No. 97015-7

SUPREME COURT

OF THE 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

REPLY ON PETITION FOR REVIEW

Susan Chen, *Pro Se* appellant

PO BOX 134, Redmond, WA 98073

Telephone: (323)902-7038

ORAL ARGUMENT REQUESTED

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CONSTITUTION AND COURT RULES

A. INTRODUCTION

Petitioner Susan Chen asks this Court to review whether a litigant bound to the judgment is entitled to a clear and unambiguous order, and whether the Court of Appeals has above-rule-and statute authority to dismiss an appeal without meeting due process requirements. Rather than address the issues at hand, Respondents Darren Migita, James Metz and Ian Kodish (collectively "SCH physicians") (joined by Seattle Children's Hospital, thereafter "SCH") falsely accused Ms. Chen of seeking multiple extensions by utilizing selective and false information (that had been clarified to all parties), *previously* before Division One, now again before this Court. Answer at 4-7.

SCH physicians further asserted that "[t]he Court of Appeals did not deprive petitioners of access to the courts" because petitioners had "notice, a reasonable right of access to the courts, or a meaningful opportunity to be heard". answer at 19-20. Ms. Chen wants to bring to the attention of this Court that the "petitioners" in this petition *also* include two minor petitioners, J.L. and L.L., whose right of access to the courts (unrepresented by Guardian ad litem) had apparently been violated because they never received "notice, a reasonable right of access to the courts, or a meaningful opportunity to be heard" because of absence of guardian ad litem. See, ***Anderson v. Dussault***, 180 Wn. 2d 1001, 321 P.3d 1206 (2014) (this Court holding that due to the absence of guardian ad litem, minor plaintiff's claims are not statutorily time barred while a minor plaintiff without a guardian ad litem who could receive notice of the pleadings.).

SCH physicians' another assertion that Petitioners (*medical malpractice plaintiffs*) have no constitutional rights to civil actions (Answer 20) was contrary to this Court's holdings in ***Hunter v. N. Mason High Sch.,*** 85 Wn.2d 810, 814, 539 P.2d 845 (1975) ("right to be indemnified for personal juries is a substantial property right,...in many cases fundamental to the injured

persons' physical well-being and ability to continue to live a decent life"); also, ***Putman v. Wenatchee Valley Med. Ctr.,*** 166 Wn.2d 974, 982, 216 P.3d 374 (2009) ("Medical malpractice claims are fundamentally negligence claims, rooted in the common law tradition."

Because Respondents' answer raises additional issues, this reply is warranted. RAP 13.4(d).

B. STATEMENT OF THE CASE

RAP 10.3 (5) requires "a fair statement of the facts and procedure relevant to the issues presented for review". SCH physicians' reference to the record is hardly a fair recitation of the facts and omits *numerous* key points. To create an impression that *pro se* litigants have been repeatedly asking for continuances, Respondents submitted selective information to Division One panel (that led to a wrongful dismissal order), and now this Court. The SCH physicians' accusations are not supported by records, for example:

- Contrary to Respondents' misrepresentation, answer at 6-7, Petitioner only asked one continuance, *not* four. Due to her language barriers and confusion with legal system, several redundant and unnecessary requests were made, and several letters/rulings were mistakenly issued but later was clarified to all parties by the Division One Case Manager. To put it simple, Chen's the *very first* request for continuance was granted that the designation of clerks' papers was due 30 days after this Court' decision, *i.e.,* August 10, 2018 (APP. 1). Chen's designation of clerks' papers was filed on August 10, 2018.
- Petitioner (falsely) accused Petitioner "failed to file their opening brief by August 10", answer at 7. but as advised by the case manager, Ms. Dahlem in her email to parties dated on August 2, 2018, Petitioner's opening brief should be due on September 24, 2018 pursuant to RAP 10.2 (a). See, App. 2-4.

SCH physicians were silent, for example, on the following:

- The Dependency Court found it "outrageous" that Darren Migita's below-the-standard of care and had to order him to talk with Dr. Green. See, CP 194, also Green Decl. & Carter Decl. (App. S-T of Petition).
- Attorney General's Office found Respondent James Metz's report was "contrary to" the child's medical records. CP 56
- Respondent Darren Migita utilized Dr. Russell Migita's treatment record to obtain a summary judgment in his favor. CP 72-77
- The summary judgment was entered in favor of the physicians prior to *any* discovery process in the context of a medical malpractice claim. CP 121 (discovery cutoff is 9/5/2017), CP 404 (the dismissal was entered on 3/3/2017). Note: in this case, zero discovery had been conducted.)
- The summary judgment was entered in favor of the physicians absent of appointment of guardian ad litem. CP 295 ("there was no appointment of guardian ad litem to prosecute the minors' claim" and "due to failure to appoint a GAL to bring the action, the action on behalf of the minors was nullity, and there was no action on behalf of the minors for judicial consideration, and therefore no action to dismiss."). also, CP 368-9.

SCH Physicians asserted that Division One did not violate Petitioners' constitutional rights. However, they were again silent in the followings:

- In Chen's motion for reconsideration dismissing appeal, Division One was fully informed that Chen and minor plaintiffs were denied any discovery before a dismissal order was entered. APP. 22-23.

- In Chen's motion for reconsideration dismissing appeal, Division One was fully informed that minor plaintiffs were not represented by guardian ad litem. APP. 21.
- In Chen's Declaration submitted in support of Chen's motion for reconsideration, Chen explicitly articulated, "[two minors] are innocent, and have [no] relation with this delayed submission. They should not be punished for dismissing appeal." APP. 20&31.

C. ARGUMENT

1. As held by this Court in *Wallace*, the Court of Appeals does not have above-the-RAP authority to dismiss an appeal.

SCH physicians *implicitly* suggested that Court of Appeals has unrestricted authority to dismiss an appeal by *severely* misinterpreting authorities. answer at 10-11. SCH physicians' argument is flawed for several reasons.

First, Respondents' novel argument was not even supported by their *own* cited authority, *i.e*, ***Wallace v. Evans***, 131 Wn.2d 572, 577, 934 P.2d 662 (1997). In ***Wallace***, this Court explicitly rejected the "inherent authority" argument and clearly announced that, "[a] court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, *but only when* no court rule or statute governs the circumstances presented." Here, in recognition that "appeal is a matter of right", RAP 6.1, RAP does impose limitations and conditions for dismissing appeal. RAP 18.9 (b) requires "10 days' notice" and RAP 18.9 (c) requires a showing of "abandoned", "moot" or "frivolous". "Where the meaning of the statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent." ***State v. Alvarado,*** 164 Wash.2d 556, 562, 192 P.3d 345 (2008). ***Ockerman v. King County***, 102 Wn. App. 212 6 P.3d 1214 (2000) (Clear and unambiguous statutory language does not require judicial

construction and is interpreted according to its plain and ordinary meaning; it is presumed that the Legislature means exactly what it says.). Here, RAP 6.1, and RAP 18.9 (b) & (c) are clear, therefore no construction is permitted.

Second, the instant case is distinguished from ***State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.***, 87 Wn.2d 298, 310, 553 P.2d 423 (1976). In ***Ralph***, the Appellants have "willfully refused", and "have made no attempt to explain their failure". But here, Chen had been acting in good faith, asking for clarification, had *indeed* prepared the 45-pages' brief.

Third, the Constitution creates the foundation and framework of the legal system, no courts enjoy any above-the-Constitution authorities, nor can a court deprive a person's constitution rights. A person's constitutional rights can be waived, or abandoned, but can *never* be deprived. Here, the language of "abandoned" in RAP 18.9 (c) explicitly reveals drafters' highest deference to the Constitution. Ms. Chen (and minor petitioners who were unrepresented by guardian ad litem) did not abandon her appeal, nor could SCH Physicians proved such showing.

2. The plain languages of RAP 6.1, 7.3 and 18.9 are unambiguous and clear, no construction is needed.

In order to support their novel proposition that Court of Appeals enjoys unrestricted authority to dismiss an appeal, SCH Physicians attempted to construe RAP 7.3 and RAP 18.9 (a), (b), (c) (Answer 11-12 & 18-19) and RAP 7.3 (Answer, 11).

"In reading statutes, our duty is to ascertain and carry out the intent and purpose of the legislature. If the meaning of a statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent…If the language of the statute is plain, the court's inquiry ends." ***State v. Anderson,*** 151 Wn. App. 396, 212 P.3d 591 (2009); also, ***State v. Alvarado***, 164 Wash.2d 556, 562, 192 P.3d 345 (2008).

Here, the languages RAP 18.9 (a), (b), (c) are plain on its face: none of the above rules permits dismissing an appeal absent of showing "abandoned", lacking "10 days' notice" or "on motions". SCH Physicians' attempts to construction RAP 18.9 (a), (b), (c) are at variance with controlling precedents. The plain language of RAP 7.3 is also clear, no construction is permitted and SCH Physicians cite no authority to support a construction is required and necessary.

Court rules are required to be examined "in context with the entire rule in which it is contained as well as all related rules". ***State v. Robinson,*** 153 Wn.2d 689, 693, 107 P.3d 90 (2005). RAP 7.3 does not address dismissal. SCH Physicians seems to suggest the RAP 7.3 affords Court of Appeals unrestricted authority to dismiss an appeal. This novel proposition cannot stand when placing RAP 7.3 in context with entire rule because "appeal is a matter of right." And this right cannot be deprived absent of certain prerequisites.

3. Two minor petitioners' constitutional rights were *completely* ignored by the Court of Appeals

SCH Physicians cite a single case, ***City of Bremerton v. Spears***, 134 Wn.2d 141, 148, 949 P.2d 347 (1998), in support of their assertion that "this is a civil case in which petitioners seek monetary damages. No comparable constitutional right to appeal in civil cases exists." Answer at 20. SCH Physicians' argument is flawed for several reasons.

First, ***Spears*** is distinguishable from the current case. The ***Spears*** Court determines that Court of Appeals have no jurisdiction to review a civil traffic infraction when the amount in controversy is less than $200. But the current case is a medical malpractice case seeking redress to enforce personal rights. This Court further pointed out that "[m]edical malpractice claims are fundamentally negligence claims, rooted in the common law tradition."). ***Putman v. Wenatchee Valley Med. Ctr.***, 166 Wn.2d 974, 982, 216 P.3d 374 (2009).

Second, over one century ago, this Court had explicitly announced that fundamental rights of state citizenship include "the rights to the usual remedies to collect debts and to enforce other personal rights." ***State v. Vance,*** 29 Wash. 435, 458, 70 P.34 (1902). In 2014, this Court reiterates that "the privileges and immunities contemplated in article 1, section 12 include the right to pursue common law causes of action in court." ***Schroeder v. Weighall,*** 179 Wn.2d 566, 316 P.3d 482 (2014).

Furthermore, "[a] person incompetent or disabled to the extent that he or she is unable to understand the nature of the proceedings is not similarly situated to those adults who are competent to assert their rights and assist in a malpractice action." ***DeYoung v. Providence Medical Center***, 136 Wn.2d 136, 141, 960 P.2d 919 (1998). Here, the instant medical malpractice claim involves two minors, J.L. and L.L. whose rights cannot be ignored or disregarded by this Court. By claiming that "[p]etitioners exercised their right of access to the courts and their opportunity to be heard on multiple occasions" (at Answer 20), SCH physicians were *intentionally* silent about minor petitioners'. [1]

While Court of Appeals violates Ms. Chen's right of access to the courts is still in dispute, even this argument is accepted, it *only* applies to Ms. Chen, the adult petitioner, but *never* the minors who were not represented by a guardian ad litem. See, ***Anderson v. Dussault***, 180 Wn. 2d 1001, 321 P.3d 1206 (2014) (this Court holding that the six-year-old minor, Rachel's claim was not barred due to the absence of guardian ad litem who could receive a notice of the proceedings.). As *conceded* by SCH physicians, "Due Process requires notice, a reasonable right of access to the courts, or a meaningful opportunity to be heard." (emphasis added). Answer at 19. Here,

[1] At the very first hearing at trial court, SCH Physicians explicitly articulated that minors cannot be involved in litigation without guardian ad litem because "[minors] are considered incompetent as a matter of law". CP 369.

neither J.L. nor L.L. were represented by guardian ad litem, therefore, they did not receive any notice, a threshold requirement for due process. In ***Anderson***, the six-year-old minor, Rachel was represented by SCH Physicians' *present* counsel, objected to the opposing argument that Rachel's claims were judicially estopped. Therefore, they argued,

> "Rachel cannot be denied her day in court through no "fault" of her own but her age. See Schroeder v. Weighall, 316 P.3d 482, 489 (Wash. 2014) (statute that eliminated tolling of minors' medical malpractice claims was unconstitutional because it "place[d] a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf.... It goes without saying that these groups of children are not accountable for their status.")."

The State privileges and immunities clause, article I, section 12 of the Washington State Constitution provides that, "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." While SCH Physicians' *present* counsel believed that six-year-old Rachel's court day should not be denied absent of a guardian ad litem, why in this instant case, the then six-year-old J.L.'s court day should be denied by the trial court, further denied by the Court of Appeals? When Rachel has no "fault" but her age (as asserted by SCH Physicians' *present* counsel), *why* J.L. should be penalized for his mother's sincere mistake? In her motion for reconsideration on dismissing appeal, Ms. Chen wrote, "This is an innocent mistake made by Chen, not two minors, J.L. and L.L. who should not be punished for being dismissing appeal". Division One did not address Chen's inquiry and concerns about minors' constitutional rights in court. This issue is now before this Court.

Due Process requires adequate notice be given to the interested parties "of the pendency of the action and afford them an opportunity to present their objections." ***Mullane v. Central Hanover Bank & Trust Co.,*** 339 U.S. 306, 313, 70 S.Ct. 652 (1950). Also, ***State v. Douty,*** 92

Wn. 2d 930 603 P.2d 373 (1979) (this Court holding that "it should be noted that the child, though named in the action, was never served. Consequently, he is not before the court."). SCH Physicians cite *no* authority for their novel argument that a minor medical malpractice plaintiff, unrepresented by guardian ad litem, has satisfied the threshold requirement, *i.e.*, notice.

Taken together, petitioners (particularly minor petitioners) *do* have constitutional rights in the context of medical malpractice claims. Here, SCH Physicians argued that petitioners have "no comparable constitutional right to appeal [in medical malpractice claim]" Answer at 20. Were we to embrace SCH Physicians' position, "privilege" or "immunity" would be granted to SCH Physicians, *i.e.*, medical malpractice defendants but burdened "a particularly vulnerable population not accountable for their status" and "a fundamental right", which is clearly unconstitutional, as held by this Court in ***Schroeder v. Weighall***. In any event, SCH Physicians cite no authorities to support the novel proposition that medical malpractice plaintiffs have no constitutional rights to appeal. Rather, the fundamental provision in RAPs is "appeal is a matter of right" see, RAP 6.1. This right can only be "abandoned" but cannot be deprived without due process protection.

D. CONCLUSION

This Court should grant review of Division One's decision dismissing appeal on the issues of:

i) whether Court of Appeals has authority in dismissing appeals without affording petitioner an opportunity of genuine adverseness;

ii) Whether Court of Appeals violates minor petitioners' due process rights when they were unrepresented by guardian ad litem who can receive "notice"; and

iii) Whether litigants are entitled to a clear judgment when they were bound to that judgment.

Given the above issues raised involved substantial public interests, and fundamental access to the courts, this Court should accept for review, and exercises its revisory jurisdiction.

DATED this 3rd of September 2019

Respectfully submitted,

/s/ Susan Chen

Susan Chen, *pro se* petitioner
PO BOX 134, Redmond, WA 98073
Tel: (323) 902-7038
tannannan@gmail.com

CERTIFICATE OF SERVICE

I, Susan Chen, declare that on the 4th day of September 2019. I did send a true and correct copy of Reply on 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
Michelle S. Taft Johnson Graffe Keay Moniz &Wick LLP 925 4th Ave Ste 2300 michelle@jgkmw.com	[ ] Hand Delivery [ ] U.S. Mail, postage prepaid [ ] Overnight Mail [ ] Facsimile [X] Via ECF/Electronic Mail
Valerie A Villacin Howard M. Goodfriend 1619 8th Avenue North Seattle, WA 98109-3007 206-624-0974 howard@washingtonappeals.com valerie@washingtonappeals.com	[ ] Hand Delivery [ ] U.S. Mail, postage prepaid [ ] Overnight Mail [ ] Facsimile [X] Via ECF/Electronic Mail

DATED this 4th of September, 2019

/s/ Susan Chen

Susan Chen, *Pro Se* Petitioner

P.O. Box 134, Redmond, WA 98073

Exhibits of Reply on Answer to Petition for Review

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]

Gmail Susan Chen <tannannan@gmail.com>

77522-7-I

Dahlem, Susan <Susan.Dahlem@courts.wa.gov> Wed, Aug 22, 2018 at 4:51 PM
To: Susan Chen <tannannan@gmail.com>
Cc: "bmegard@bbllaw.com" <bmegard@bbllaw.com>, "dnorman@bbllaw.com" <dnorman@bbllaw.com>, "Rando@jgkmw.com" <Rando@jgkmw.com>, "michelle@jgkmw.com" <michelle@jgkmw.com>

Ms. Chen,

Based on the clerk's ruling on 7-6-18, I will strike the court's motion.

Because your statement of arrangements proposes using a transcript previously obtained by the respondents and appears to be part of the clerk's papers (please check to make sure this is accurate) the appellant's brief is due 45 days from the filing of the designation of clerks papers. See RAP 10.2 (a).

According to that rule, the appellant's brief is due September 24, 2018.

I am including all counsel for respondent's on this e-mail.

Susan Dahlem

From: Susan Chen [mailto:tannannan@gmail.com]
Sent: Wednesday, August 22, 2018 4:14 PM
To: Dahlem, Susan <Susan.Dahlem@courts.wa.gov>
Subject: Re: 77522-7-I

In observation of clerk's ruling on July 26, I later filed a motion for clarification on July 5, and on July 6 the clerk ruled and granted the motion to extend deadlines for "statement of arrangement" and "designation of clerks' papers" to 30 days after decision of the supreme court. The clerk's ruling on July 6 is attached in this email for your ease of reference.

Hope this clarify.

Sincerely,

Susan

APP. 2

On Wed, Aug 22, 2018 at 4:04 PM Dahlem, Susan <Susan.Dahlem@courts.wa.gov> wrote:

> Ms. Chen,

No mistake. The overdue letter sent on August 21, 2018 is not a ruling. It's a letter sent for failure to file something.

The clerk entered a ruling on June 25, 2018 that says: **"Extension of time to file the Opening Brief granted to 30 days after a decision by the supreme court on the motion for expenditure of public funds"**

The motion for expenditure of public funds was denied in Supreme Court on July 11, 2018. The appellant's brief was therefore due August 10, 2018.

The brief was not filed on August 10, 2018.

Susan S. Dahlem

Court of Appeals - Division One

Phone 206-464-5387

susan.dahlem@courts.wa.gov

From: Susan Chen [mailto:tannannan@gmail.com]
Sent: Wednesday, August 22, 2018 3:43 PM
To: Dahlem, Susan <Susan.Dahlem@courts.wa.gov>
Subject: 77522-7-I

Dear Susan,

I am very confused for the ruling just entered.

Since the designation of Clerks' papers and statement of arrangement were just filed Aug 10 following Court Clerk's ruling dated on July 6. Why the brief is due so soon, especially that the trial court just filed the index for clerks' papers on Aug 17. I am lost. Is it a mistake?

thanks,

Susan Chen

On Tue, Aug 21, 2018 at 4:38 PM Dahlem, Susan <Susan.Dahlem@courts.wa.gov> wrote:

The attached letter is being transmitted to counsel electronically. No hard copy will follow.

ATTENTION COURT FILERS: The Supreme Court and the Court of Appeals now have a web portal to use for filing documents.

Beginning July 3, 2017, all electronic filing of documents in the Court of Appeals should be through the web portal.
Here is a link to the website where you can register to use the web portal: https://ac.courts.wa.gov/
A help page for the site is at: https://ac.courts.wa.gov/index.cfm?fa=home.showPage&page=portalHelp
Registration FAQs: https://ac.courts.wa.gov/cotent/help/registrationFAQs.pdf
Registration for and use of the web portal is free and allows you to file in any of the divisions of the Court of Appeals as well as the Supreme Court.

The portal will automatically serve other parties who have an e-mail address listed for the case.
In addition, you will receive an automated message confirming that your filing was received.

The attached ruling is being transmitted to counsel electronically. No hard copy will follow.

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Registration FAQs: https://ac.courts.wa.gov/cotent/help/registrationFAQs.pdf
Registration for and use of the web portal is free and allows you to file in any of the divisions of the Court of Appeals as well as the Supreme Court.

The portal will automatically serve other parties who have an e-mail address listed for the case.
In addition, you will receive an automated message confirming that your filing was received.

Susan S. Dahlem

Senior Case Manager

Court of Appeals - Division One

'Direct 206.464.5387 ~ Fax 206.389.2613

*susan.dahlem@courts.wa.gov

P *Think Green! Please do not print this e-mail unless it is necessary.*

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

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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

Susan Chen, *Pro Se* appellant

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APP. 10

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.*

APP. 11

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,

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> "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

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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

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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 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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