

NO. 98368-2

SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN CHEN as parents and natural guardians of JASON LIAN, a minor, and LEO LIAN, a minor, and NAIXIANG LIAN, as parents and natural guardians of JASON LIAN, a minor, and LEO LIAN, a minor,

Petitioners,

v.

KATE HALAMAY, M.D., and ALLEGRO PEDIATRICS (previously known as Pediatric Associates),

Respondents.

RESPONDENTS' ANSWER TO PETITIONERS' MOTION FOR PERMISSION FOR LICENSED LAWYER, MR. JAMES DAUGHERTY TO FILE BRIEFS ON BEHALF OF MINOR, J.L.

1. Identity of Answering Party.

Repondents ask for the relief requested in Part 2.

2. Relief Requested.

Denial of Petitioners' "Motion for Permission for licensed lawyer, Mr. James Daugherty to file briefs on behalf of minor, J.L.".

3. Facts Relevant to Respondents' Answer.

Pro se litigants Susan Chen and Naixiang Lian, as parents and guardians of J.L. and L.L., (collectively Chen)¹ brought this medical malpractice lawsuit against Dr. Kate Halamay and Allegro Pediatrics, based on Dr. Halamay's legally mandated reporting of Ms. Chen to CPS for suspected child abuse of J.L. CP 24-25, 79-80, 162. After the trial court dismissed Chen's claims on summary judgment, CP 279-80, and denied Chen's motion for reconsideration, CP 308-09, Chen appealed. CP 310-18.

Ms. Chen and Mr. Lian then filed a *pro se* CR 60 motion to vacate the trial court's orders granting summary judgment and denying reconsideration. CP 632-72, 970-77. After the trial court denied the motion to vacate, CP 1532-34, Chen then moved to set aside the judgment or, in the alternative, to reconsider the denial of the motion to vacate. CP 1542-48. The trial court denied that motion, too, CP 1578, and Chen appealed those orders. CP 1580-87.

After Chen filed the second appeal – from the trial court's denial of the motions to vacate and to set aside the judgment – the Court of Appeals, Division I, consolidated Chen's two appeals. Then, in an unpublished

¹ Respondents use the same collective reference "Chen" that the Court of Appeals used, except where the context warrants distinctions among the Petitioners. No disrespect is intended.

opinion entered on February 10, 2020, the Court of Appeals affirmed the trial court's orders. Chen filed a motion for reconsideration on February 28, 2020, which the Court of Appeals denied on March 23, 2020.

Meanwhile, on March 3, 2020, after the Court of Appeals had issued its unpublished opinion and the deadline for seeking reconsideration had passed, Attorney Daugherty moved for permission to appear before the Court of Appeals to represent J.L. *See* App. B.² In his Certificate of Attorney, Mr. Daugherty stated that he had been retained by J.L.'s father, Mr. Lian, to represent J.L. *pro bono*, and that his representation of J.L. would be "independent of the Parent's wishes." App. C. at ¶¶8, 9. Mr. Daugherty candidly admitted that, after meeting twice with J.L., he did "not believe that [he] will be able to establish a normal attorney-client relationship" with him, or even be able to communicate with him. App. C. at ¶6. Nonetheless, with no direction available from his purported client, J.L., and independent of the wishes of J.L.'s legal guardians, Mr. Daugherty proposed to "represent [J.L.'s] legal interests." App. C. at ¶7. The only step Mr. Daugherty identified he might take if allowed to appear was possibly to file a motion for the appointment of a guardian ad litem. App. C. at ¶7. In a one-sentence order entered on April 14, 2020, the Court of

² Citations to "App." are citations to the appendices to Respondents' August 31, 2020 "Answer to Motions for Discretionary Review"

Appeals denied Mr. Daugherty's motion for permission to appear in that court. App. A.

Both Chen and Mr. Daugherty requested and received separate extensions of time to seek discretionary review of the Court of Appeals' interlocutory order denying Mr. Daugherty's motion to permit him to appear to represent J.L. Respondents did not object to those requested extensions. On June 30, 2020, Chen filed a *pro se* Motion for Discretionary Review. And on July 30, 2020, Mr. Daugherty filed a "Petition for Discretionary Review." Respondents timely filed an answer to those motions without any request for extension.

Meanwhile Chen also requested and received two extensions of time – first to May 22, 2020, and then to June 30, 2020 – to file a petition for review of the Court of Appeals' decision on the merits of the case and denial of reconsideration. Respondents did not object to those requested extensions. Chen, on June 30, 2020, filed a Petition for Review of the Court of Appeals' decision. Respondents timely answered without any request for extension.

Thereafter, Chen requested an extension of time to file a reply in support of the Petition for Review, which this Court denied on August 17, 2020, on the basis that, under RAP 13.4(d), because Respondents had raised no new issues in their answer to the petition, "no reply may be filed." Chen

nonetheless filed a reply on August 24, 2020, which is subject to a Clerk's motion to strike to be considered together with Chen's pending Petition for Review by a Department of this Court on November 3, 2020.

At no point during this process did Mr. Daugherty attempt, seek permission, or indicate any desire, to file on behalf of J.L. a separate Petition for Review of the Court of Appeals' decision on the merits, or any separate briefing in support of the Petition for Review that Chen filed. Indeed, it was not until September 24, 2020, when he filed his "Reply to Answer of Respondents" in connection with his "Petition for Discretionary Review" of the Court of Appeals' denial of his motion for permission to appear in that court, that Mr. Daugherty gave any indication that he might wish to do so, when he asserted in that reply that "an attorney for J.L. could file a Petition for Discretionary Relief to the Washington Supreme Court regarding the dismissal of the underlying causes of action" notwithstanding that the deadline for doing so had long since passed. *See* Daugherty's "Reply to Answer of Respondents" at p. 5.

Oral argument on Chen's and Daugherty's motions for discretionary review of the Court of Appeals' denial of Mr. Daugherty's belated motion for permission to appear in that court was had on October 1, 2020. Then, on October 2, 2020, Chen filed the current motion for permission for Mr. Daugherty to file supplemental briefs on behalf of J.L. in support of the

Petition for Review, together with Mr. Daugherty's "Certificate of Attorney" in support of the motion, in which he asks not only to file a responsive brief to the Petition for Review, but also for an additional four weeks to do so. Neither Chen's motion nor the accompanying "Certificate of Attorney" contains any explanation for Mr. Daugherty's failure to timely seek to file any such brief or any indication as to what more he believes he could bring to bear on the Petition that Chen has not already proffered.

On October 5, 2020, the Commissioner determined that the motions for discretionary review should be referred to a Department of this Court for consideration on its November 3, 2020 motion calendar. Chen's current motion for permission for Mr. Daugherty to file supplemental briefs on behalf of J.L. in support of the Petition for Review Chen filed is also set for consideration by a Department of this Court on the November 3, 2020 motion calendar, at the same time as the Court considers the pending Petition for Review and Clerk's motion to strike reply.

4. Grounds for Relief and Argument.

RAP 7.3 empowers this Court "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." But there is nothing fair or orderly about postponing the Court's consideration of Chen's Petition for Review to grant Chen's and Mr. Daugherty's dilatory request

to allow Mr. Daugherty to submit additional and untimely briefing in support of the pending Petition for Review.

A Petition for Review must be filed within 30 days of the decision to be reviewed. RAP 13.4. Thus, the Petition for Review was originally due to be filed no later than 30 days after the Court of Appeals denied Chen's motion for reconsideration on March 23, 2020. Chen, however, requested and received two extensions of that time, without objection from Respondents, and ultimately filed the Petition for Review on June 30, 2020. In all that time, Mr. Daugherty, on behalf of J.L., never sought to file, or asked for additional time to file, either his own Petition for Review, or any briefing in connection with the Petition for Review that Chen filed. Yet he purports to have been representing J.L. *pro bono* since at least March 3, 2020, when he filed his motion to appear on behalf of J.L. in the Court of Appeals. And he filed a separate "Petition for Discretionary Review" on behalf of J.L., seeking review of the denial of his motion for permission to appear in the Court of Appeals.

The present motion for permission for Mr. Daugherty to belatedly file supplemental briefing on behalf of J.L. in connection with the Petition for Review is not even made by Attorney Daugherty. The motion is brought by Chen on behalf of J.L., with an attached "Certificate of Attorney" from Mr. Daugherty. Neither the motion nor the "Certificate of Attorney" provide

any explanation for the untimely nature of the request, or any indication of what more Mr. Daugherty would bring to bear on the Petition.

The request to delay consideration of the pending Petition to allow Mr. Daugherty to submit untimely additional briefing should be denied. Chen did not raise any argument about “unauthorized practice of law” that she now makes until after the Court of Appeals affirmed the trial court’s decisions. Only in Chen’s motion for reconsideration of that decision did Chen first argue that, notwithstanding RCW 4.08.050, parents’ *pro se* appearance and pursuit of claims as legal guardians of their minor children somehow constitutes the unauthorized practice of law. It was only after the Court of Appeals had rendered its decision affirming the trial court and the time for filing any motion for reconsideration had passed that Mr. Daugherty first sought permission to appear in the Court of Appeals on behalf of J.L. And, by the time the Court of Appeals denied that request, Chen’s motion for reconsideration had already been denied. Moreover, in this Court, even though Chen and Mr. Daugherty submitted two separate Motions for Discretionary Review of the Court of Appeals’ ruling denying his request to appear in that court, they waited until after completion of briefing and oral argument on those motions for Chen to submit the pending motion for permission for Mr. Daugherty to submit supplemental briefing on behalf of J.L.

“At some point all litigation must end.” *De Perez Jimenez v. United States Dist. Court*, 84 S. Ct. 14, 11 L.Ed.2d 30 (1963). After Chen requested and received two extensions of time to file the Petition for Review, Chen filed the Petition for Review. Respondents have answered the Petition for Review. And Chen has filed a reply in support of the Petition for Review that is the subject of a motion to strike slated to be heard together with the Petition for Review on November 3, 2020. In addition, Chen and Mr. Daugherty have already filed separate motions for discretionary review of the Court of Appeals’ ruling denying Mr. Daugherty’s untimely motion to appear in that court, which have been fully briefed and referred by the Court Commissioner for consideration by a Department of the Court also on November 3, 2020. This matter is ready for the Court’s consideration and should not be delayed further based on an untimely request to permit Mr. Daugherty to submit additional briefing. The fair and orderly procedure would be for the Court to deny Chen’s current motion for permission for Mr. Daugherty to submit supplemental briefs on the Petition for Review and consider the Petition for Review on Nov. 3, 2020, as scheduled.

For all these reasons, Chen’s motion for permission for Mr. Daugherty file supplemental briefing on behalf of J.L. in connection with the pending Petition for Review should be denied.

DATED this 12th day of October, 2020.

FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN SPILLANE, PLLC

s/Jeremiah R. Newhall

Jeremiah R. Newhall, WSBA #54959

Attorneys for Respondents

701 Fifth Avenue, Suite 4750

Seattle, WA 98104

Ph: 206.749.0094

Fx: 206.749.0194

Email: jeremiah@favros.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 12th day of October, 2020, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Petitioners' Motion for Permission for Licensed Lawyer, Mr. James Daugherty to File Briefs on Behalf of Minor, J.L.," to be delivered in the manner indicated below to the following:

Pro Se Plaintiffs/Petitioners:

Susan Chen
Naixiang Lian
P.O. Box 134
Redmond, WA 98073
Email: tannannan@gmail.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

James Daugherty, WSBA#33332
ATTORNEY AT LAW
505 Broadway East, #209
Seattle, WA 98102
Ph: 206.484.3626
Email: daughertylaw@protonmail.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Dated this 12th day of October, 2020, at Seattle,
Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant
Email: carrie@favros.com

FAVROS LAW

October 12, 2020 - 2:10 PM

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