendant Metz alleged that mother did not follow through medical instruction but a review on a full and complete medical record does not support

this allegation: J.L. saw specialists he was referred to which includes but not limited to audiologist, nutritionist, GI, nephrology, endocrinology. J.L. conducted all lab works and imaging tests ordered by doctors. J.L. was referred to conduct an autism evaluation which had been promptly done and subsequently since then he had been working with all types of intervention therapies per recommendation. J.L. also went to ER and urgent care when needed. He was removed due to the friction with an urgent care physician at his follow-up visit, which was recommended by Dr. Russell Migita from SCH.

32. In his SCAN team report, Defendant Metz used plain wrong and highly misleading statements to describe how J.L.'s mother refused to send him to ER on October 20. However, SCH Records strongly support the fact that J.L. was seen at SCH ER on October 20, 2013 and was released on the same day by Dr. Russell Migita because "He does not have hypertensive emergency at this time and does not meet the eminent risk criteria for medical hold. We will discharge him to his parents with close followup with primary care provider" *See*, P. 156. When writing his SCAN team report on October 27, 2013, Defendant Metz has full access to J.L's SCH medical record and knows that Ms. Chen was innocent but was deliberately indifference to the truth.

33. Prior to October 24, 2013, Defendant Metz did not have any *direct* experience seeing J.L. and his family, nor consulted with J.L's main treating physician, but pre-arranged a removal with an urgent care provider, Kate Halamay, and subsequently provided wrong information to CPS and Dependency Court to support an unlawful removal for J.L.

34. In its decision to dismiss the criminal charges against Ms. Chen, King County Prosecutor's Office wrote, "In the Scan team consult report dated 10/27/13, Dr. Metz

wrote that [Ms. Chen] refused to follow Dr. Russell Migita's advice on 10/20/13 by leaving the ER against medical advice. Dr. Migita's ER report does not support this statement.". Prosecutors further wrote, "Dr. Migita further told [Ms. Chen] to take [J.L.] to see Dr. Halamay again in 1-3 days which [Ms. Chen] did." In its conclusion, prosecutors wrote, "The State will be unable to sustain its burden in this case. The evidence shows that [Ms. Chen] took [J.L.] to the ER when instructed to do so. Perhaps most significantly, the SCH SCAN team's written report regarding [J.L.]'s medical history was not accurate....[Ms. Chen] will also be able to show that [J.L.] had a distended abdomen for 6+ months and no doctor or nurse ever called CPS or requested a medical hold before 10/24/13."

Defendant Darren Migita

35. Defendant Darren Migita explicitly refused to consult with J.L.'s long-term provider and was not at all interested in learning J.L.'s medical history but jumped to a conclusion of child abuse/neglect to support a decision for out-of-home placement for J.L. At 72 hours' hearing when asked if he planned to talk with J.L's occupational therapist, Darren Migita said "No" because "SCH has its own occupational therapist". Even after being reminded that this is J.L.'s long-term provider who knows him, but Darren Migita insisted that it is unnecessary.

36. Dependency Court orders defendant Darren Migita to talk with J.L.'s doctor Dr. Green. Even with the Court Order, Defendant Darren Migita only spent less than five minutes merely informing Dr. Green of a child abuse decision but refusing to listen to J.L.'s

medical history. The Court also requires Darren Migita talk with J.L.'s parents, but this never happen up till today.

37. At 72 hours' hearing, Defendant Darren Migita has been dishonest providing wrong information to the Dependency Court at multiple occasions which includes but not limited to citing an old lab to support a "kidney failure" diagnosis on October 24, and to justify the unlawful removal. Darren Migita omitted the material fact that J.L. was seen but discharged by the doctor on October 20. *See,* P. 150-157. Darren Migita further omitted that J.L was detected having a 0.5 creatinine (*see*, P. 556) for kidney function on October 24, which Dr. Kate Halamay (a pediatrician from Pediatric Associates) admitted in the recorded interview that 0.5 is a normal number for kidney function. By citing the outdated information, and omitting both subsequent discharge from the hospital, the actual status for his kidney function, and the intervening time period before J.L. was placed in the State Custody, Darren Migita's testimony created the false impression that there was an exigent medical situation on October 24, 2013. Darren Migita had access to the complete, accurate medical evidence in SCH, but knowingly or with deliberate indifference failed to correct this misleading testimony to the Court. The materially false or misleading evidence submitted by Darren Migita was material to the Court's ultimate decision to wrongly keep J.L. in state's custody.

38. At 72 hours' hearing, Defendant Darren Migita has been dishonest for providing wrong information to the Dependency Court at multiple occasions which includes but not limited to claiming "J.L. has no GI distress" but *himself* was observed to prescribe GI mediations for J.L. during hospitalization as well as the discharge. *E.g. See,* P. 331, 333.

Perhaps most significantly, J.L. was again prescribed GI medications at his discharge on November 7, 2013 even after Darren Migita repeatedly told the dependency Court that J.L. has no GI distress such that all his failure to thrive was only due to parents' starvation.

39. At the 72 hours' hearing, Defendant Darren Migita has been dishonest for providing wrong information to the Dependency Court at multiple occasions which includes but not limited to claiming Ms. Chen having Munchausen Syndrome by Proxy, though he had never personally met or talked with Ms. Chen and her family; in addition, though Darren Migita also claimed, "J.L has no autism, but reactive attachment disorder" though never saw interaction between J.L. and his parents, a pre-requisite to diagnose this rarely seen disease.

Defendant Ian Kodish

40. On October 28, 2013, based on defendant Darren Migita's referral, defendant Kodish conducted a 40 minutes' "Mental Health Evaluation" on a minor patient, J.L., without interviewing J.L.'s family. His evaluation was based on "largely unknown" history.

41. When conducting his "Mental Health Evaluation" on October 28, 2013, Defendant Kodish is aware that JL's parents are originally from China but did not attempt to communicate with JL with a Chinese interpreter. As a licensed psychiatrist, Kodish knew that family history is a major risk factor for most psychiatric disorders [Kendler et al., 1997; Miles et al., 1998; Sullivan et al., 2000; Bandelow et al., 2002, 2004; Byrne et al., 2002; Qin et al., 2002; Klein et al., 2003; Newman and Bland, 2006; Coelho et al., 2007]. In University of Nevada, Reno, School of Medicine's website, "family history" is listed as

one of the most important elements of the psychiatric assessment. When making his psychiatric evaluation on JL, "family psychiatric/medical history" was entered by defendant Kodish as "largely unknown". Kodish determined JL was "reactive attachment disorder" without observing the interaction between JL and his parents. Kodish denied JL having autism.

42. In his email, former governor-appointed chairperson for Washington Council for Prevention of Child Abuse and Neglect, Licensed psychologist, Dr. Darrow Chan was greatly concerned about the unreliable evaluation provided by SCH psychiatrists. E.g. Defendant Kodish's first sentence under "chief complaint and history of present illness/present concern" is, " [J.L.] is a 3 year old male child... concerning for failure to thrive as well as medical child abuse and neglect" In addition, under "Reason for referral" section, Kodish states, "due to concern for failure to thrive, neglect and medical child abuse". Licensed psychologist, Dr. Darrow Chan questioned, "have either J.L.'s parents been found guilty of this? This statement influences how the entire report is interpreted." Thus, defendant Kodish's statement makes it sound like was established as fact that J.L. suffered from neglect.

43. As seen from the report, Kodish's evaluation report was written based on a lot of "unknown". In this report, "family psychiatric/medical history" was stated as "largely unknown"; for "history of head injury or seizures" was written as "no known history", for "allergies" is "NKDA" (No Known Drug Allergies). Under "developmental/birth history", "pregnancy" was described as "information not available", and "maternal history of drug/etoh use during pregnancy" is again identified as "unknown". In addition,

under "Clinical impression/conceptualization/formulation", Kodish again wrote, "[J.L.]'s history is largely unknown outside of records..." and "family history is largely also unknown".

44. Even with so much "unknown" observed in this report, Kodish reached a conclusion that "most concerning and likely diagnosis psychiatrically would be reactive attachment disorder..." though admitted that "parents unable to be interviewed" under Section of "history of present illness".

45. Kodish's diagnosis of "reactive attachment disorder" was lacking key element of "direct observation of interaction with parents or caregivers", "questions about the home and living situation since birth", "an evaluation of parenting and caregiving styles and abilities" which was recognized by all reputable hospitals like Mayor Clinic: (resources:https://www.mayoclinic.org/diseases-conditions/reactive-attachment-disorder/diagnosis-treatment/drc-20352945)

46. Mayo Clinic defines Reactive Attachment disorder ("RAD") as "a rare but serious condition in which an infant or young child doesn't establish healthy attachments with parents or caregivers". However, Defendant Kodish had never attempted or actually interviewed J.L's parents and observed the interaction between J.L. and his parents before reaching a diagnosis of "reactive attachment disorder". Child Mind Institute further wrote, "To be diagnosed with RAD (Reactive Attachment Disorder), the child must not meet the criteria for autism spectrum disorder..." Given the fact that J.L. had been diagnosed as "autism spectrum disorder" but Kodish was deliberately indifferent to this fact. Mayo Clinic identified "risk factors" of developing RAD may increase in

children who "frequently change foster homes or caregivers". Kodish's misdiagnosis led to J.L. being wrongfully removed and eventually went through eight (8) different foster homes, and had clinically increased the risk of "reactive attachment disorder". Further, Kodish's misdiagnosis resulted in J.L. being denied autism therapy for months which subsequently caused his losing abilities.

47. Defendants Darren Migita, James Metz and Ian Kodish fell below the standard care for not consulting with J.L.'s main treating physicians Dr. Green or reviewing a full medical history before jumping to conclusion; Defendant Darren Migita had acted in bad faith for providing tons of plain wrong and/or highly misleading information (directly contrary to medical records) to the Dependency Court, which led to adverse placement decision to remove both children.

48. A complete medical record indicates that SCH providers have been tracking J.L.'s weight which has demonstrated a pattern of "fluctuation". For example, on September 14, 2012, J.L was weighed 12.6 kg ("Ideal weight is 12.6-13.4kg")=27lb. *See*, P. 139-141. (Note: J.L. weighted 29lb on 10/24/2013 when he was removed). On July 18, 2013, J.L. was weighed 13.2 kg (=29.1lb). See, P. 115-117. On September 5, 2013, J.L. was weighed 12.8 kg (=28 lb). *See*, P. 111-114. Defendants have full access to J.L.'s SCH medical record and knew J.L's weight is "weight fluctuation" rather than "simply weight loss" but told CPS and Dependency Court differently.

49. This complete medical record indicates that J.L.'s parents have been in good faith following all instructions from medical providers. J.L.'s blood work was done; his imaging orders were fulfilled; his follow-up appointment had been made. For example, in

2012, J.L. was seen at SCH Nutrition Clinic, Audiology Clinic, Physical Therapist based on referrals from Dr. Megan Kullnat. J.L. was having abdominal X-ray on May 4, and subsequently seen at GI clinic on May 10, 2013 was based on referrals from Dr. Hal Quinn. J.L. saw Endocrinology Clinic and further GI Clinic was based on recommendations from GI Clinic on May 10, 2013. All defendants have full access to SCH medical records and knew that J.L.'s parents are innocent but were deliberately indifferent to their innocence both in 2013 Dependency Court, in 2014 Criminal court, in 2016 Civil Court.

50. This complete medical record also includes some lab work done on different days and from different providers. e.g., labs ordered by Dr. Gbedawo. *See*, P. 582-585; P. 587-589. All the defendant physicians have access to a complete medical record and knew that J.L. saw Dr. Green and Dr. Gbedawo but never attempted to contact them for medical history before jumping to a conclusion. In his report, Defendant Metz recommends contacting these two doctors for medical history, but this never actually happened up till today.

51. A review on a complete medical record at SCH support the fact that J.L. has documented history of digestion distress that was affecting (and continues to affect) his weight gain. All these three defendants have a full access to J.L.'s SCH medical record and know that J.L.'s parents were innocent but were deliberately indifferent to the truth.

52. Defendant did not contact JL's main treating physicians and reviewing medical records before jumping to conclusion of child abuse/neglect. Defendants knew that available medical records did not support a child abuse case, they deliberately withheld critical medical information from the court to deceive a dismissal order. Defendants' multiple

false conclusions contained blatantly false and materially misleading statements had caused significant damage to J.L. and his family.

53. Defendants' unlawful participation in unlawful CPS removal action on two children which subsequently led to an unlawful criminal charge against Ms. Chen. Ms. Chen and her family have been heavily involved in altogether four different legal proceedings triggered from 2013-2015, the last one did not get resolved until 2015. J.L significantly regressed and lost all his abilities he previously had. J.L.'s parents desperately sought treatments, including New York, Harvard and later China (per Harvard expert's advice).

54. On October 24, 2016, J.L.'s parents filed the present case pro se, without the benefit of counsel but did not receive any "Notice of Rule Requirements" under LCR 11 (a) (3).

55. *Pro se* plaintiffs did not receive any documents for summary judgment defendants and was initially unaware that defendants had filed a pre-discovery motion for summary judgment until February 17 was told by one consulting attorney who checked the case status and informed me of the filing for motion for summary judgment.

56. On February 21, Pro se Plaintiffs filed a response, requesting a continuance since due to defendants' improper service they were unaware of the summary judgment. Ms. Chen wrote," I need some time so that I can request and read the discovery.". Ms. Chen further request time to "redact" minor children's personal information. Ms. Chen also reminded the Court that she "was not able to represent the children" (due to failure of appointing guardian ad litem). Lastly, Ms. Chen reminded the trial court that some other defendants do not file notice of appearance, and she needs time to consolidate all complaints.

57. On March 2, 2017, a Spokane Attorney Mr. Keith Douglass contacted defendants, informing them that he was actively reviewing files and was interested in taking the case, and asked for a possible continuance. Defendants disagreed with a continuance but admitted that the Court, in all likelihood, would grant such a continuance per CR 56 (f).

58. At the Hearing held on March 3, 2017, Ms. Chen once again requested a continuance to do discovery under CR 56 (f). The Court did not grant Ms. Chen's request for continuance to do discovery. Instead, the court entered an order granting defendants' motion for summary judgment dismissing plaintiffs' complaints.

59. On March 10, Pro se plaintiffs filed a motion for Reconsideration, specially asking the Court to clarify that the dismissal order against the children to be "without prejudice", given the facts that their statute limitations have not expired, and they were not represented by guardian ad litem.

60. On March 17, defendant DSHS filed a Notice of Appearance. *See,* Dkt #48

61. On March 21, defendants filed their response to plaintiffs' motion for reconsideration. *See,* Dkt # 52 and 55.

62. On March 24, Pro se plaintiffs filed their reply in support of their motion for reconsideration. *See,* Dkt #58.

63. On March 30, another defendant of the case, SCH filed a motion to strike plaintiffs' reply. *See,* Dkt # 61.

64. On April 5, Pro se plaintiff Ms. Chen requested a continuance for medical reasons if there is a reply required. *See,* Dkt #113. The court did not respond to such request.

65. On April 10, the Court entered an order denying plaintiffs' motion for reconsideration and granting defendants' motion to strike plaintiffs' reply in support of motion for reconsideration.

66. On May 5, 2017, plaintiffs filed a notice of appeal. *See,* Dkt #74. The appeal was not accepted due to "the other pending claim under the same caption" thus the orders entered is not final judgment. *See,* appellant court ruling. This appeal was identified as "discretionary review" (#768247) instead of "appeal" which was denied for review. Dkt #111.

67. On August 10, Plaintiffs voluntarily dismissed defendant DSHS, see #97, and further voluntarily dismissed the remaining defendants including Redmond police department, detective D'Amico, State of Washington on September 22. *See,* Dkt # 100. On October 20, plaintiffs filed a notice of appeal which is accepted and currently pending in court of appeals (appeal # 775227).

68. Due to the tremendous stress from the prejudice in the courtroom, Ms. Chen's health deteriorated to such a point that she experienced severe headache, and breast pain, cannot at all get into sleep, she was referred to conduct diagnostic mammography, X-ray, ultrasound, MRI during the period of time. She also suffered from severe problems for temporal losing eye sight, sometime in March to May experienced two severe subconjunctival hemorrhages.

69. Ms. Chen had made two attempts to obtain J.L.'s medical record from SCH but was denied access. One attempt was through with assistance of Ms. Heather Kirkwood.

70. Most recently, I received a copy of medical records through discovery in federal court civil action. This is *the first time* I have access to J.L.'s *original and full* medical record in SCH. I also received some of DSHS Discovery through federal court civil action.

71. I have attached as Exhibit A, a true and correct copy of medical records (minors' information redacted) obtained during Susan Chen et al v. Natalie D'Amico et al., Western District of Washington Case #16-cv-01877-JLR. This second set of medical records reveals significant omissions from the medical records provided by Defendants before.

72. Medical records support the fact that Defendants were deliberately indifferent to my innocence in 2013, leading to JL and LL's wrongful removal and unlawful criminal prosecution against me, and causing significant harm to the family. It was unbelievable that in 2017 Defendants once again utilized the false information to mislead and conceive the Court. Defendants' misconduct wrongfully deprived Plaintiffs of their legal right to due process of law by, *inter alia*, depriving them of an unbiased tribunal with a full and fair record of evidence and a full and fair hearing.

73. I have attached as Exhibit B, a true and correct copy of "Child Health and Education Screening Report" from DSHS Discovery (minor's personal information redacted).

74. I have attached as Exhibit C, a true and correct copy of "Parent/Child/Sibling Visit Service Referral" from DSHS Discovery (minor's personal information redacted).

75. I have attached as Exhibit D, a true and correct copy of order granting defendants' motion for summary judgement of dismissal.

76. I have attached as Exhibit E, a true and correct copy of order denying plaintiffs' motion for reconsideration.

77. I have attached as Exhibit F, a true and correct copy of order granting defendant SCH's motion to strike plaintiffs' reply in support of motion for reconsideration.

I, Susan Chen make this declaration under the penalty of perjury under the laws of Washington in Seattle, Washington on the 1st day of September 2018.

/s/ Susan Chen

Susan Chen, *Pro se* plaintiff

PO BOX 134

Redmond, WA, 98073

APPENDIX S

THE HONORABLE KEN SCHUBERT

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

SUSAN CHEN, et al ,

Plaintiffs,

vs.

DARREN MIGITA, et al

Defendants.

CASE NO. 16-2-26013-6 SEA

DECLARATION OF JOHN A GREEN III, MD IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE

I, John A Green III, MD, am over the age of eighteen, am competent to testify to the matters stated herein, and make the following declaration based on my personal knowledge.

1. I write regarding J.L. and L. L. (born in 2008 and 2010 respectively)
2. Since beginning practice in 1975, I have worked with children and adults with chronic health problems. I worked for the first seven years as a full time emergency physician and a part time family practitioner, focusing in particular on children and adults with chronic and unsolved health problems.
3. Since 2001 I limited my practice to children with special needs. In these 17 years I have evaluated and treated over 3000 children and adults with autism. Since then I have been an annual participant in the invitation only international think tank on autism sponsored by Autism Research Institute, have contributed chapters in two

books on treating autism, have been trained neurologists and pediatricians in autism care in Italy, Hungary and Poland. I have been a regular lecturer in national autism conferences, and have collaborated with multiple researchers, and contributed to a number of studies on medical issues in autism.

4. I began evaluation and treatment of J. L. in 2012.

5. As is common in children with autism, J.L. had feeding and digestive problems, contributing directly to impaired weight gain. Nevertheless, in the six months of following him closely, he gained one inch of height, which is normal, and reflective of adequate protein intake and uptake.

6. In 2013, I was called by Darren Migita MD to discuss J.L.'s case. I learned in that call of less than five minutes that it was prompted by an Order from the Dependency Court in King County. In that call Dr. Migita did not ask me a single question about my medical findings or treatment of J.L.. Rather, he simply told me a little about how they were treating him. It was not a collaborative or collegeate call. Dr. Migita did not ask me to share lab findings or my records with his team.

7. On review, I believe that Darren Migita failed to meet the standard of care, which requires a physician to adequately review the full medical history and findings, and to consult with treating physicians. The single call he made to me was not a consulting or information seeking call on his part.

8. During the brief conversation, I did in that call advise Darren Migita, M.D. that I felt J.L.'s health issues were medical, not psychological, that I knew the parents well, and that I had no reason to suspect them of abuse or neglect of J. L.

9. The child abuse case based promoted by Dr. Darren Migita was not based on a review on J.L.'s entire medical history.

10. Two other involved doctors, Ian Kodish, M.D. and James Metz did not contact me for investigating J.L.'s medical history, either.

11. This negligence caused severe emotional trauma to J.L. and his brother, L.L. and to their parents, whose marriage understandably broke. Further, the unwarranted criminal action against J.L.'s mother, which was based on inadequate review of J. L.'s full records and incorrect conclusions further caused significant harm to these boys and their family.

I declare under penalty of perjury pursuant to the laws of the State of Washington and under United States of America that the foregoing is true and correct.

Signed this 28th day of November in Spokane, Washington.

John A Green III MD

516 High Street
Oregon City, OR 97045
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Fax: 503-722-4450

APPENDIX T

THE HONORABLE KEN SCHUBERT

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

SUSAN CHEN, et al.,

Plaintiffs,

vs.

DARREN MIGITA, et al.

Defendants

CASE NO. 16-2-26013-6 SEA

DECLARATION OF TWYLA CARTER

I, Twyla Carter, declare as follows:

1. I am over 18 years of age, have personal knowledge of the matters set forth herein, and am competent to testify as to these matters.
2. I am a senior staff attorney at the ACLU National Office. I work in the Criminal Law Reform Project at the Trone Center for Justice and Equality. I have been working at the ACLU since September 5, 2017.
3. Prior to working at the ACLU, I was a public defender for ten years at the King County Department of Public Defense. Most recently, I was the Misdemeanor Practice Director and oversaw all misdemeanor casework across the four divisions of the Department. Previously, I was a staff attorney with The Defender Association ("TDA") and handled felony and misdemeanor trial caseloads, represented juveniles, and appealed misdemeanor

criminal convictions

4. In March 2014, I was handling a felony trial caseload as a public defender. On or about March 26, 2014, I was present in court during a status hearing for Ms. Chen's case and heard Judge James Rogers state on the record that he was going to sign a pro se order. I offered to represent Ms. Chen as a "friend of the court" and represented her at the hearing in that capacity. On March 28, 2014, I was assigned to represent Ms. Chen as her public defender on a felony charge of Criminal Mistreatment of a Child in the second degree, relating to her child J.L. Ms. Chen always maintained her innocence of any wrongdoing toward J.L.

5. Pursuant to investigation in the criminal matter, I read all documents received in discovery and pursuant to subpoena requests and I conducted interviews of the state's witnesses and witnesses for Ms. Chen. It was readily apparent that the medical providers with the most experience with Ms. Chen and J.L. and the most knowledge about J.L.'s health and well-being, who were all mandatory reporters, all strongly supported Ms. Chen and denied that Ms. Chen was responsible for J.L.'s condition. It was also readily apparent that the providers (Dr. Kate Halamay and three defendant physicians from Seattle Children's Hospital) connected to the original CPS report and J.L.'s removal had little to no experience with J.L. or knowledge of his situation, and rushed to inaccurate judgments based on inaccurate assumptions.

6. On July 21, 2014, the assigned investigator, Sara Seager, and I conducted an interview of Dr. Kate Halamay, which was recorded by audio means. During this interview, I learned that Dr. Halamay saw J.L. a total of three times before making this CPS referral and that

she did not attempt to contact Dr. Green though was fully aware that J.L. saw Dr. Green.

7. The information I received from Dr. Halamay was inconsistent with the information she provided in her CPS referral. For example, Dr. Halamay told CPS that J.L.'s lab results had worsened, but J.L.'s results had actually improved between August and October Contrary to her allegation that MS. Chen did not follow all referrals; she could only provide one example for this allegation. Ms. Chen informed me that this appointment was actually scheduled in November, but J.L was removed in October. When I asked Dr. Halamay why no other Children's physician called CPS, in two years of seeing J.L.'s fluctuating levels and distended tummy which was the exact same symptoms for two years when she had only seen J.L. three times, she was unable to answer this question.

8. On July 29, 2014, I met with King County prosecutors, Benjamin Gauen and his supervisor, Corinn Bohn, to discuss Ms. Chen's case and to request a dismissal of the criminal charge because Ms. Chen was innocent.

9. At the meeting, I highlighted some facts contradicting the criminal allegation:

   a. Contrary to the allegation that Ms. Chen had refused to take J.L. to the emergency room, J.L.'s parents had taken him to the ER at Seattle Children's Hospital ("SCH") on the afternoon of October 20, 2013. J.L. was seen by Dr. Russell Migita and discharged the same night. Ms. Chen was told to follow up with other providers over the next few days, which she did.

   b. Contrary to the allegations that J.L. lacked continuity of care, Ms. Chen had been diligently following the advice of licensed medical providers and consistently taking J.L. to his primary providers—including Dr. John Green, Dr. Hatha

Gbedawo, and certified pediatric occupational therapist Brooke Greiner—to treat his medical and developmental issues following and related to his diagnosis of autism.

c. It was well documented that J.L. had autism and suffered from chronic gastrointestinal issues typical of children with autism, and that Ms. Chen had been working with J.L.'s primary medical providers in an attempt to address these issues. At the referral of J.L.'s primary providers, Ms. Chen took J.L. to a number of specialists in an attempt to understand and address his serious medical symptoms which were affecting his ability to gain weight.

d. J.L. has a well-documented history of nutritional and weight difficulties as a result of his health conditions. The drop in J.L.'s weight between August and October 2013 was typical of the type of weight fluctuations that he had been experiencing throughout the year prior to his removal. Despite him gaining some weight in the days immediately following his admission to SCH on October 24, 2013, J.L. then immediately lost much of the weight he had gained before he was even discharged from the hospital. He continued to lose weight in the weeks after discharge under the custody of the State, to the point where he weighed about the same as when he was removed.

e. I listened to the audio recording of the 72-hour dependency hearing held from October 28, 2013 to October 30, 2013. Dr. Darren Migita misrepresented J.L.'s condition to the Court including misstating his Creatinine level (number for kidney function) by citing an outdated number.

f. The dependency court relied upon Dr. Darren Migita's testimony that J.L. was diagnosed as malnourished and Dr. Migita's misrepresentation about J.L.'s ability to consume and absorb food. SCH discharge notes on November 7, 2013 proved that Dr. Migita's testimony was wrong. J.L. weighed 29 pounds on October 24, 2013 (date of removal) and only 30.2 pounds on November 7, 2013 (discharge date).

g. The dependency court stated in its ruling, that J.L. has autism, but Darren Migita lacked knowledge of J.L.'s medical history of his autism diagnosis. The Court ordered Darren Migita to obtain a copy of J.L.'s autism report within 24 hours. Additionally, the court noted it was "very concerned about the attending physician at SCH not talk to the parents. Frankly I found that outrageous."

10. The Attorney General's Office ("AGO") dismissed the dependency matter on September 12, 2014. The King County Prosecuting Attorney's Office ("KCPAO") dismissed Ms. Chen's criminal case on September 19, 2014.

11. The way Ms. Chen and her family were treated was tragic and wrong. I saw first-hand the family's terrible anguish and the emotional toll this travesty of justice took on them. This was an immigrant family, with language barriers and cultural differences, struggling to do the best they could for their severely autistic child and his extremely complex medical needs. They were completely invested in J.L.'s health and well-being. To have their son taken from them based on inaccurate information, and then for Ms. Chen to be singled out and falsely charged for mistreatment, was completely unjust and terribly sad. Of all the countless matters I handled in my ten years as a public defender in King County, I can

honestly say that Ms. Chen's case is the one case that still keeps me up at night to this day. This heartbreaking situation never should have happened.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 23rd day of December, 2018.

Twyla Carter
WSBA No. 39405

SUSAN CHEN - FILING PRO SE

April 22, 2019 - 4:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97015-7
Appellate Court Case Title:	Susan Chen & Naixiang Lian v. Darren Migita MD, et al.
Superior Court Case Number:	16-2-26013-6

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- 970157_Exhibit_20190422154756SC715094_6305.pdf
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Comments:

This amendment was submitted pursuant to Deputy Clerk ruling dated on March 29 to incorporate arguments from motion for discretionary review. However, Petitioner still believed it is more appropriate to file motion for discretionary review therefore her motion to modify ruling seeking permission to file motion for discretionary review was before this Court.

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