No. 98866-8

SUPREME COURT

OF THE STATE OF WASHINGTON

NO.79685-2-I

COURT OF APPEALS, DIVISION I

OF STATE OF WASHINGTON

SUSAN CHEN *et al.*

Petitioners/Respondents/Plaintiffs

v.

DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D.

Respondents/Appellants/Defendants

SEATTLE CHILDREN'S HOSPITAL

Respondents/Respondents/Defendants

PETITION FOR REVIEW

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I. INTRODUCTION, IDENTITY OF PETITIONERS & COURT OFAPPEALS DECISIONS

"The statutory and constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Jurisdiction is such a fundamental and important prerequisite to a court taking action in a case that objections to jurisdiction can be raised *at any time*: before or after a final judgment, CR 12 (h)(3); RAP 2.5(a) (1); CR 60(b)(5).

This case involves children (J.L. and L.L.) who were severely harmed by the medical misdiagnosis made by three Seattle Children's Hospital ("SCH") Physicians. This misdiagnosis resulted in children's removal from their home and mother (Ms. Chen)'s arrest. The children were eventually returned to Ms. Chen and criminal charges were dropped "in the interest of justice". Chen sued SCH and the doctors. The trial court judge who previously presided over dependency did not recuse, but entered an ambiguous order of dismissal that was silent on jurisdictional issues, the basis for the decision, and its impact on the minor children, whose statute of limitations have not expired. App A. ("2017 Order"). In 2019, a subsequent judge vacated the 2017 order based on the lack of jurisdiction, noting that under Washington law, dismissal without prejudice is the most a court may do when it lacks personal jurisdiction. *See*, *State v. Nw. Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947) ("*Magnesite*"). App B ("2019 Order"). On appeal, Division One reversed the 2019 Order and reinstated the 2017 Order without addressing *Magnesite* or the jurisdictional issues.

This case raises the issue of whether minor children can be properly represented by non-attorney parents acting *pro se* on their own behalf. Division One opined that non-attorney parents can represent and litigate act on behalf of a minor child directly conflicts with this Courts' decisions in *State v. Yishmael,* 195 Wn. 2d 155, 456 P.3d 1172 (2020) (non-attorney's practice of

law is a strict liability offense); *Hagan & Van Kamp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981) (striking down RCW 19.62 that authorized nonlawyers to practice of law); *Washington State Bar Association v. Washington Association of Realtors*, 41 Wn. 2d 697, 251 P.2d 619 (1952) (court's concerns on legal work by "unskilled or unqualified" layer persons); *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn* ("The 'pro se' are quite limited and apply only if the layperson is acting solely on *his own behalf*") (emphasis in original). The decision is of great public concerns which should be addressed by this Court. If Division One's decision stands, Washington non-attorney parents will be motivated to represent their minor children without hiring an attorney. *Pro se* litigants are legally prohibited from acting on others' behalf such that minors had never been before the court and should not be bound by the judgment. Whether children who suffer serious, even devastating, injuries through medical malpractice or other malfeasance are bound by *pro se* actions of their parents in court, particularly when, as here, there is no legal counsel or guardian ad litem, no decision on the merits, and the children's statutes of limitation have not run has never been determined by this Court -These matters of first impression have serious implications for the disabled, including children who have been injured by medical malpractice or other malfeasance. The public interest and the manifest errors during these proceedings require this Court's attention.

The core issue is jurisdictional: whether the trial court has authority to render judgment against unrepresented minors whose statutes of limitations have not run, whether a court lacking personal jurisdiction over defendants can rule on the merits; and whether the order was void *ab initio* given the extraordinary facts: *unrepresented* minors, *unsigned* complaints, *unserved* defendants and *mandatorily recused* judge. Division One's reasoning that a court could ignore jurisdiction but just proceed to act on the merits is dangerously flawed – if accepted, Oregon Courts

could act against Washington residents without having to first obtain jurisdiction; or Superior Court could take over this Court's appellate authority as long as it *chooses* to do so.

Whether non-attorney parents could act on behalf of minor children in courts were raised in lower courts but unaddressed. Whether or not the issue has been previously raised is not at issue here because regulation on practice of law lies within this Court's *sole* jurisdiction. "The Washington Supreme Court has inherent and *plenary authority* to regulate the practice of law in Washington" GR 12; APR 1 (a); *State v. Yishmael* (En Banc); *Washington State Bar Ass'n v. State*, 125 Wn.2d 901 (1995) (En Banc); *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*(En Banc); *Graham v. State Bar Ass'n,* 86 Wn.2d 624, 631, 548 P.2d 310 (1976) (En Banc). Sole jurisdiction, public interests, and manifest errors require this Court's determination.

Petitioner Susan Chen ("Chen"), parent of J.L. and L.L (aged 10 and 12) ask this Court to review Division One's Opinion, which is attached as App. C. Division One's July 22, 2020 denial of Motion for Reconsideration is attached as App. D.

II. ISSUES PRESENTED FOR REVIEW

1. Was the trial court's order granting summary judgment in favor of SCH physicians *void ab initio* due to lack of personal jurisdiction based on improper service, unsigned complaints and similar errors, as claimed by the physicians?

2. Does the trial court have authority to *further* rule on the merits when it lacks personal jurisdiction due to improper service and unsigned complaints?

3. Having presided over the juvenile dependency leading to this litigation, was the order entered by the trial court judge who was mandatorily required to recuse by the Code of Judicial Conduct void *ab initio*?

4. Was the trial court's order granting summary judgment in favor of three SCH physicians *void ab initio* as to minors due to lack of legal representation?

5. Should the children be bound to the judgment only because their names were mistakenly listed by their *pro se* parents?

6. Was the trial court excluded from addressing jurisdictional issues in CR 60 motion?

7. Did Division One err in granting *pro se* parents the privilege of practicing law in Washington courts, absent this Court's approval?

8. Does RCW 4.08.050 protect minors' interests, or does it jeopardize these voiceless and vulnerable peoples' rights – should minors be punished when the request to appoint a guardian ad litem was not made or was untimely made by minors' relatives or friends?
9. Does RCW 4.08.050 authorize parents to act on their minor children's behalf, free from consequence of unlawful practice of law?

III. FACTS RELEVANT TO PETITION FOR REVIEW

A. Petitioners were harmed by SCH Physicians' 'outrageous' misconduct, as confirmed by decisions of the offices of the Attorney General and King County prosecutors.

Because the Opinion does not accurate state the record, this Court is respectfully directed to Opening Brief (App. J, at P.9-19)) and Reply Brief (App K, at P. 3-5) as to the basic events. Since Petitioners were nonmoving parties on summary judgment, the facts must be viewed in the light most favorable to them. *Dowler v. Clover Park Sch. Dist. No. 409,* 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Here, the opposite is true: Division One recited facts that are contrary to the record, omitting entirely references to J.L.'s primary physicians, Drs. Green and Gbedawo. Chen's version was further supported by the two dismissal orders (available as public record) and the declarations of professional witnesses: Declaration of John Green, M.D., (CP 829-831) and attorney witness Twyla Carter, WSBA No. 39405 (CP 799-804). *Also,* Declaration of Susan Chen (CP 135-156) (review of J.L.'s 600 pages of medical records that were withheld by Seattle Children's Hospital ("SCH") prior to summary judgment, CP 806-807; CP 158). J.L. was severely harmed by three SCH physicians, Darren Migita, James Metz and Ian Kodish (collectively, "SCH Physicians"). A brief summary of SCH physicians' misconduct may be useful:

- SCH Physicians had not seen J.L. previously and did not attempt to consult with J.L.'s main treating physicians before jumping to an abuse diagnosis that led to a one year out-of-home placement for J.L., and a wrongful criminal prosecution against his mother Chen.

- At the Hearing, Darren Migita misrepresented J.L.'s condition to the Court, for example:
  - Migita falsely claimed that J.L. had kidney failure by citing a wrong lab (CP 802; 817); but the only medication given was a "bisacodyl" (for constipation) CP 942;
  - Migita told the Court that J.L. did not have digestive issues, but the records established that Migita prescribed GI medication. CP 137; CP 799-804.

- The Juvenile Court Commissioner was "outrageous" that Darren Migita diagnosed abuse without reviewing J.L.'s medical records, consulting with J.L.'s main treating physicians, or talking to J.L.'s parents. The Court had to order him to do so. CP 106, 234; 803, 830.

- In 2012, Lakeside Autism Center diagnosed J.L. as autistic following three days' testing by a group of professionals. In 2013, Ian Kodish concluded after 40 minutes, with substantial "unknown history", that J.L. was not autistic without following appropriate protocols, including interviews and input from J.L.'s caregivers. CP 147; CP 432-435.

- Both offices of Attorney General and King County prosecutors found the SCAN report authored by James Metz "contrary to" the facts in J.L.'s medical records at SCH. CP 264.

- Finding SCH Physicians' misrepresentations and misdiagnoses, two dismissal orders were entered. Criminal charges were dismissed "in the interest of justice". CP 264, 385.

- SCH Physicians' misrepresentation and misdiagnoses caused severe and permanent regression to J.L. At age 7, he cannot speak, and screams uncontrollably, sometimes for hours, at any actual or possible separation from his parents. These conditions were not present when he was seized. CP 893.

As stated by attorney witness, Twyla Carter, in her declaration (App. M):

- "It readily apparent that the medical providers with the most experience with Ms. Chen and J.L. and the most knowledge with 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 apparent that [SCH physicians] 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 judgment based on inaccurate assumption." CP 800.

- "The Dependency Court relied upon Darren Migita's testimony that J.L. was diagnosed as malnourished and Migita's misrepresentation about J.L.'s ability to consume and absorb foods." CP 803.

B. Facing SCH physicians' jurisdictional challenge, trial court entered an ambiguous order, silent in language about with or without prejudice ("2017 Order").

J.L.'s parents, Chen and Lian ("Chen"), *pro se* sued SCH and SCH physicians, mistakenly listing minors' names in complaint but quickly informed the court that *pro se* parents, they could

not represent the children, CP 4 ("I was not able to represent my children"); and asked the court to give them time to retain an attorney (CP 5). SCH physicians filed a pre-discovery Motion for Summary Judgment (CP 288-311; *also* APP. E), arguing at length that trial court lacked personal jurisdiction because they were not SCH employees (CP 194, 198-199, 211, 223), that service at SCH was "insufficient," and that lack of signature on the complaints, and summons without proof of service (CP 227-228) rendered the complaint void *ab initio*:

- "this Court lacks personal jurisdiction over Dr Migita, Dr. Kodish, and Dr. Metz because Plaintiffs failed to effect original service of process". CP 288.
- if the summons and complaint are not completed within 90 days, "the action is treated as if it had not been commenced". CP 300.
- "If the original complaint is void, there is nothing to amend (CP 302); "Something that is "void" has no legal effect". CP 303.
- "Voided complaints have no legal effect and are not subject to later amendment because there is nothing to amend". CP 289.
- "the filing of a void complaint does not commence a civil action". CP 304. "**the complaint Plaintiff seeks to amend does not exist, it is a nullity because it was void ab initio and "there can be no 'relation back' to a pleading . . . that was a nullity from the start**" (bold in original). *Id.*
- plaintiffs' complaints should be dismissed "because they were void ab initio, and therefore, they failed to confer subject matter jurisdiction upon this Court". CP 305.
- "For instance, there is no additional evidence that will change the fact that this Court lacks personal jurisdiction over Dr. Migita, Dr. Kodish and Dr. Mertz". Reply, at CP 484.
- "As noted above, no evidence will change the fact this Court lacks personal jurisdiction over defendants." Reply, at CP 486.

The SCH Physicians claimed that since the complaints were void *ab initio* and statute of limitations had now run, the claims must be dismissed in their entirety.[1] SCH Physicians'

[1] Petitioners contended that SCH Physicians' jurisdictional arguments only applied to the parents, not children whose statute of limitations had not expired (CP 14; 895), as recognized by SCH (CP 639).

jurisdictional attack continued at Hearing (CP 520, 522-3), with further challenge to the lack of appointment of a guardian ad litem for the children. CP 524-5. Chen requested continuance and informed the court of Defendants' untimely service was on "the week of February 17". CP 548; 750-752. Judge Hill granted summary judgment without hearing the merits. CP 545 ("No, I don't need to hear the merits of her case"). Her decision did not address jurisdiction and was silent about whether it was with or without prejudice. Petitioners moved for reconsideration, asking the Court to clarify whether the order was with or without prejudice for the children. CP 562-564. *Also see,* App. F. Judge Hill declined to clarify the order without clarification or comment.

C. The chief trial judge resolved the jurisdictional ambiguity in light of this Court's holding in *State v. Northwest Magnesite Co.* ("2019 Order").

Petitioners' CR 60 Motion to vacate summary judgement was before the Chief Judge Ken Schubert per KCLCR 60 (e)(2)(iii). Judge Schubert granted Petitioners' Motion for reconsideration and vacated the summary judgment order as to the SCH physicians based on observed irregularities. Judge Schubert explained that a court lacking jurisdiction cannot rule on merits. *See,* App. G, Report of Proceedings ("RP") at 13. Judge Schubert articulated:

> "No one to my knowledge provided me with a case where a party can both defend on procedural grounds and say, "Hey, I am never served. Your Honor, with all due respect, you don't have jurisdiction over me. But, by the way, go ahead and reach the merits and dismiss these claims against me with prejudice, even though you've never had jurisdiction over me. To me that doesn't make sense.
>
> Why would a Court ever reach the merits of a defense when the party is, as a preliminary matter, saying, "You don't even have jurisdiction over me? You deal with jurisdiction first. That's the way it's always been. That's the way it should have been here."

Judge Schubert also explained why this order was ambiguous (App. G, at RP, at 32-34):

- One, [Judge Hill] didn't feel clarification was necessary or I guess really just [Judge Hill] didn't feel clarification ...[Judge Hill] didn't feel clarification was necessary." RP, at 32.
- Now, the clarification not being necessary could be seen one of two ways. *Id.*

- "I didn't need to clarify because it was obviously with prejudice" or "I didn't need to clarify because it was obviously without prejudice." RP, at 33.
- The thing is, though, is we have a court rule...that says that when there is a dismissal...under CR 41...*Id.*
- So at least in the context of a voluntary dismissal, the lack of clarity, the default means without prejudice in that scenario. So but where is there ever a scenario that a lack of clarity means with prejudice? RP, at 34.

In the Order, Judge Schubert explained his reasoning on granting vacation:

"Whether the Court dismissed plaintiffs' complaint on jurisdictional or substantive grounds is critical. If the Court did not have personal jurisdiction over Defendants, then it had no power to rule on the merits of the claims asserted against them and the dismissal could not have been with prejudice as a matter of law. See, *State v. Nw. Magnesite Co.*, 28 Wn. 2d 1, 42, 182 P.2d 643, 664 (1947) ("However, we do not agree with the trial court that the order dismissing those respondents should be with prejudice to the state's cause of action against them. The court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties."

Based on the above reasoning, Judge Schubert granted vacating the 2017 order (App. C):

"The parties (and the appellate court) are entitled to know the legal effect of this Court's orders. Was dismissal due to a lack of personal jurisdiction, and thus without prejudice? Or was dismissal with prejudice due to a finding of both personal jurisdiction over Defendants and a lack of meritorious claims against them?

The silence of this Court's orders in that regard creates a question of regularity of the proceedings that justifies relief from the operation of those orders. Accordingly, this Court GRANTS the motion for reconsideration."

D. Court of Appeals reinstated the 2017 Order without addressing *Magnesite*, or explaining why 2019 Order consistent with precedent was an abuse of discretion.

SCH physicians appealed Judge Schubert's Order. Over two months before the issuance of the Opinion, Petitioners submitted RAP 10.8 Statement of Additional Authorities (*See* App. H):

> Pursuant to RAP 10.8, Appellants cite the following additional authorities, with regard to issues in their opening brief, *i.e.*, (1) whether trial court lacking personal jurisdiction can reach merits (*e.g.*, Brief at P. 20- 24) and (2) whether minors had been properly before the court (*e.g.*, Brief at P. 31; 39).
>
> *Melo v. U.S.* 505 F 2d 1026 (8th Cir. 1974) ("Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but rather should dismiss the action.")

28 U.S. Code § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel...".).

John v. County of San Diego, 114 F. 3d 874, 877 (9th Cir. 1987) ("a nonlawyer 'has no authority to appear as an attorney for others than himself")

Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn., 91 Wn.2d 48, 586 P.2d 870 (1978) ("[o]rdinarily, only those persons who are licensed to practice law in this state..."[t]he 'pro se' exception are quite limited and apply only if the layperson is acting solely on his own behalf."

RCW 2.48.170 ("Only active members may practice law").

Division One did not address any of the above authorities in its Opinion, nor did it address *Magnesite,* which requires dismissal without prejudice in the absence of personal jurisdiction. It similarly did not explain how a court can reach merits before discovery or render judgment against children who were unrepresented by licensed lawyers. Chen moved for reconsideration, arguing that *pro se* parents cannot act on children's behalf:

- Jurisdiction is the ***first*** issue to address. As stated by the Supreme Court of the United States, "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . ." *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). This Court did not explain how Judge Hill can render a judgment when facing jurisdictional challenge. (emphasis in original).
- minors had not been properly before the courts. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel" 28 U.S.C. § 1654. Similarly, Washington courts have long recognized that only licensed lawyers can practice law. *Washington State Ass'n v. Washington Ass'n of Realtors*, 41 Wn.2d 697, 699, 251 P.2d 619 (1952). In *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 586 P.2d 870 (1978), Washington Supreme Court reiterated that "[o]rdinarily, only those persons who are licensed to practice law in this state". RCW 2.48.010 et seq; APR 5, 7. Having recognized the "pro se exception", the Supreme Court stated that "[t]he 'pro se' exceptions are quite limited and apply only if the layperson is acting solely on his own behalf." *Id.*
- Since Chen's representation of J.L. and L.L. was legally prohibited, any judgment against the children was invalid. At minimum, any dismissal as to the children should be "without prejudice."
- In making a determination that the *pro se* parents could represent their minor children in this case, the Court improperly granted them privileges of unauthorized practice of law, which is prohibited by laws.

See, App. I. Division One denied the Motion for reconsideration.

IV. WHY THIS COURT SHOULD ACCEPT FOR REVIEW

There are few concepts that are as important to our nation's jurisprudence as that of jurisdiction. As stated by the Supreme Court of the United States, "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . ." *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). Because of its importance, objections to jurisdiction can be raised *at any time*: before or after final judgment. CR 12 (h)(3), RAP 2.5(a)(1), CR 60(b)(5).

In addition to the jurisdictional issues, this case involves the unauthorized practice of law and the right to access to the courts for children and the disabled, both of which apply here. These issues may be addressed irrespective of whether they were addressed in the lower courts since the power to regulate the practice of law lies within the sole jurisdiction of the Supreme Court. *Graham.*

This is a constitutional case. RAP 13.4 (b)(3). Washington's constitution, Const. art. 4, §1 vests the judicial power of the State in the judiciary. "One of the basic functions of the judicial branch of government is the regulation of the practice of law". *Washington State Bar Association v. State.* This includes ensuring proper jurisdiction and protecting the vulnerable.

This is a case involving substantial public interests. RAP 13.4 (b)(3) &(4). For decades, this Court has stressed that regulation of the practice of law is necessary to protect the court and the profession, ensure the proper administration of justice and further the public interest. To this end, the unauthorized practice of law includes laypersons acting on behalf of others. *Wash. State Bar Assn. v. Great W. Union Fed. Saw. & Loan Assn.*

Division One's decision conflicts with this Courts' multiple decisions. RAP 13.4 (b) (1). "Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts." *State v. Zimmerman,* 130 Wn. App. 170, 121 P.3d 1216 (2005).

A. Division One's decision ignores the fundamental jurisdictional issue, conflicts with this Court's holding in *Magnesite*, and raises a constitutional question about judicial power. RAP 13. 4(b)(1)&(3).

1. The 2017 order was void *ab initio* due to unsigned complaints, unserved defendants and unrepresented minors.

The Supreme Court has made clear that the order was void when the court "lacks personal jurisdiction or subject matter jurisdiction over the claim." *Marley v. Dep' t of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P. 2d 189 (1994). "Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court". *Wesley v. Schmeckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959). "A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void ab initio and is, in legal effect, no judgment at all." *Id.* The Court's jurisdiction is invoked only after a proper pleading is filed and properly served. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010); CR 3 (commencement of action requires serving a copy of a summon with a complaint or by filing a complaint). Here, the trial court's jurisdiction was not invoked due to the *unsigned* complaints, *improperly* served defendants, statutorily recused judge, and *essentially unrepresented* minors.

As set forth in SCH Physicians' briefs and repeated in Division One's Opinion, service upon SCH was insufficient. *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143 111 P.3d 271 (2005) ("Basic to litigation is jurisdiction, and first to jurisdiction is service of process"); *Rabbage v. Lorella*, 5 Wn. App. 2d 289, 297, 426 P.3d 768 (2018) ("In personam jurisdiction is obtained upon the initial service of process"). Two of the complaints were also unsigned. To invoke personal jurisdiction over a party, proper service of the summons and complaint is essential. *Ahten.* Only after these procedural requirements are met does the court acquire jurisdiction. RCW 4.28.020. SCH Physicians' cited authority also supported this position. *Beard v. Branson*, 2016 WL 1705290

(Tenn. Ct. App. April 26, 2016) ("If the 'unsigned paper' is a jurisdictional notice of appeal or complaint, then the court does not obtain jurisdiction over the matter."). CP 303. While it is clear that the *pro se* attempted to serve the parties, it is equally clear that the procedural requirements were not met, as noted by the SDH physicians and Division One. The Court did not acquire jurisdiction due to the procedural defects. A judgment entered by a court lacking proper jurisdiction is void. *In re Powell*, 84 Wn. App. 432, 927 P.2d 1154 (1996).

The children were not, moreover, represented by counsel when the 2017 order was entered. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654. As recognized by SCH physicians, minors "are considered incompetent as a matter of law". CP 525. J.L. is also severely disabled, due in large part caused by SCH physicians' misdiagnoses. If anyone needed legal representation, it was J.L. Such representation would have required a member of the Bar who is qualified to practice law. RCW 2.48.170; APR 1(b); GR 24; *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068 (2002); *In re Disciplinary Proceedings Against Droker*, 59 Wn.2d 707, 719, 370 P.2d 242 (1962); *State v. Hunt*, 75 Wn. App. 795, 803-05, 880 P.2d 96 (1994). The '*pro se*' exceptions apply only if the layperson is acting solely *on his own behalf. Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n.*; *State v. Yishmael.* (nonlawyers' practice of law is a strict liability offense). Since the children were (and are) legally incompetent, legal representation by licensed counsel was mandatory. In any event, minors J.L. and L.L. should not be bound to the judgment only because their names were mistakenly listed on the complaints. *State v. Santos,* 104 Wn.2d 142, 702 P..2d 1179 (1985) ("A child must not be a party in name only. 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*"). Without proper representation and guardian ad litem, J.L. and L.L. were

not properly before the court, and any judgment against them should be vacated as *Santos*.

Code of Judicial Conduct provides that a judge "*shall*" disqualify when the judge "previously presided as a judge over the matter in another court." Rule 2.11 (6)(d). Here, Judge Hill presided over Petitioners' underlying dependency matter leading to the removal of the children from Chen's home and this subsequent litigation. Judge Hill reviewed testimonies from several *same* witnesses who would testify in this litigation and made multiple important discretionary decisions in dependency including removing J.L. out-of-home. While this knowledge may not have resulted in actual prejudice, it raises a reasonable question as to impartiality. Thus, the court should disqualify itself. *See, State v. Graham*, 91 Wn. App. 663, 960 P.2d 457 (1998) (recusal is "compelled" for being former city counsel of state's police witness, even no knowledge about the presiding case. The Court held that, "[w]hile this fact may have resulted in no actual prejudice, it did raise a reasonable question as to his impartiality"); *also, Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946 (2001) ("the trial court should have disqualified itself" due to "the trial court's personal knowledge"). Division One's decision that no need to recusal conflicts with *Graham* and *Kauzlarich* and erodes the public confidence in our judicial system.

These deficiencies were further aggravated by the absence of a guardian ad litem who could receive notice on behalf of minors, violating due process. *Anderson v. Dussault*, 181 Wn.2d 360, 333 P.3d 395 (2014) (minor plaintiff's action was not time barred due to lack of a guardian ad litem to receive notice on minor's behalf). Other procedural irregularities further aggravated the issue. For example, the motion for summary judgment requires 28 days' notice per CR 56 (c) but SCH Physicians sent their pleadings by mail (SCH also claimed non-existent e-service) on February 2, 2017, which was deemed complete under CR 5 (b)(2)(A) on "the third day", *i.e.*, February 6, 2017 (February 5 was Sunday) – just 24 days prior to the March 3 Hearing.

The 2017 order was not a valid order. "A valid judgment exists where (1) the court rendering judgment had jurisdiction, (2) notice and an opportunity to be heard were afforded to the parties affected, (3) the court is competent to render judgment, (4) the party asking the enforcement complies with the rules of the state of enforcement to enter the judgment." *Estate of Toland v. Toland,* 170 Wn. App. 828, 286 P.3d 60 (2012). Here, the first three requirements were not met. When a court lacks jurisdiction, it has no power to act further, and dismissal without prejudice is the limit. *Magnesite* remains mandatory authority on this point.

2. The 2019 Court was under "nondiscretionary duty" to vacate the underlying 2017 order which was void *ab initio*.

"A judgment entered by a court which lacks jurisdiction is void and must be vacated whenever the lack of jurisdiction comes to light". *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783, 790 P.2d 206 (1990). This is nondiscretionary. *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991), review denied, 118 Wn.2d 1022, 827 P.2d 1393 (1992). When the jurisdictional challenge was brought before the then-chief judge Ken Schubert, he was under a mandatory duty to address it (CR 60 (b) (5) and his decision followed this court's holding in *State v. Magnesite*. The superior court's decision to vacate will not be disturbed absent a showing of clear or manifest abuse of discretion. *In re Hardt*, 39 Wn. App. 493, 693 P.2d 1386 (1985).

Here, Division One erred in refusing to address jurisdictional issues and vacate the void order (RAP 2.5 (a)(1)); and by failing to follow the directly controlling precedent, *i.e., Magnesite*. *Opinion*, at 9 & 12. "When this Court has once decided a question of law, that decision, when the question arises again, is not only binding on all inferior courts in this state, but it is binding on this court until that case is overruled." *Godefroy v. Reilly,* 146 Wash. 257, 259, 262 P.639 (1928); *also, In re Marriage of Larson,* 178 Wn. App. 133, 313 P.3d 1228 (2013) ("We are not free to ignore binding Washington Supreme Court precedent, and we err when disregard it."). *Magnesite* remains

mandatory and was cited by Division One in *Hous. Auth. Of City of Evertt v. Kirby,* 154 Wn. App. 842, 226 P.3d 222 (2010). Whether agreed or not, both the Superior Court and the Court of Appeals were both bound to *Magnesite.* Division One has no authority to propose a new rule.

3. Disagreements with the trial court are insufficient to reverse a deferential ruling.

Vacation of a judgment under CR 60 is within the trial court's sound discretion. *State v. Santos*, 104 Wn.2d 142, 702 P.2d 1179 (1985). An order to vacate is reviewed for a manifest abuse of discretion. *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003); *In re Guardianship of Adamec*, 100 Wn.2d 166, 667 P.2d 1085 (1983). The abuse of discretion standard is deferential. This Court defined "manifest of abuse of discretion" in a recent decision: "We need not agree with the trial court's decision for us to affirm that decision. We must merely hold the decision to be reasonable." *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017).

Division One did not address whether Judge Schubert's ruling was reasonable. Instead, it simply disagreed with him. Specifically, Division One suggested that Judge Hill had resolved the ambiguity on whether the dismissal was with or without prejudice, stating:

> "In any event, contrary to trial court's ruling below, the legal effect of the court's order granting summary judgment is not ambiguous when viewed in context of record as a whole. Any ambiguity was resolved when the court specifically rejected Chen's request on reconsideration to limit the scope of its ruling by clarifying that the dismissal was "without prejudice."

See Opinion, at 12. It is, however, hard to see how Judge Hill resolved this issue when she didn't even mention it. Clearly, Judge Schubert did not think it was resolved:

> "Their motion for reconsideration was based solely on whether it was with or without prejudice... they asked for clarification on that. What I think is interesting is she just denied, she didn't provide clarification. Now you could read that one of two ways. One, [Judge Hill] didn't feel clarification was necessary or I guess really just [Judge Hill] didn't feel clarification...[Judge Hill] didn't feel clarification was necessary....Now, the clarification not being necessary could be seen one of two ways...I didn't need to clarify because it was obviously with prejudice' or 'I didn't need to clarify because it was obviously without prejudice.' The thing is, though, is we have a court rule...that says that when there is a dismissal...under CR 41...what it says to me is, if the court doesn't say, at least in that context, then it's presumed to be without prejudice...So at least in the context of a voluntary

dismissal, the lack of clarity, the default means without prejudice in that scenario. So but where is there ever a scenario that a lack of clarity means with prejudice?"

See, App. G, RP 33-34. *Also,* App. J, Petitioners' Opening Brief, at 26, 28, 29.

Division One raised another disagreement with Judge Schubert (*Opinion*, at 12):

"Since SCH did not dispute the sufficiency of service of process or seek summary judgment on any other procedural ground, the court must have dismissed the claims against the physicians on the merits because the only claims SCH were based on vicarious liability for the alleged wrongful acts of the physicians."

This is not, however, the only explanation. For example, SCH repeatedly stated that it cannot be sued for "vicarious liability" because "the three co-defendant physicians are not employees of Seattle Children's Hospital." CP 527; *also* CP 412. All three SCH physicians supported SCH on this point. CP 194, 198-9, 211, 223. Thus, Judge Hill may have dismissed SCH as an improperly named defendant. Even more important, since Judge Hill explicitly articulated that her decision was not based on the merits, which she had not yet heard (CP 545); her decision must have been based on procedural grounds also possibly unrepresented minors or unsigned complaints.

Division One also claimed that Judge Schubert attempted to correct a legal error made by Judge Hill. *Opinion*, p. 14. Legal errors are, however, associated with a court that has *complete jurisdiction.* In *Dike v. Dike,* 75 Wn. 2d 1, 448 P.2d 490 (1968), this Court discussed the difference between a void judgment and an erroneous judgment:

> [A] void judgment should be clearly distinguished from one which is merely erroneous or voidable. There are many rights belonging to litigants -- rights which a court may not properly deny, and yet if denied, they do not render the judgment void. Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith.

As claimed by the SCH physicians and supported by Division One's recitation of Chen's procedural errors, Judge Hill did not obtain personal jurisdiction over the parties, and the 2017

order was therefore void, *not* erroneous. Judge Schubert was under a duty to vacate an order in which jurisdiction had not been established, particularly when the SDH physicians claimed it did not exist. This was within Judge Schubert's sound discretion under CR 60 (b)(5). *Gustafson v. Gustafson*, 54 Wn. App. 66, 772 P.2d 1031 (1989) (Courts should and do give a liberal construction to 60(b)). Judge Schubert acted reasonably, and his interpretation was also reasonable: First, he was under a duty to comply with this Court's controlling precedent. Second, he was required to address the jurisdictional issue whenever it came into light. *Allstate Insurance v. Khani,* 75 Wn. App. 317 (1994). Third, he was under the duty to uphold justice. *In re Hardt,* 39 Wn. App. 493, 693 P.2d 1386 (1985) ("Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally 'to preserve substantial rights and do justice between the parties.'). As Judge Schubert said, "how would I be doing justice today if I deny the motion and then it turns out next week the appeal is dismissed, and she gets no further justice from a court." RP 16. Division One did not give appropriate deference to Judge Schubert's order or reasoning, which complied with the letter and spirit of the law.

B. Division One's decision grants *pro se* litigants privilege to act on minors' behalf, conflicts with this Court's most recent holding in *State v. Yishmael* that non-attorney's practice of law is "a strict liability offense". This Court's review is needed to address the issue regarding the practice of law and need for legal representation for minors. RAP 13.4 (b)(1),(3) & (4).

The regulation of the practice of law is vested exclusively in the Supreme Court. *State v. Yishmael.* (En Banc); *Washington State Bar Ass'n v. State.* (En Banc); *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.* (En Banc); *Graham v. State Bar Ass'n.* (En Banc). APR 1 (a), GR 12.1. also, RCW 2.06.030. Over one century ago, this Court declared that regulating the practice of law is to best protect and serve the public interest:

> [P]ower to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.

In re Lambuth., 18 Wash. 478, 51 P. 1071 (1898) (per curiam). More recent cases are in accord. *e.g., Washington State Bar Association v. Washington Association of Realtors,* 41Wn. 2d 697,251 P.2d619(1952) (power to regulate the practice of law necessarily includes laypersons' preparation of real estate documents; legislative act permitting gratuitous legal work by the "unskilled or unqualified" could not prevent the court from granting an injunction if necessary to protect the public interest); *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.,* 91 Wn.2d 48, 586 P.2d 870 (1978) ("Ordinarily, only those persons who are licensed to practice law in this state may do so without liability for authorized practice...It is our duty to protect the public from the activity of those who, because of lack of professional skills, may cause injury whether they are members of the bar or persons never qualified for or admitted to the bar"); *Hagan & Van Kamp, P.S. v. Kassler Escrow, Inc.*(stressing its duty to protect the public from injury by unauthorized practitioners, Court struck down a statute authorizing escrow agents and others to prepare certain real estate documents as dangerously flawed because "it virtually gives free rein to almost anyone of any degree of intelligence to perform any task related to real property or personal property transactions"). For the protection of the public, the unlawful practice of law is a crime. RCW 2.48.180(3); *State v. Yishmael.* To practice law, one must complete the required legal training, pass the bar exam and receive an order from the Supreme Court of Washington admitting one to practice law. Chen does not meet any of these requirements and can therefore only represent herself under the limited "pro se exception". Lacking legal representation, judgment against minors is thus *void.*

It has widely recognized that minors are not bound to their parents' *pro se* action and courts

have a statutory duty to protect minors' interests. As noted by the Third Circuit, "The infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him." *Osei-Afriyie v. Medical College of Pennsylvania,* 937 F.2d 876, 883 (3rd Cir. 1991). All jurisdictions throughout the country have chosen to dismiss minors' claims without prejudice, "thereby giving [minors] further opportunity to secure an attorney at some later time within the limitations period...[minor] should not be prejudiced by his father's failure to comply with the court order." The Third Circuit explained:

> A litigant has a right to act as his or her own counsel...However, we agree with *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam), that a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child. The choice to appear *pro se* is not a true choice for minors who under state law...cannot determine their own legal actions. There is thus no individual choice to proceed pro se for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.
>
> It goes without saying that it is not the interest of minors or incompetents that they be represented by non-attorneys. Were they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Osei-Afriyie, 937 F.2d at 882-883 (remanding to district court so it could either appoint counsel or dismiss the complaint without prejudice). The Second and Ninth Circuits have reached similar conclusions. *Cheung v. Youth Orchestra Found. Of Buffalo, Inc.*, 906 F.2d 59, 61-62 (2nd Cir. 1990) (dismissal without prejudice to minor who was represented by *pro se* parents; no issues should be decided until the counsel issue is resolved; remanded to give minor an opportunity to retain or request appointment of counsel; if minor did not retain counsel or the district court declined to appoint counsel, the complaint should be dismissed without prejudice); *Johns v. County of San Diego,* 114 F.3d 874 (9th Cir. 1997) (directing the district court to change dismissal with prejudice to without prejudice; "because the goal is to protect the rights of infants, the complaints should not have been dismissed with prejudice as to minor").

In addition to legal counsel, a Guardian ad Litem should have been appointed for the children. Division One suggested that RCW 4.08.050 places [initial] burden upon minor's parents to request appointment of Guardian ad litem. *Opinion,* at 17. The plain language in the statue seemingly suggests the initial duty was upon the Court – only after the court made the initial inquiry does the burden shift to request the appointment. If a statute remains ambiguous after a plain meaning analysis, it is appropriate to refer to case law. *Dep't of Ecology v. Campbell & Gwinn, LLC.,*146 Wn.2d 1, 43 P.3d 4 (2002); *Shelly v. Elfstrom*, 13 Wn. App. 887, 538 P.2d 149 (1975) (it was "the duty of *the court* to determine either that [party] was competent or that a guardian ad litem was required"). No matter whose initial duty, the intent was to *protect* minors' interest, *not* to punish minors whose parents did not timely make the request. Division One also suggests that RCW 4.08.050 authorizes *pro se* parents to act on behalf of a minor child. *See,* Opinion at 17, citing *Taylor v. Enumclaw Sch. Dist. No. 216,* 132 Wn. App. 688, 694, 133 P.3d 492 (2006). This is in apropos: the parent in *Taylor* was *not pro se*. This suggestion also conflicts with Division One's decision in *re Dependency of E. M.,* 12 Wn. App. 2d 510, 458 P.3d 810 (2020) ("Only legal counsel can advocate for the legal rights and interests of a child."). Could RCW 4.08.050 be harmonized with RCW 2.06.170? If not, what will be resolution? This is a question for this Court to determine. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (the Washington Supreme Court "has the ultimate authority to say what a statute means.").

V. CONCLUSION

In light of foregoing, Petitioners request that this Court accept this case for review and exercise its jurisdiction to reverse Division One's decisions and vacate Judge Hill's ambiguous orders. In the alternative, the Court may order the cases dismissed without prejudice against the mistakenly named minors, whose claims still fall well within the statute of limitations.

DATED this 21st of September, 2020

Respectfully submitted,

/s/ Susan Chen
Susan Chen, *pro se*
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 September, 2020.

/s/ Susan Chen
Susan Chen, *pro se*

PO BOX 134, Redmond, WA 98073

APP. A

The Honorable Hollis R. Hill

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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, Plaintiffs, vs. 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, Defendants.	NO. 16-2-26013-6 SEA ORDER GRANTING DEFENDANTS DARREN MIGITA, M.D., IAN KODISH, M.D., AND JAMES METZ, M.D.'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL ~~[PROPOSED]~~ HH

THIS MATTER, having come before the Court on Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal, and the Court having reviewed the records and files herein, specifically: and having heard oral argument as well as statements from Tonya Cartee

1. Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101
T (206) 622-5511 F: (206) 622-8986

2. Declaration of Bruce W. Megard, Jr. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal, with attached exhibits;

3. Declaration of Darren Migita, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

4. Declaration of James Metz, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

5. Declaration of Ian Kodish, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

6. Declaration of Bruder Stapleton, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

7. Defendant Seattle Children's Hospital's Joinder to Co-Defendants Kodish, Migita, and Metz' Motion for Summary Judgment;

8. Declaration of Michelle S. Taft in Support of Defendant Seattle Children's Hospital's Joinder to Co-Defendants Kodish, Migita, and Metz' Motion for Summary Judgment, with attached exhibits;

9. Plaintiffs' Response (if any);

10. Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Reply on Motion for Summary Judgment of Dismissal;

11. Declaration of Susan Chen;

12. Declaration of Daxang Liao;

13. Plaintiff's Motion for Continuance;

14. _____.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants Darren Migita, M.D., Ian Kodish, M.D. and James Metz M.D.'s Motion for Summary Judgment of Dismissal is **GRANTED**.

LAW OFFICES
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IT IS ALSO ORDERED: Plaintiffs' request for continuance is denied. The claims against Seattle Children's Hospital are dismissed

IT IS SO ORDERED this 3rd day of March, 2017.

Honorable Hollis R. Hill

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

By: WSBA No. 40564 for
Bruce W. Megard, Jr., WSBA #27560
Attorney for Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.

JOHNSON GRAFFE KEAY MONIZ & WICK

By: Michelle S Toft WSBA #46443
Rando B. Wick, WSBA #20101
Attorney for Defendant Seattle Children's Hospital

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SUPERIOR COURT OF WASHINGTON KING COUNTY

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,

Plaintiffs,

vs.

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,

Defendants.

NO. 16-2-26013-6 SEA

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

~~[PROPOSED]~~ H H

THIS MATTER, having come before the Court on Plaintiffs' Motion for Reconsideration of Order Granting Defendants' Motion for Summary Judgment of Dismissal, and the Court having reviewed the records and files herein, specifically:

1. Plaintiffs' Motion for Reconsideration of Order Granting Defendants' Motion for Summary Judgment of Dismissal;

2. Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Response to Plaintiffs' Motion for Reconsideration;

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3. Declaration of Bruce W. Megard, Jr. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Response to Plaintiffs' Motion for Reconsideration, with attached exhibits;

4. Defendant Seattle Children's Hospital Response to Plaintiffs' Motion for Reconsideration;

5. ~~Plaintiffs' Reply (if any);~~

6. _____;

7. _____; and,

8. _____;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Reconsideration of Order Granting Defendants' Motion for Summary Judgment of Dismissal is DENIED.

IT IS ALSO ORDERED: Plaintiffs Reply is stricken by separate order.

DATED this 10th day of ~~March~~ April, 2017.

The Honorable Hollis R. Hill

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

By: _____
Bruce W. Megard, Jr., WSBA #27560
Attorney for Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.

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APP. B

Honorable Ken Schubert

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

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,

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 & HEALTH SERVICES,

Defendants.

NO. 16-2-26013-6 SEA

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION TO VACATE ORDERS ON MARCH 3 AND APRIL 10, 2017

Plaintiffs seek reconsideration of this Court's December 14, 2018 Order Denying Plaintiffs' Motion to Vacate Summary Judgment Orders from March 3, 2017 and April 10, 2017. At the hearing of their motion to vacate, this Court observed that defendants Darren Migita, Ian Kodish and James Metz (collectively "Defendants") based their first argument

in support of their motion for summary judgment on their contention that the court lacked personal jurisdiction over them. Their motion also sought dismissal on substantive grounds as well. In granting Defendants' motion, the Court's March 3, 2017 order did not identify the basis for its decision. In their motion for reconsideration, Plaintiffs raised the need for clarity as to whether dismissal was with or without prejudice. The Court entered its April 10, 2017 order denying that motion for reconsideration without additional comment.

Whether the Court dismissed plaintiffs' complaint on jurisdictional or substantive grounds is critical. If the Court *did not* have personal jurisdiction over Defendants, then it had *no* power to rule on the merits of the claims asserted against them and the dismissal could *not* have been with prejudice as a matter of law. *See State v. Nw. Magnesite Co.*, 28 Wn. 2d 1, 42, 182 P.2d 643, 664 (1947) ("However, we do not agree with the trial court that the order dismissing those respondents should be with prejudice to the state's cause of action against them. The court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties."). But if the Court *did* have personal jurisdiction over Defendants, then it could properly reach the merits of plaintiffs' claims against them and the dismissal of those claims would presumably be with prejudice.

The parties (and the appellate court) are entitled to know the legal effect of this Court's orders. Was dismissal due to a lack of personal jurisdiction, and thus without prejudice? Or was dismissal with prejudice due to a finding of both personal jurisdiction over Defendants and a lack of meritorious claims against them?

The silence of this Court's orders in that regard creates a question of regularity of the proceedings that justifies relief from the operation of those orders. Accordingly, this Court GRANTS the motion for reconsideration. Should the appellate court so permit, this Court will enter a formal order vacating the March 3 and April 10, 2017 orders pursuant to CR

60(b) as to Defendants only.[1] This Court must receive that permission because plaintiffs have appealed this Court's March 3 and April 10, 2017 orders and this order will change a decision then being reviewed by the appellate court. *See* RAP 7.2(e). This Court denies Defendants' request for sanctions, which they requested in their opposition to the motion for reconsideration.

DONE this 28th day of January, 2019.

E-signature on following page

JUDGE KEN SCHUBERT

[1] This Court does not vacate those orders as they relate to Seattle Children's Hospital (SCH). SCH did not move for dismissal based on lack of personal jurisdiction and thus, there is no ambiguity as to the legal effect of the dismissal of plaintiffs' claims against SCH.

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 GRANTING MTN FOR RECONSIDERATION

Signed by: Ken Schubert
Date: 1/28/2019 10:02:40 AM

Judge/Commissioner: Ken Schubert

This document is signed in accordance with the provisions in GR 30.
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APP. C

FILED
6/22/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN CHEN, as parents and natural guardians of J.L., a minor, and L.L., a minor, and NAIXIANG LIAN, as parents and natural guardians of J.L., a minor, and L.L., a minor, Respondents/Cross-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; THE CITY OF REDMOND; and STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellants/Cross-Respondents.	No. 79685-2-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — CR 60(b)(1) authorizes a trial court to vacate a judgment based on an "irregularity," which may occur upon a failure to adhere to a "prescribed rule" or "mode of proceeding." However, a motion to vacate under CR 60(b) is not a substitute for a direct appeal. In this case, the superior court perceived a legal error as to an aspect of a prior order granting summary judgment and partially vacated that order in an attempt to correct the error. This was an abuse of discretion. For these reasons, we reverse and remand for reinstatement

of the order granting summary judgment dismissing the claims against the defendant physicians. We otherwise affirm.

FACTS

Susan Chen and Naixiang Lian are the parents of two minor children, J.L. and L.L.[1] J.L. came to the attention of the Suspected Child Abuse and Neglect (SCAN) team at Seattle Children's Hospital (SCH) in October 2013, when he was three years old. Several physicians referred him to the hospital based on a constellation of concerning symptoms, including low weight, abdominal distention, and lethargy. After repeated urging, Chen brought J.L. to SCH's emergency department on October 20, 2013. The physician who examined J.L. described his "gaunt" appearance and "protuberant belly" as well as his "complex past medical history and an undetermined reason for his failure to thrive." Due to J.L.'s presentation and abnormal lab results, the physician recommended a coordinated workup to include endocrinology, gastroenterology, and nephrology. However, the parents insisted on taking J.L. home and the physician concluded that he "[did] not meet the eminent risk criteria for [a] medical hold." The doctor discharged J.L. with his parents' agreement to follow up with J.L.'s primary care physician the following day.

Three days later, on October 23 2013, Chen took J.L. to his primary care physician who made a report to Child Protective Services (CPS), due to her longstanding concern about J.L.'s symptoms and Chen's resistance to medical

[1] Chen's motion to use initials to refer to the minor children is granted.

advice.[2] After some negotiation with a CPS social worker, Chen returned with J.L. to SCH on October 24, 1013. The emergency room physician observed signs of "gross malnutrition" and noted that J.L. had been placed in State custody due to his critical symptoms and Chen's opposition to medical evaluation. The doctor admitted J.L. to the hospital for further evaluation and monitoring by the SCAN team.

Drs. Darren Migita and James Metz were a part of SCH's "Child Protection Team" that evaluated J.L. for possible child abuse and neglect on October 27, 2013. Dr. Metz reported that J.L. was "severely malnourished" and concluded that his significantly distended abdomen could be related to his malnourishment. Dr. Metz noted that Chen's behavior appeared to be "erratic" and that, while she sought care for J.L. from numerous physicians, she did not appear to follow through with recommendations. Regardless of her intentions, Dr. Metz concluded there was likely an "element of neglect given [J.L.'s] current nutritional status." Dr. Migita requested a psychiatric consult to evaluate J.L.'s exposure to trauma and the presence of trauma-related disorders. Dr. Ian Kodish conducted an evaluation and observed that J.L. had a "severe speech delay" and exhibited features of "reactive attachment disorder, which may stem from a failure of strong nurturing attachment formed with [L.J.'s] primary caregiver." He concluded that other disorders, including Autism Spectrum disorder, could not be definitively ruled out.

---

[2] J.L.'s primary care physician is not a party to this lawsuit. The trial court dismissed Chen's claims against that physician and this court recently upheld the dismissal in an unpublished decision. See Chen v. Halamay, No. 76929-4, slip op. (Wash. Ct. App. Feb. 10, 2020) (unpublished) http://www.courts.wa.gov/opinions/pdf/769294.pdf.

Following his discharge from the hospital, the State placed both J.L. and L.L. in foster care. L.L. was returned to his parents' care after a few days, but the State initiated a dependency proceeding as to J.L. and he remained in foster care for almost a year, until the dependency was dismissed in September 2014.

In October 2016, representing themselves pro se, Chen and Lian (collectively, Chen) sued Drs. Metz, Migita, and Kodish, and SCH.[3] Chen filed three separate complaints under the same cause number. Two of the complaints were unsigned. The complaints also identified J.L. and L.L. as plaintiffs. Chen alleged that (1) the physicians misdiagnosed J.L.; (2) the medical treatment they provided to him fell below the standard of care; (3) the physicians reported inaccurate information to CPS; and (4) failed in their duties as expert witnesses, which resulted in J.L. being removed from his home and caused harm to the family. Chen claimed that the SCH was vicariously liable because the physicians were acting within the scope of their "employment and agency." In fact, none of the defendant physicians were employed by SCH.

On December 8, 2016, Chen filed a single summons directed at all three physicians and SCH. On December 13, 2016, she served SCH with a copy of the summons and complaint. Chen did not, however, personally serve any of the physicians and none of the physicians authorized SCH to accept service on their behalf.

[3] In addition to the individual physicians and SCH, Chen's lawsuit included additional defendants, including the City of Redmond, the State of Washington, and the Department of Social and Health Services.

The three physicians jointly moved for summary judgment in February 2017.[4] They sought dismissal of Chen's claims based on (1) failure to effect service on the physicians, resulting in a lack of jurisdiction; (2) failure to file within the statute of limitations as to Drs. Metz and Kodish, because the complaint filed against them was unsigned and therefore void; (3) failure of proof under RCW 7.70.040 because the plaintiffs had not retained a qualified expert who expressed the opinion that the physicians' conduct fell below the standard of care; and (4) statutory immunity under RCW 26.44.060 based on the physicians' good faith reports of alleged child abuse or neglect. The physicians requested dismissal "with prejudice."

SCH separately joined in the motion, and adopted the physicians' arguments. Because the only claim against it was premised on vicarious liability for the alleged negligent acts of the physicians, SCH argued that the claims against it should be dismissed with prejudice for the same reasons that the claims against the physicians should be dismissed.

Chen did not file an answer to the defendants' motions. Instead, she sought a continuance, stating that she "hope[d] to look for an attorney."

The parties appeared before King County Superior Court Judge Hollis Hill on March 3, 2017, for argument on the motions. Chen appeared with the assistance of an interpreter. She again requested a continuance, but also responded to the defendants' claims regarding the failure to effect service and the

[4] The signature page of the motion for summary judgment is dated February 2, 2016, but the attached certificate of service for the motion is dated February 2, 2017. The 2016 date appears to be a scrivener's error.

statute of limitations, and maintained that she would be able to marshal evidence to support the claims regarding misdiagnosis and negligent treatment.

The court denied the request for a continuance under CR 56(f) because it did not appear that evidence existed that could justify Chen's opposition to the motion, especially as to claims involving "pure issues of law," such as ineffective service of process, the statute of limitations, and statutory immunity for reports to CPS. The court entered an order granting the physicians' motion for summary judgment, denying the motion to continue, and dismissing the claims against SCH. The court's order stated that the physicians' motion was "GRANTED" and that the "claims against Seattle Children's Hospital are dismissed."

Chen sought reconsideration. Her motion was limited to the issue of "prejudice regarding re-filing of the minor Plaintiffs' claims at some future date." She asked the court to clarify that, as to the claims asserted by the minor plaintiffs, the claims against the physicians were dismissed without prejudice. Chen also argued that reconsideration was warranted because the court failed to appoint a Guardian Ad Litem (GAL) to represent J.L. and L.L.

The physicians opposed reconsideration, arguing there was no need to clarify the summary judgment order because the court granted their motion, thereby indicating that dismissal was warranted on all bases. SCH likewise argued that the order unambiguously dismissed all claims with prejudice, even though the order was silent. The court denied reconsideration. Chen filed a notice of appeal.[5]

[5] Because the claims against other named defendants were still pending, this court initially dismissed Chen's appeal as premature. After the remaining defendants were voluntarily dismissed, we allowed the appeal to proceed. This court eventually dismissed Chen's appeal in 2019 after she failed to file briefing following multiple extensions and the Supreme Court denied her petition for

Meanwhile, on March 2, 2018, after Judge Hill retired and while Chen's appeal was pending, she filed a motion in superior court seeking to vacate the summary judgment order and the order denying reconsideration.[6] Chen argued that she was deprived of a fair hearing, the dismissal was based on false or misleading information, the orders were "void," and again, challenged the failure to appoint a GAL. Approximately six months later, Chen amended her motion to vacate to include additional grounds. Among other things, Chen claimed there was "newly discovered evidence" as to whether the physicians acted in good faith as required the immunity statute and that the physicians failed to properly serve their motion for summary judgment. Chen's motion to vacate came before a different judge, King County Superior Court Judge Ken Schubert. The court entered a show cause order on the motion. The court also granted Chen's request to appoint counsel to represent J.L. under GR 33 (requests for accommodation by individuals with disabilities) for the limited purpose of drafting a reply brief, if necessary, and to appear at the show cause hearing to present argument on behalf of J.L.

The physicians and SCH jointly opposed the motion to vacate. J.L., now represented by counsel, filed a reply, asserting (1) an "irregularity" because the physicians' motion for summary judgment was not timely served; (2) the plaintiffs' failure to respond to the summary judgment motion was due to "excusable

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review of that decision. See, Chen, et al. v. Migita, M.D., et al., No. 77522-7-I (Wash. Ct. App.); Chen, et al. v. Migita, M.D., et al., No. 97015-7 (Wash.).

[6] Chen also sought to vacate the court's order striking the reply brief she filed in support of her motion for reconsideration, which the court struck because it addressed issues beyond the scope of the motion for reconsideration.

neglect;" (3) the court could not have dismissed claims against Drs. Metz and Kodish on the merits because the complaints against them were unsigned and therefore, void; and (4) the court should have construed the motion to continue as a motion to appoint a GAL. J.L. also claimed he had now identified experts to support the claims that the physicians violated the standard of care.

Chen submitted a declaration from a physician who had treated J.L. since 2012. The declaration challenged only Dr. Migita's good faith reporting of suspected abuse or neglect, alleging an inadequate review of J.L.'s medical records. Chen offered no explanation for the failure to obtain this declaration at the time the court considered the motion for summary judgment.

At the December 2018 hearing on the motion to vacate, the court questioned whether Judge Hill could have dismissed the claims against the physicians on the merits if she also agreed that the court lacked jurisdiction. On the other hand, the court stated that the summary judgment ruling was "100 percent right" as to SCH. Ultimately, it concluded that the lack of clarity as to whether the dismissal was with or without prejudice was not a basis to vacate under CR 60 because the judge had an opportunity to clarify her ruling. The court entered an order denying the motion to vacate.

Shortly after, on January 28, 2019, the superior court granted Chen's motion to reconsider and reversed its decision. In its written decision, the court concluded that the failure to specify the basis for granting summary judgment in favor of the physicians warranted vacating the order because if the court lacked jurisdiction over the physicians due to the failure to effect service of process, then the court

had "no power to rule on the merits . . . and the dismissal could not have been with prejudice as a matter of law." See State v. Northwest Magnesite Co., 28 Wn.2d 1, 42, 182 P.2d 643 (1947) (dismissal without prejudice is the limit of a court's authority when it lacks personal jurisdiction over a party). The court concluded that the order's silence as to the basis for summary judgment created a "question of regularity of the proceedings that justifies relief." The court did not disturb the summary judgment order insofar as it dismissed the claims against SCH. The court noted that SCH did not dispute proper service or seek summary judgment on procedural grounds. Therefore, there was "no ambiguity as to the legal effect of the dismissal of plaintiffs' claims" against SCH.

The physicians appeal and Chen cross appeals.[7]

ANALYSIS

I. Irregularity under CR 60(b)(1)

The physicians challenge the trial court's order vacating the 2017 order that granted their motion for summary judgment and dismissed all of Chen's claims against them.

As a threshold matter, Chen argues that the 2019 order vacating the previous order of summary judgment is interlocutory and that the physicians' appeal is premature. This issue has been resolved. A commissioner of this court

[7] Chen and Lian filed a brief in response to the physicians' appeal and a cross appeal. Although J.L. was appointed counsel below to address his interests with respect to the motion to vacate, he abandoned his appeal of the initial order denying the motion to vacate and has not filed a brief opposing the physicians' appeal or supporting the cross appeal. See J.L., a minor v. Migita, M.D., et al., No. 79486-8-I (Wash. Ct. App.).

rejected Chen's motion to dismiss the appeal on this precise basis and the Washington Supreme Court denied discretionary review. See Chen, et al. v. Migita, M.D., et al., No. 97526-4 (Wash.). A superior court order granting a motion to vacate a judgment, as entered in this case, is appealable as a matter of right. RAP 2.2(a)(10).

CR 60(b) authorizes a trial court to relieve a party from judgment in specified circumstances. Those circumstances include "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order."[8] CR 60(b)(1). CR 60(b) authorizes vacation of judgments only for reasons "extraneous to the action of the court or for matters affecting the regularity of the proceedings." Burlingame v. Consol. Mines & Smelting Co., Ltd., 106 Wn.2d 328, 336, 722 P.2d 67 (1986).

Irregularities under CR 60(b)(1) are those relating to a failure to adhere to some prescribed rule or mode of proceeding. Lane v. Brown & Haley, 81 Wn. App. 102, 106, 912 P.2d 1040 (1996). Generally, these irregularities involve procedural defects unrelated to the merits that raise questions as to the integrity of the proceedings. See In re Marriage of Tang, 57 Wn. App. 648, 654-55, 789 P.2d 118 (1990). For instance, in In re Marriage of Tang, the court reversed an order vacating a decree of dissolution because the failure to include a list of assets and values in the decree was an "irregularity" that justified relief from the decree. Id. at

[8] In addition to CR 60(b)(1), Chen cited other subsections of CR 60 as bases to vacate: CR 60(a)(clerical mistake), CR 60(b)(3) (newly discovered evidence), CR 60(b)(4) (fraud), CR 60(b)(5) (void judgment), and CR(b)(11)(any other reason justifying relief from the operation of the judgment). In granting Chen's motion, the superior court relied solely on "irregularity" under CR 60(b)(1).

654. In Lane v. Brown & Haley, the court reversed an order vacating an order of dismissal because the failure to provide notice of a pending summary judgment motion was not an irregularity since "[c]lient notice is not a court requirement." 81 Wn. App. at 106.

We review a decision granting a motion to vacate under CR 60(b) for abuse of discretion. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). The trial court abuses its discretion when its decision is based on untenable grounds or reasoning. Id. at 309-10. An abuse of discretion also occurs when the trial court bases its ruling on an erroneous view of the law. In re Marriage of Shortway, 4 Wn. App. 2d 409, 418, 423 P.3d 270 (2018).

The failure to specify the basis for granting summary judgment is not an "irregularity" within the meaning of CR 60(b) because there is no prescribed rule that requires the trial court to articulate the basis for its ruling. "[T]he superior court does not need to state its reasoning in an order granting summary judgment." Greenhalgh v. Dep't. of Corr., 180 Wn. App. 876, 888, 324 P.3d 771 (2014). CR 56 does not require the court to make findings. CR 52(a)(5)(B) expressly provides that findings of fact and conclusions of law are not necessary "[o]n decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2)." Indeed, because appellate review of summary judgment is de novo, findings of fact and conclusions of law are not only unnecessary, they are superfluous and will be disregarded by the court on appeal. Nelson v. Dep't of Labor & Indus., 198 Wn. App. 101, 109, 392 P.3d 1138 (2017), review denied, 190 Wn.2d 1025, 420 P.3d 707 (2018); Hemenway v. Miller, 116 Wn.2d 725, 731, 807

P.2d 863 (1991). Chen cites caselaw that pertains to judgments entered in cases where findings are required and thus has no applicability here. See Little v. King, 160 Wn.2d 696, 722, 161 P.3d 345 (2007) (Madsen, J. concurring/dissenting) (involving motion to vacate a default judgment). The order granting summary judgment specified the materials considered in accordance with CR 56(h) and was thus fully compliant with CR 56, the applicable prescribed rule.

In any event, contrary to the trial court's ruling below, the legal effect of the court's order granting summary judgment is not ambiguous when viewed in context of the record as a whole. Any ambiguity was resolved when the court specifically rejected Chen's request on reconsideration to limit the scope of its ruling by clarifying that the dismissal was "without prejudice." The effect of the court's order was also made clear by the fact that the court dismissed the claims against both SCH and the physicians. Since SCH did not dispute the sufficiency of service of process or seek summary judgment on any other procedural ground, the court must have dismissed the claims against the physicians on the merits because the only claims against SCH were based on vicarious liability for the alleged wrongful acts of the physicians.

The superior court's conclusions that Judge Hill was required to address the personal jurisdiction issue before the merits and may have erred with respect to the scope of relief granted to the defendants are not matters "affecting the regularity of the proceedings." See Burlingame, 106 Wn.2d at 336. We need not resolve the issue of whether Judge Hill, in fact, first resolved the jurisdictional issue in Chen's favor. Even assuming that the superior court's analysis on that issue

was correct, it is clear that the court vacated summary judgment because of a perceived a legal error. That a judgment or order is legally erroneous is a ground for appeal, but not a basis to set aside the judgment or order.

It is a "long recognized" principle that an error of law will not support vacating a judgment under CR 60(b). Port of Port Angeles v. CMC Real Estate Corp., 114 Wn.2d 670, 673, 790 P.2d 145 (1990). Errors of law are not extraordinary circumstances "correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors." State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). Indeed, the trial court's power to vacate judgments

> "[I]s not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion."

Kern v. Kern, 28 Wn.2d 617, 619, 183 P.2d 811 (1947) (quoting 1 Black on Judgments (2nd ed.) § 329, at 506).

Chen maintains that the superior court's legal analysis was correct and consistent with Washington precedent, and therefore the superior court did not abuse its discretion. But again, because a motion to vacate is not a mechanism to correct legal errors, her arguments are unavailing.[9]

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[9] Chen also raises several procedural arguments. She contends that the physicians' briefing fails to comply with RAP 10.3(a)(5) by providing a fair statement of the facts and procedure relevant to the legal issues raised. We disagree. The Appellants' briefing is compliant with the Rules of Appellate Procedure. The parties simply disagree about the relevance of particular facts in view of the legal issues before us. And contrary to Chen's argument, the Appellants are not required to include in the record on appeal every document filed below. Their obligation is to perfect the record so that we have before us all the evidence necessary to resolve the issue raised on appeal. See RAP 9.2(b); Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994). They have done so. And although Chen argues that the physicians have filed an unauthorized

The court abuses its discretion by vacating an order for reasons other than those specified by CR 60(b). Burlingame, 106 Wn.2d at 336; Tang, 57 Wn. App. at 654-56. Here, the superior court attempted to correct legal error by vacating the order. Relying on a legal error to set aside an order granting summary judgment, the court treated CR 60(b) as a substitute for direct appeal. This was an abuse of discretion and accordingly, we reverse.

II. Cross Appeal

Chen contends that additional bases under CR 60 support vacating the order granting summary judgment as to SCH. And for various reasons, she claims that the order granting summary judgment is "clearly erroneous."

The physicians argue that Chen cannot seek review of the 2019 order granting reconsideration and vacating summary judgment as to the physicians because she is not aggrieved by that order. See RAP 3.1 ("Only an aggrieved party may seek review by the appellate court."); Randy Reynolds & Assocs., Inc. v. Harmon, 193 Wn.2d 143, 150, 437 P.3d 677 (2019) (a party is aggrieved when a decision affects their pecuniary interests or personal rights or imposes a burden or obligation on them). However, the effect of the order granting reconsideration is to vacate summary judgment as to the physicians, and deny the motion to vacate summary judgment as to SCH. Because Chen seeks to reverse the denial of her

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overlength reply brief, the brief is within the 50-page limit for a reply brief filed by an appellant/cross respondent. See RAP 10.4(b). Chen's procedural motions made in connection with her response and cross appeal are denied.

motion to vacate as it pertains to SCH, she is aggrieved by that aspect of the order and is not precluded from seeking review.

Nevertheless, many of Chen's arguments do not address the standards to vacate under CR 60, but merely challenge the underlying order granting summary judgment dismissal. For instance, Chen contends that the court erred by denying her motion for a continuance to allow her to conduct discovery, erred in granting summary judgment before the discovery cutoff date, and that genuine issues of material fact precluded the entry of summary judgment. See CR 56(c). But on appeal of a trial court's decision on a CR 60(b) motion, we review only the court's decision on the motion—not the underlying order. Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). We do not consider Chen's arguments that are solely directed at the underlying 2017 summary judgment order because those arguments cannot be raised in this appeal from the court's decision on her motion to vacate.

To the extent Chen contends that the court was required to vacate the order of summary judgment as to both the physicians and SCH on other grounds, we disagree. For instance, Chen relies on the physicians' failure to comply with CR 56(c) by less than 28 days' notice of its motion before the summary judgment hearing. But she did not oppose summary judgment on this basis or establish prejudice. Even if raised in the context of a direct appeal, Chen could not establish that the court abused its discretion by proceeding with the hearing in these circumstances. See Hood Canal Sand & Gravel, LLC v. Goldmark, 195 Wn. App.

284, 295, 381 P.3d 95 (2016) (court does not abuse its discretion by deviating from CR 56's timing requirements if there is adequate notice and time to prepare).

Chen also fails to establish that she was entitled to vacate summary judgment because SCH withheld "critical medical evidence." A judgment may be vacated under CR 60(b)(3) based on new evidence if the moving party presents evidence that could not have been discovered exercising due diligence in time to move for a new trial. Wagner Dev., Inc. v. Fid. & Deposit Co. of M.D., 95 Wn. App. 896, 906, 977 P.2d 639 (1999). The fact that Chen obtained medical records through discovery in other litigation does not establish that she could not have obtained them exercising due diligence. Between the time of J.L.'s evaluation and treatment in 2013 and the physicians' motion for summary judgment in February 2017, Chen made no request to SCH for medical records through discovery or otherwise.

The record does not establish a basis to vacate because Judge Hill presided over the previously-dismissed dependency and did not recuse in this matter. Chen did not file an affidavit of prejudice or a motion to recuse. Recusal is not required unless the circumstances are such that the judge's "impartiality might reasonably be questioned." Wash. Code of Judicial Conduct, 2.11(A). We presume, however, that judges perform "regularly and properly and without bias or prejudice." Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); Jones v. Halvorson–Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). The dependency proceeding was separate from Chen's lawsuit, and there is nothing in the record to give rise to

inference that the judge's impartiality "might be questioned." No authority requires recusal in these circumstances.

And finally, the summary judgment order is not void for purposes of CR 60(b)(5) because the court did not appoint a GAL to represent J.L. and L.L. A parent may initiate a lawsuit as a guardian on behalf of a minor child. See e.g. Taylor v. Enumclaw Sch. Dist. No. 216, 132 Wn. App. 688, 694, 133 P.3d 492 (2006) (father authorized to sue as minor son's guardian). RCW 4.08.050(1) provides that a trial court must appoint a GAL for children under 14 years of age "upon the application of a relative or friend of the infant." Here, Chen and her husband initiated the lawsuit on their own behalf and as parents and natural guardians of J.L. and L.L. They did not ask the court to appoint a GAL at any time before the court entered the order granting summary judgment. No authority required the court to appoint a GAL on its own initiative.

Because the superior court erred in granting the motion to vacate the order of summary judgment as to the physicians, we reverse and remand for the court to reinstate the order granting summary judgment and dismissing Chen's claims against them. In all other respects, we affirm.

Affirmed, reversed in part and remanded.

WE CONCUR:

APP. D

FILED
7/22/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

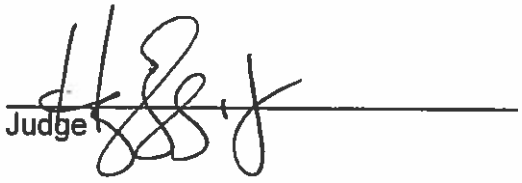
SUSAN CHEN, as parents and natural guardians of J.L., a minor, and L.L., a minor, and NAIXIANG LIAN, as parents and natural guardians of J.L., a minor, and L.L., a minor, Respondents/Cross-Appellants. v. DARREN MIGITA, M.D.; IAN KODISH, M.D.; JAMES METZ, M.D.; SEATTLE CHILDREN'S HOSPITAL; REDMOND CITY POLICE DEPARTMENT DETECTIVE NATALIE D'AMICO; THE CITY OF REDMOND; and STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellants/Cross-Respondents.	No. 79685-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

The respondent/cross-appellant, Susan Chen, filed a motion for reconsideration and motion to publish the court's opinion filed on June 22, 2020. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied. It is further

ORDERED that the motion to publish the opinion is denied.

FOR THE COURT:



Judge

APP. E

The Honorable Hollis R. Hill
Hearing Date: March 3, 2017
Hearing Time: 10:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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,

Plaintiffs,

vs.

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

CASE NO. 16-2-26013-6 SEA

DEFENDANTS DARREN MIGITA, M.D., IAN KODISH, M.D., AND JAMES METZ, M.D.'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

I. RELIEF REQUESTED

Defendants, Darren Migita, M.D., Ian Kodish, M.D. and James Metz, M.D. ("defendants" or "physicians") respectfully request an order dismissing Plaintiffs' Complaints against them with prejudice. First, this Court lacks personal jurisdiction over Dr. Migita, Dr. Kodish, and Dr. Metz because Plaintiffs failed to effect original service of process of their Complaints with a Summons. The Fourteenth Amendment requires that adequate notice be given to parties regarding the pendency of any action against them, and due process requires

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strict compliance with the statutes and court rules regarding service of process. Plaintiffs apparently attempted to serve their Complaints against Dr. Migita, Dr. Kodish, and Dr. Metz by delivering them to Seattle Children's Hospital. The law requires that each defendant be served personally, or by leaving a copy of the Summons at their "usual abode" with someone of suitable age pursuant to RCW 4.28.080(16) and pursuant to CR 4(a)(1). As to the defendant physicians, Plaintiffs failed to accomplish this, and the law requires dismissal.

Second, plaintiffs failed to commence their action against Dr. Kodish and Dr. Metz within the statute of limitations. Plaintiffs' Complaints filed against Dr. Kodish and Dr. Metz October 2016 were unsigned, in violation of CR 11(a) and the attendant local rule. The Complaints were thus void *ab initio*. Voided complaints have no legal effect and are not subject to later amendment because there is nothing to amend. Because Plaintiffs waited until the eve or near eve of the statute of limitations running, this is fatal to Plaintiffs' Complaints because they cannot re-file a timely action against either Dr. Kodish or Dr. Metz based on the actions alleged in their Complaints.

Third, there is no evidence that Plaintiffs have retained any qualified expert who believes Dr. Migita, Dr. Kodish or Dr. Metz fell below the standard of care in any regard as to the health care rendered to the minor J. Lian, or that such actions proximately caused harm. This requires dismissal as a matter of law.

Fourth, RCW 26.44.060 provides immunity for physicians who make a good faith report pursuant to statute as to alleged child abuse or neglect. To the extent Plaintiffs' allegations raise a "false reporting" claim with regard to their communications with Child Protective Services (CPS), any claim based on those allegations must be dismissed.[1]

[1] Defendants incorporate by reference the statement of facts articulated in the contemporaneous brief filed by defendant Seattle Children's Hospital, and the supporting documentation provided therewith.

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II. STATEMENT OF FACTS

A. J. Lian was treated at the Emergency Department of Seattle Children's Hospital and was placed into state custody due to suspicion for abuse and/or neglect by his plaintiff parents.

On October 24, 2013, the minor J. Lian was treated at Seattle Children's Hospital. *See* Declaration of Bruce W. Megard in Support of Defendants Darren Migita, M.D., James Metz, M.D., and Ian Kodish, M.D.'s Motion for Summary Judgment of Dismissal ("Megard Dec."), Ex. 1. He was estimated to be underweight at 12.2 kg (26 pounds). *See id.* The child was noted to have a failure to thrive, chronic constipation, diarrhea, and a history of elevated Blood Urea Nitrogen (BUN).[2] *See id.* The providers stated:

> **Clinical exam shows gross malnutrition and muscle wasting. Concern for medical cause of wasting vs. neglect. Given mother's resistance to medical evaluation in this ill child, he is currently in state custody.**

Id. at 3 (emphasis added). The providers added that the child would be admitted to the general medicine service with Suspected Child Abuse and Neglect (SCAN) consulting to "continue with medical evaluation and initiate treatment for malnutrition." The ED discharge diagnosis was "failure to thrive," and he was admitted to the hospital. *Id.* at 3.

B. Plaintiffs filed a Complaint against Dr. Migita but failed to effect personal service of process.

On October 24, 2016, Plaintiffs, as "parents and natural guardians" of two minors, including J. Lian, filed a Complaint against Dr. Migita and Seattle Children's Hospital. Megard Dec., Ex. 2 ("Dr. Migita Complaint"). In the Complaint against Dr. Migita, Plaintiffs allege Dr. Migita provided medical services to J. Lian on October 24, 2013 in the emergency department of Seattle Children's Hospital. *Id.* at 2, ¶¶ 8-9. They allege that during the treatment provided on October 24, and during a 72-hour hearing allegedly conducted from October 28 to October 30, 2013, Dr. Migita "made a misdiagnosis" of J. Lian that resulted in

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[2] A BUN test is done to see how well your kidneys are working. If your kidneys are not able to remove urea from the blood normally, your BUN level rises. Heart failure, dehydration, or a diet high in protein can also make your BUN level higher. Liver disease or damage can lower your BUN level.

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him being removed out of his home by Child Protective Services (CPS) for nine months. *Id.* at 3, ¶ 10. They further allege that Dr. Migita fell below the standard of care, failed to deliver accurate information to CPS, and failed to "meet the applicable standard in 'good faith' of being expert witness." *Id.* at 4-5, ¶¶ 12-17.

Dr. Migita is not an employee of Seattle Children's Hospital and has not authorized Seattle Children's Hospital to accept legal service of process on his behalf. *See* Declaration of Darren Migita, M.D. ("Migita Dec.") at ¶ 2. *See also* Declaration of Bruder Stapleton, M.D. ("Stapleton Dec.") at ¶ 2.

C. Plaintiffs filed an unsigned Complaint against Dr. Metz but failed to effect service of process.

On October 28, 2016, Plaintiffs filed an ***unsigned*** Complaint against Dr. Metz and Seattle Children's Hospital under the same cause number created with the filing of the Complaint against Dr. Migita. Megard Dec., Ex. 3 ("Dr. Metz Complaint"). Plaintiffs allege that on October 27, 2013, Dr. Metz provided medical services to J. Lian. *Id.* at 2. They allege that Dr. Metz made a "misdiagnosis" for J. Lian, causing him to be removed from his parent's home by Child Protective Services for nine months. *Id.* at 3. They allege Dr. Metz fell below the standard of care, failed to deliver accurate information to CPS, and caused mental anguish and stress for Plaintiffs. *Id.* at 3-4.

Dr. Metz is not an employee of Seattle Children's Hospital and has not authorized Seattle Children's Hospital to accept legal service of process on his behalf. *See* Declaration of James Metz, M.D. ("Metz Dec.") at ¶ 2. *See also* Stapleton Dec. at ¶ 3.

D. Plaintiffs filed an unsigned Complaint against Dr. Kodish but failed to effect personal service of process.

On October 28, 2016, Plaintiffs filed an ***unsigned*** Complaint against Dr. Kodish and Seattle Children's Hospital under the same cause number created with the filing of the Complaint against Dr. Migita. Megard Dec., Ex. 4 ("Dr. Kodish Complaint"). Plaintiffs allege that on October 28, 2013, during J. Lian's hospitalization at Seattle Children's

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Hospital, and during the 72-hour hearing on October 30, 2013, Dr. Kodish made a "misdiagnosis" of J. Lian, causing him to be removed by CPS for nine months. *Id.* at 2-3. They allege Dr. Kodish fell below the standard of care, failed to deliver accurate information to CPS, and caused mental anguish and stress for Plaintiffs. *Id.* at 3-4.

Dr. Kodish is not an employee of Seattle Children's Hospital and has not authorized Seattle Children's Hospital to accept legal service of process on his behalf. *See* Declaration of Ian Kodish, M.D. ("Kodish Dec.") at ¶ 2. *See also* Stapleton Dec. at ¶ 4.

E. Plaintiffs filed a Summons naming Seattle Children's Hospital and the three physicians.

On December 8, 2016, Plaintiffs filed a Summons under this cause number directed at Seattle Children's Hospital and Dr. Migita, Dr. Kodish, and Dr. Metz. *See* Megard Dec., Ex. 5. The Summons was signed by both Plaintiffs, but it did not include any proof of service. *See id.*

F. Plaintiffs filed an "Amended Complaint" seeking to add the Redmond City Police Department and Detective Natalie D'Amico.

On December 12, 2016, Plaintiffs filed another Complaint under this cause number, this time against the Redmond City Police Department and Detective Natalie D'Amico. *See* Megard Dec., Ex. 6.[3] The Plaintiffs are Susan Chen and Naixiang Lian, and they allege an action under 42 U.S.C. § 1983. They state that their claim arises from a December 9, 2013 police report that "intentionally and willfully subjected plaintiff to....false arrest and false imprisonment." *Id.* at 2, ¶ 2. They allege that on October 25, 2013, Detective D'Amico assisted Child Protective Services to remove Plaintiffs' older son, "L. Lian", into state custody. *Id.* at 5, ¶ 22.

G. The King County Deputy Sheriff filed multiple Returns of Service, none of which reflected personal service on the physicians.

On December 13, 2016, the King County Deputy Sheriff filed four Returns of Service.

[3] This Complaint is identified as an "Amended Complaint" on the cause docket. *See* Dkt. #12.

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Megard Dec., Ex. 7. In the three Returns of Service addressing the Complaints filed against defendants, the King County Deputy Sheriff, Alan Kelley, ***erroneously*** stated that he personally served process upon the Dr. Migita, Dr. Kodish, and Dr. Metz, respectively:

> By delivering such true copy, personally and in person, to Diana Williams, who is an executive assistant and who stated that **she was authorized to accept legal service for Children's Hospital** thereof, on the date above specified.
>
> **At 4800 Sand Point Way Northeast, Seattle, WA 98105, King County, State of Washington.**

See id. (emphasis added).

H. Plaintiffs filed an Amended Complaint and Summons directed at the State of Washington and Department of Social & Health Services.

On December 21, 2016, Plaintiffs filed another Complaint for Damages under this cause number, alleging claims against the State of Washington and Department of Social & Health Services. Megard Dec., Ex. 8. They allege that the lawsuit arises out of DSHS' failure to investigate a "wrong CPS referral" to protect Plaintiffs' son J. Lian from a foreseeable harm as an "autism child" and failed to provide him therapy services while "he was in dire needs for months and caused his significant regressions while in state custody." *Id.*, ¶ 7. Plaintiffs' Complaint was signed only by Susan Chen. *See id.* at 18.

I. Plaintiffs filed a Complaint against the City of Redmond.

Also on December 21, 2016, Plaintiffs filed another Complaint under this cause number against the City of Redmond. *See* Megard Dec., Ex. 9. They allege that the City of Redmond committed negligence with regard to supervising and training its employees to protect Plaintiffs "to be free from an unreasonable search and seizure." *Id.* at 2, ¶ 1.

III. EVIDENCE RELIED UPON

1. Declaration of Bruce W. Megard, Jr. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of

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Dismissal, with attached exhibits;[4]

2. Declaration of Darren Migita, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal

3. Declaration of James Metz, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and Ian Metz, M.D.'s Motion for Summary Judgment of Dismissal

4. Declaration of Ian Kodish, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal;

5. Declaration of Bruder Stapleton, M.D. in Support of Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.'s Motion for Summary Judgment of Dismissal; and

6. The records and pleadings in the Court file.

IV. LEGAL AUTHORITY AND ARGUMENT

A. This action is ripe for summary judgment determination as questions regarding personal jurisdiction and statutes of limitations present pure issues of law.

The function of summary judgment is to determine if there is a genuine issue of material fact which requires a formal trial. *Case v. Daily Record, Inc.*, 83 Wn.2d 37, 42, 515 P.2d 154 (1973) (quotation omitted). When there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is properly granted. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011) (citations omitted); *see also* CR 56(c). A

[4] Because defendants ask this Court to consider materials outside the pleadings in determining whether to dismiss for lack of personal jurisdiction, this motion is framed as a motion for summary judgment as opposed to a CR 12(b)(2) motion. *See Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.*, 9 Wn. App. 284, 289, 513 P.2d 102 (1973) ("If matters outside the pleadings are presented to the court on a motion to dismiss for lack of personal jurisdiction under CR 12(b)(2) the motion is to be treated as a motion for summary judgment"). However, defendants expressly do not waive any of the CR 12(b) defenses by bringing this motion, including lack of personal jurisdiction or improper service. *See Butler v. Joy*, 116 Wn. App. 291, 296, 65 P.3d 671 (2003) (summary judgment motion is not a CR 12 motion and bringing summary judgment was not a waiver of CR 12(b) defenses).

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defending party may support its motion for summary judgment by "merely challenging the sufficiency of the plaintiff's evidence as to any material issue." *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 839 P.2d 744 (1992).

Moreover, whether a plaintiff properly served a defendant is a purely legal issue that cannot be presented to a jury, and is thus, appropriately resolved by the trial court.[5] *See, e.g., Jackson v. Sacred Heart Med. Ctr.*, 153 Wn. App. 498, 500, 225 P.3d 1016 (2009); *Gross v. Sundig*, 139 Wn. App. 54, 67, 161 P.3d 380 (2007). Whether a trial court was correct in asserting or not asserting personal jurisdiction over a party is also a question of law. *See, e.g., Hartley v. Am. Contract Bridge League*, 61 Wn. App. 600, 603, 812 P.2d 109 (1991). When there is a challenge to personal jurisdiction, "the plaintiff has the initial burden of making a *prima facie* showing of proper service." Tegland, 14 Wash. Prac., *Civ. Proc.* § 4:40 (2d. ed. 2013) (citation omitted). **Dismissal is an appropriate remedy** for when the court lacks personal jurisdiction over a party due to insufficient service of process. *See, e.g., French*, 116 Wn.2d at 595; *Crouch v. Friedman*, 51 Wn. App. 731, 734-35, 754 P.2d 1299 (1988); *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 36, 823 P.2d 518 (1992).[6]

Similarly, whether an action was brought within the applicable statute of limitations is also an issue that should be resolved as a matter of law. "The applicable statute of limitations is an issue of law and is a proper subject for summary judgment." *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 358, 247 P.3d 816 (2011). If the record demonstrates that there is no genuine issue of material fact as to when a statutory period for bringing a cause of

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[5] Defendants note that their counsel filing a notice of appearance does not preclude them from challenging the sufficiency of service of process. *See, e.g., Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 178, 744 P.2d 1032 (1987); *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 209, 660 P.2d 756 (1983); *Sanders v. Sanders*, 63 Wn.2d 709, 714, 388 P.2d 942 (1964); *Gerean*, 108 Wn. App. at 973. Nor does a delay in filing an answer waive the defense. *See French v. Gabriel*, 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991).

[6] Although a defendant technically appears by filing a motion or an answer challenging personal jurisdiction, the appearance does not constitute a waiver of the right to challenge personal jurisdiction and the defendant is not required to file a "special" or limited" appearance for purposes of challenging personal jurisdiction. Tegland, 14 Wash. Prac., *Civ. Proc.* § 4:37 (2d ed. 2013) (citations omitted). *See also Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 765-66, 757 P.2d 933 (1988) (defendant does not waive a jurisdictional defense by moving for dismissal).

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action commenced, summary judgment based on a statute of limitations should be granted.[7]

B. *Pro se* parties are held to the same standards as parties represented by counsel.

"A trial court must hold *pro se* parties to the same standards to which it holds attorneys." *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010). It is reversible error for a trial court to improperly aid or give inordinate leniency to a *pro se* party. *See, e.g., Edwards*, 157 Wn. App. at 464-65. *Pro se* parties are bound by the same rules of conduct and procedure as a licensed attorney. *See In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001). Therefore, the law requires that the Court treat Plaintiffs Susan Chen and Naixiang Lian as if they were represented parties.

C. Dismissal is required because this Court lacks personal jurisdiction over Dr. Migita, Dr. Kodish, and Dr. Metz because Plaintiffs failed to effect personal service on them.

Dismissal of Plaintiffs' suit is mandated when this Court lacks personal jurisdiction over Dr. Migita, Dr. Metz, and Dr. Kodish due to Plaintiffs' failure to effect original service of process. "Under the due process clause, a Washington court may not assert personal jurisdiction over a defendant unless (1) the defendant is given adequate notice and opportunity to be heard, and (2) the defendant has the requisite minimum contacts with the state of Washington." Tegland, 14 Wash. Prac., *Civ. Proc.* § 4:1 (2d ed. 2013).

As to the first requirement, the Fourteenth Amendment requires that any deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652 (1950) (citations omitted).[8] Due process requires adequate notice be given to interested parties "of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. The notice must be

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[7] *See, e.g., Cox v. Oasis Phys. Therapy, PLLC*, 153 Wn. App. 176, 186, 222 P.3d 119 (2009); *Olson v. Siverling*, 52 Wn. App. 221, 224, 758 P.2d 991 (1988); *Wood v. Gibbons*, 38 Wn. App. 343, 349, 685 P.2d 619 (1984).

[8] True and correct copies of all out of state authority are provided to this Court and Plaintiffs pursuant to LCR 7(b)(5)(B)(v).

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"reasonably calculated, under all the circumstances," to reach the defendant. *Id.* at 318. Washington adopted the "reasonable notice" standard from *Mullane*. *See, e.g., In re Marriage of McLean,* 132 Wn.2d 301, 308-09, 937 P.2d 602 (1997).

Due process requirements cannot be met without proper service of process, which is the threshold requirement for the trial court to assert personal jurisdiction over the party. "Basic to litigation is jurisdiction, and first to jurisdiction is service of process." *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005) (citations omitted). Further, "[p]roper service of the Summons and complaint is a prerequisite to a court obtaining jurisdiction over a party." *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011) (citation omitted). *See also Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996) ("A trial court does not have jurisdiction over a defendant who is not properly served"). Also, "[s]ervice of process is sufficient only if it satisfies the minimum requirements of due process and the requirements set forth by statute." *Powell v. Sphere Drake Ins. PLC*, 97 Wn. App. 890, 899, 988 P.2d 12 (1999).

Indeed, "beyond due process, statutory service requirements must be complied with in order for the court to finally adjudicate that dispute." *Farmer v. Davis*, 161 Wn. App. 420, 433, 250 P.3d 138 (2011) (citation omitted). *See also Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972). RCW 4.28.080 delineates these requirements as to a variety of persons and entities. Personal jurisdiction over Washington residents "is obtained either **by serving the defendant personally** or by substitute service [under RCW 4.28.080(16)]." *Lepeska v. Farley*, 67 Wn. App. 548, 551, 833 P.2d 437 (1992) (emphasis added). Applicable here, the statute provides that a Summons shall be served by delivering a copy:

> to the defendant personally, or by leaving a copy of the Summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

RCW 4.28.080(16). *See also* CR 4(d) (describing allowable methods of service).

A plaintiff must strictly comply with the statutory requirements for service of process.

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See, e.g., Weiss v. Glemp 127 Wn.2d 726, 732-34, 903 P.2d 455 (1995) (substantial compliance with personal service statute not sufficient). A defendant's **actual knowledge of the Summons and Complaint**, unaccompanied by the statutorily prescribed notice, is not sufficient.[9] As noted by Tegland:

> In other words, the statutory requirements are **jurisdictional**, and failure to comply with the statutory requirements **deprives the court of personal jurisdiction over the defendant**, even if the defendant received actual notice of the proceeding.

3 Wash. Prac., Rules Practice *CR 4* (7th ed. 2013) (citations omitted) (emphasis added). Indeed, Tegland also notes that the modern trend is to "impose more rigorous requirements of notification." 14 Wash. Prac., *Civ. Proc.* § 4:2 (2d ed. 2013) (citation omitted).

If the trial court has not acquired jurisdiction over a defendant, **that defendant is entitled to immediate dismissal**. *See Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970). The burden is on the plaintiff to first establish proper service, which may be made by producing an affidavit of service "that shows that service was properly carried out." *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005) (citation omitted).[10]

Neither Dr. Migita, Dr. Kodish, nor Dr. Metz were personally served by the terms of RCW 4.28.080, and this Court lacks personal jurisdiction over them. RCW 4.28.080(16) requires personal service be made either (1) personally on the defendant, or (2) by leaving copies of the Summons and Complaint at the defendant's place of abode (place of residence) with a person of suitable age and discretion that is a resident in the defendant's abode. There is no dispute that Plaintiffs have failed to meet these jurisdictional requirements. Migita Dec.

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[9] *See, e.g., Gerean v. Martin-Joven*, 108 Wn. App. 963, 975, 33 P.3d 427 (2001) (dismissal affirmed for lack of service even when party had actual notice of the action); *In re Marriage of Logg*, 74 Wn. App. 781, 786, 875 P.2d 647 (1994) (no personal jurisdiction over husband in a marriage dissolution when Summons and petition were not properly served); *Meadowdale Neighborhood Committee v. City of Edmonds*, 27 Wash. App. 261, 616 P.2d 1257 (1980) (mayor had actual knowledge); *Veradale Valley Citizens' Planning Committee v. Board of County Com'rs of Spokane County*, 22 Wash. App. 229, 588 P.2d 750 (1978).

[10] *See, e.g., Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 654, 230 P.3d 625 (2010); *Coughlin v. Jenkins*, 102 Wn. App. 60, 65, 7 P.3d 818 (2001); *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997); *Walker v. Bonney-Watson Co.*, 64 Wn. App. at 36.

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at ¶ 3; Metz Dec. at ¶ 3; Kodish Dec. at ¶ 3. Plaintiffs are apparently under the misapprehension that leaving a copy of the Complaints at Seattle Children's Hospital is sufficient to render original service on the physicians. *See* Megard Dec., Ex. 7. It is not. Neither Dr. Migita, Dr. Kodish, nor Dr. Metz's workplace is their "abode." *See Streeter-Dybahl v. Nguyet Huynh*, 157 Wn. App. 408, 413, 236 P.3d 986 (2010) (the defendant's place of abode is the defendant's "center of domestic activity"). Neither Dr. Migita, Dr. Kodish nor Dr. Metz has ever authorized Seattle Children's to accept legal service on their behalf. Stapleton Dec. at ¶¶ 2-4; Migita Dec. at ¶ 2; Metz Dec. at ¶ 2; Kodish Dec. at ¶ 2.

Additionally, receipt of a complaint at a person's workplace in the mail is not service of process. Finally, even if they had been served with signed Complaints as contemplated by the law, none of these defendants were served with or received a copy of a Summons as required by CR 4(a)(1) and RCW 4.28.020(16). These rules are strictly interpreted, and dismissal is required when this Court lacks personal jurisdiction over any of these defendants. *See Bethel*, 3 Wn. App. at 865-66.

D. Dismissal of Dr. Kodish and Dr. Metz is required when plaintiffs have not commenced an action against them within the statute of limitations.

1. Washington has a strong policy of enforcing statutes of limitations.

Washington courts have repeatedly recognized the strong policy behind the strict enforcement of statutes of limitations: "The policy behind statutes of limitations is to ensure essential fairness to defendants and to bar Plaintiffs who have slept on their rights." Karl B. Tegland, 16 Wash. Prac., *Tort Law & Practice* § 9.1 (3d ed. 2012) (citing multiple cases); *see also Burns v. McClinton*, 135 Wn. App. 285, 292-93, 143 P.3d 630 (2006) ("The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims."); *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 585 P.2d 812 (1978). Consistent with the above policy, a plaintiff must commence a claim within the applicable statute of limitations to avoid

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a statute of limitations defense and potential dismissal of his or her claim.[11]

2. A party commences an action by serving a copy of a Summons with a Complaint or by filing a Complaint.

CR 3 defines how an action is "commenced." Tegland, 15A Wash. Prac., *Handbook on Civ. Proc.*, § 3.1 (2016-17 ed.). The rule states:

> **(a) Methods.** Except as provided in rule 4.1, a civil action is **commenced by service of a copy of a Summons together with a copy of a complaint,** as provided in rule 4 or by filing a complaint. Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the Summons and complaint within 14 days after service of the demand or the service shall be void. An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.

CR 3(a) (emphasis added).

Further, and as referenced within CR 3 above, RCW 4.16.170 controls "commencement" within the context of tolling the applicable statute of limitations. Under that statute, an action is only deemed commenced when the Summons and complaint is filed **or** served. *See, e.g., Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 968-69, 33 P.3d 427 (2001). If, however, the party only serves the Summons and complaint, but does not file, or vice versa, the action is considered only "tentatively commenced" until perfected. *See Banzeruk v. Estate of Howitz ex. rel. Moody*, 132 Wn. App. 942, 945-46, 135 P.3d 512 (2006); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991). If the second step of either filing or serving the Summons and complaint is not completed within **90 days**, the action is treated as if it had not been commenced for the purposes of tolling the statute of limitations. RCW 4.16.170; *see also O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 523-24, 125 P.3d 134 (2004). These rules are interpreted strictly, **and even technical oversights are fatal to a claim**. *See*

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[11] *See, e.g., 1000 Virginia Ltd. P'Ship v. Vertecs Corp.*, 158 Wn.2d 586, 574, 146 P.3d 423 (2006) ("A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time"); *Unisys Corp. v. Senn*, 99 Wn. App. 391, 397-98, 994 P.2d 244 (2000).

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Margetan v. Superior Chair Craft Co., 92 Wn. App. 240, 246, 963 P.2d 907 (1998).

3. Medical malpractice claims must be commenced within three years from the date of the allegedly negligent act.

Chapter 7.70 RCW governs all civil actions for injuries resulting from health care provided after June 25, 1976. *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268 (2001) (citing *Branom v. State*, 94 Wn. App. 964, 968-69, 974 P.2d 335 (1999)). The court in *Branom* further recognized that "health care" is construed broadly, noting that it has been previously interpreted as meaning "the process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient." 94 Wn. App. at 969-70 (citation omitted). The statute thus applies to all actions arising out of health care, "regardless of how the action is characterized." *Id.* at 969.

RCW 4.16.350 governs the statute of limitations for medical malpractice claims and imposes a three-year statute of limitations for commencement of such claims. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 112, 103 P.3d 631 (2011). RCW 4.16.350(3) states that the three-year period begins to run from "the act or omission alleged to have caused the injury or condition." *Id.*; *see also Gunnier v. Yakima Heart Center, Inc., P.S.*, 134 Wn.2d 854, 859-64, 953 P.2d 1162 (1998). The statute also states: "**Any action not commenced in accordance with this section shall be barred.**" RCW 4.16.350 (emphasis added).

4. Plaintiffs failed to timely commence their actions against Dr. Kodish and Dr. Metz within the statute of limitations.

Plaintiffs' causes of action against Dr. Kodish and Dr. Metz were not commenced as contemplated by CR 3(a) within the three-year statute of limitation under RCW 4.16.350(3). Based on Plaintiffs' allegations contained in the Complaints filed against Dr. Metz, Plaintiffs needed to have at least initially commenced their action by October 29, 2016, three years after the date he allegedly provided negligent healthcare to Plaintiffs' minor son. *See* Megard Dec., Ex. 3 at 3-4, ¶¶ 6-15. Plaintiffs needed to have at least properly initially commenced their action by October 28, 2016, three-years after the date he allegedly provided negligent

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healthcare. *See* Megard Dec., Ex. 4 at 2-3, ¶¶ 6-14. While Plaintiffs filed Complaints against both Dr. Kodish and Dr. Metz on October 28, 2016, Plaintiffs failed to properly commence their action against each. *See* Megard Dec., Exs. 3, 4.

First, Plaintiffs' Complaints against Dr. Kodish and Dr. Metz are void and are of no legal effect because they were not signed and cannot be remedied by amendment because they are jurisdictional pleadings. CR 11(a) requires that all pleadings be signed, including when the party is not represented:

> A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address.

CR 11(a). Plaintiffs neither signed their Complaints nor provided their addresses as required by law and court and local rule.[12] *See* Megard Dec., Exs. 3, 4. Under Washington law, if the party fails to comply with CR 11's requirement, "**the court will strike the document unless the proponent signs it promptly upon notification of the omission.**" Tegland, 15 Wash. Prac., *Civ. Pro.* § 51:4 (2d ed. 2016) (emphasis added). *See also Griffith v. City of Bellevue*, 130 Wn.2d 189, 922 P.2d 83 (1996).[13]

In this case, because Plaintiffs' Complaints against Dr. Kodish and Dr. Metz are unsigned, this Court lacks jurisdiction over them and no amendment could remedy the defects. Plaintiffs waited until the eve or near-eve of the running of the statute of limitations to file their Complaints against Dr. Metz and Dr. Kodish. *See* Megard Dec., Exs. 3, 4. The obvious risk of doing so is that any defect in the filing of those Complaints could be fatal because Plaintiffs would be unable to file a complaint that complies with CR 11 within the statute of limitations. Moreover, Plaintiffs cannot be afforded leave to "amend" their Complaints by signing them. If the original complaint is void, there is nothing to amend. A

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[12] This also violates KCLR 11(a)(1), applicable to pro se parties.

[13] *See, e.g., In re Estate of Fitzgerald*, 172 Wn. App. 437, 452, 294 P.3d 720 (2012) (noting that a trial court may strike the pleading of a corporation that is not signed by an attorney); *Biomed Comm, Inc. v. State Dept. of Health Bd. of Pharm*, 146 Wn. App. 929, 193 P.3d 1093 (2008) (same).

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re-filed complaint would be an original complaint, and any original complaint filed now or at any point in the future would be untimely as a matter of law as to those defendants. Even if this Court allowed them to re-file signed Complaints, it would not save Plaintiffs' claims against Dr. Kodish or Dr. Metz because the statute of limitations against the physicians ran in October 2016.

Second, out of state authority provides some helpful guidance on this issue. In the recent case of *Beard v. Branson*, 2016 WL 1705290 (Tenn. Ct. App. April 26, 2016), the court denied a petition to rehear and supplement its original opinion reversing the trial court on the grounds that the wrongful death claims were barred by the statute of limitations because the only complaint filed prior to the running of the statute of limitations period was void. The *pro se* party's complaint was unsigned, and the court concluded that it was void *ab initio* and could not be amended. 2016 WL 1705290 *3. The dipositive issue to the *Beard* court was whether the pleading was jurisdictional. It noted: "if the 'unsigned paper' is a jurisdictional notice of appeal **or complaint**, then the court does not obtain jurisdiction over the matter." *Id.* (emphasis added). The *Beard* court quoted a passage from one of its earlier cases as part of its reasoning that the court never obtained jurisdiction:

> Something that is "void" has no legal effect. *See* Black's Law Dictionary 1349 (9th ed. 2010). Another legal dictionary defines "void" as "absolutely null," going on to describe an order that is "void ab initio" as "that which is void in the beginning, **[which] cannot be cured by waiver, acquiescence or lapse of time.**" Bryan A. Garner, A Modern Legal Dictionary 920 (2d ed. 2005). Because the complaint was void as to Catherine's claims, **it was insufficient to commence an action on her behalf**, and neither Catherine nor her claims were properly before the trial court. *See* Tenn. R. Civ. P. 3 (providing that every civil action commences when a complaint is filed). This is of the utmost significance because a decree is "void as to any person shown by the record itself not to have been before the Court in person, or by representation." *See Gentry v. Gentry*, 924 S.W.2d 678, 680 (Tenn.1996); *see also Tate v. Ault*, 771 S.W.2d 416, 419 (Tenn.Ct.App.1988) (noting that a judgment is void if the court rendering it lacked jurisdiction over the subject matter or the parties). For the reasons stated above, neither Catherine nor her claims were before the trial court; therefore, the trial court's judgment is void to the extent it ruled on the merits of Catherine's purported claims. *See Gentry*, 924 S.W.2d at 680.

Id. (citing *Vandergriff v. ParkRidge E. Hosp.*, 2015 WL 9943593, at *4 (Tenn. Ct. App. Aug.

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21, 2015)) (emphasis added).

The *Beard* court further rejected the plaintiff's argument that the unsigned complaint was merely "voidable", and that CR 11 allowed for the party to promptly correct the deficiency. It stated:

> With the foregoing in mind, we turn our attention to consider the office of Tenn. R. Civ. P. 11 in relation to a void complaint. As is the case with all Tennessee Rules of Civil Procedure, Rule 11 applies to civil actions. "All civil actions are commenced by filing a complaint with the clerk of the court." Tenn. R. Civ. P. 3. The filing of a void complaint is a nullity, which has no legal effect. *See Bivins*, 910 S.W.2d at 447; *see also Vandergriff*, 2015 WL 9943593, at *6. **Therefore, the filing of a void complaint does not commence a civil action. Because the filing of a void complaint does not commence a civil action, Rule 11 has no office in relation to a void complaint.** For these reasons, we conclude that Tenn. R. Civ. P. 11 is not available to cure a void complaint.
>
> Moreover if Rule 11.01 were applicable, **it would not provide a basis for relief due to Plaintiff's failure to promptly correct the deficiency.**

Beard, 2016 WL 1705290 *3 (emphasis added). The court continued by expressly rejecting the argument that the amended complaint filed by a licensed attorney after the statute of limitations had run should relate back to the original complaint by noting that, in the cases cited by plaintiff, there was a viable complaint where a party could be added or substituted. *Id.* at *4. It held:

> Here, the complaint Plaintiff seeks to amend does not exist, **it is a nullity because it was void ab initio and "there can be no 'relation back' to a pleading ... that was a nullity from the start."** Because the complaint filed by Mr. Hartley was a nullity, there was no complaint to which the amended complaint could relate back.

Id. (citation omitted) (emphasis added).

The principles articulated in *Beard* are consistent with Washington law and with other jurisdictions as well.[14] Plaintiffs' Complaints against the defendant physicians should be

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[14] *See, e.g., Black v. Ameritel Inns, Inc.*, 81 P.3d 416, 419 (Idaho 2003) ("In conclusion, this Court holds the Appellants violated Rule 11 by submitting an improper signature. Their amended complaint may not relate back in time as a cure to the previous complaint because the complaint was signed in violation of Idaho Rule 11"); *Housing Authority of the City of Hartford v. Collins*, 449 A.2d 189, 191 (Conn. 1982) ("Since there was no action properly before the court to which jurisdiction might attach, it is evident that there was no complaint

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dismissed because they were void *ab initio*, and therefore, they failed to confer subject matter jurisdiction upon this Court. Because the Complaints were void at the time of filing, there is nothing to amend or relate back to, and Plaintiffs would instead have to file new lawsuits if they desired to seek relief against these defendants. However, under RCW 4.16.350(3), any such lawsuit(s) would be untimely by several months based on the allegations raised by Plaintiffs.

E. Plaintiffs have no evidence that Dr. Migita, Dr. Kodish or Dr. Metz fell below the standard of care or proximately caused harm to Plaintiffs.

Plaintiffs' claims against the defendant physicians are controlled by RCW 7.70.040 because they allege that each fell below the standard of care in multiple regards. *See* Megard Dec., Exs. 2, 3, 4. The elements for a medical negligence claim 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). *See also* RCW 4.24.290.[15]

1. Plaintiffs have no evidence that Dr. Migita, Dr. Kodish or Dr. Metz fell below the standard of care in any regard.

A plaintiff must support a medical negligence claim under RCW 7.70 with expert testimony demonstrating that the health care provider failed to act within the applicable standard of care and that that failure caused the alleged injuries. *See Harris v. Groh*, 99 Wn.2d 438, 449, 683 P.2d 113 (1983) ("[E]xpert testimony will generally be necessary to

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properly before the court to which an amendment might be annexed. This being the case, there was no abuse of discretion in denying the motion to amend"); *Morris v. Gates*, 20 S.E.2d 118, 121 (Va. 1942) (holding that an unverified bill of complaint that was not signed by complainants or by counsel acting for complainants, could not be treated as a "pleading" on which to grant or decline relief in absence of appearance and waiver); *Gonzalez v. Wyatt*, 157 F.3d 1016, 1022 (5th Cir. 1998) (holding that pro se prisoner's § 1983 excessive force claims against corrections officer were barred by statute of limitations, even though a non-lawyer inmate mailed complaint to clerk within two-year limitations period; complaint was unsigned, prisoner was confined in different unit than inmate, prisoner did not see complaint until after two-year period expired, and prisoner did nothing to ratify filing of complaint or to tender or to adopt it prior to expiration of two-year period).

[15] The statute provides that a plaintiff must show that the defendant health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances" and that "[s]uch a failure was a proximate cause of the injury complained of." RCW 7.70.040(1) and (2).

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establish the standard of care and most aspects of causation"); *Keck v. Collins*, 181 Wn. App. 67, 90, 325 P.3d 306 (2014). *See also* Tegland, 16A Wash. Prac., *Tort Law and Prac.*, § 15.13 (2013-14 ed.) ("It is the general rule that expert medical testimony is necessary to establish the relevant standard of care and causation in a negligence action against a health care provider").

The absence of standard of care testimony is fatal to a plaintiff's medical negligence claim as a matter of law. "[T]o defeat summary judgment in most medical negligence cases, the plaintiff **must produce competent medical expert testimony** establishing that the injury complained of was proximately caused by a failure to comply with the applicable standard of care." *Davies v. Holy Family Hosp*, 144 Wn. App. 483, 492-93, 183 P.3d 283 (2008) (emphasis added). "If the plaintiff in a medical negligence suit lacks competent expert testimony, **the defendant is entitled to summary judgment.**" *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 (2001); *see also Young*, 112 Wn.2d at 227 (plaintiff's expert's affidavit did not create an issue of fact and summary judgment was subsequently affirmed for defendants).

Here, it is undisputed that Plaintiffs have not identified any expert witness, qualified or not, that will testify to the standard of care of Dr. Migita, Dr. Kodish or Dr. Metz, or that any alleged action fell below that standard. These are not issues that can be determined by a lay jury. A lay person by default does not have any specialized knowledge regarding any treatment issues related to J. Lian. *See Versteeg v. Mowery*, 72 Wn.2d 754, 758-59, 435 P.2d 540 (1967) (lay jury in no position to decide on what is required by physician standard of care). Any self-serving declaration from Plaintiffs about how these are "issues of fact" is insufficient as a matter of law.[16] Because there is no reason to believe Plaintiffs have a

[16] "The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965).

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qualified expert that will opine that Dr. Migita, Dr. Kodish, or Dr. Metz fell below the standard of care in any regard, summary judgment of dismissal is mandated. *See, e.g., Young*, 112 Wn.2d at 227; *Davies*, 144 Wn. App. at 492-93; *Colwell*, 104 Wn. App. at 611.

2. Plaintiffs have no evidence that any allegedly negligent conduct by the physicians proximately caused any harm.

Expert testimony in support of a plaintiff's medical negligence claim is also required in order to show that the health care professional's negligence proximately caused the alleged injuries.[17] "Expert testimony from a medical doctor will generally be necessary to establish causation in a medical malpractice case." *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 448, 177 P.3d 1152 (2008). As stated by the court in *Reese*:

> The requirement of expert testimony to prove causation is a sound and logical rule.... **[J]urors and courts generally do not possess sufficient knowledge and training to determine whether a physician's or surgeon's actions actually caused plaintiff's injury**. The medical field is foreign to common experience. The expert medical witness domesticates this field for the trier of fact, and counsel must be aware of this situation to best serve his client[.]

128 Wn.2d at 308 (citation and quotation omitted) (emphasis added).

That expert testimony "must demonstrate that the alleged negligence 'more likely than not' caused the later harmful condition leading to injury; that the defendant's actions 'might have,' 'could have,' or 'possibly did' cause the subsequent condition, is insufficient." *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 331, 966 P.3d 351 (1998) (citation omitted).[18] Mere speculation that the professional's actions or omissions proximately caused the alleged harm is insufficient for claims to survive summary judgment dismissal. *See, e.g., Reese*, 128 Wn.2d at 309 (citations omitted); *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162-63, 194 P.3d 274 (2008). Indeed, to be admissible, the

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[17] *See, e.g., Reese*, 128 Wn.2d 300, 907 P.2d 282 (1995); *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171 (1989); *Harris*, 99 Wn.2d at 451; *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 774 P.2d 1171 (1989); *see also* DeWolf & Allen, 16 Wash. Prac., *Tort Law and Prac.* § 15.32 (3d ed. 2013-14).

[18] *See, e.g., Shellenbarger v. Brigman*, 101 Wn. Ap. 339, 348-49, 3 P.3d 211 (2000); *Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973) (citations omitted).

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expert's opinion "must be based on a reasonable degree of medical certainty." *Rounds*, 147 Wn. App. at 163.

Plaintiffs have no expert testimony establishing that any allegedly negligent act by Dr. Migita, Dr. Kodish, or Dr. Metz proximately caused any harm to any Plaintiff on a more-probable-than-not basis. As a matter of law, this is fatal to plaintiffs' claims against the defendant physicians. *See, e.g., Davies*, 144 Wn. App. at 496; *Pelton v. Tri-State Memorial Hospital*, 66 Wn. App. 350, 354-55, 831 P.2d 1147 (1992).

F. Plaintiffs' claims against Dr. Migita, Dr. Kodish and Dr. Metz should be dismissed when they are immune from suit pursuant to RCW 26.44.060.

If Plaintiffs' claims against the defendant physicians are interpreted as "false reporting" claims, the physicians must be dismissed because they are immune. Under RCW 26.44.060, Washington law provides immunity for those who participate in the reporting, investigating and participation in a judicial process related to suspected child abuse or neglect, provided it is done in good faith. Washington encourages the reporting of child abuse – even suspected child abuse. *See, e.g., Yuille v. State*, 111 Wn. App. 527, 529, 45 P.3d 1107 (2002); *Whaley v. State*, 90 Wn. App. 658, 668, 956 P.2d 1100 (1998). Indeed, RCW 26.44.030 requires that health care providers with "reasonable cause to believe that a child has suffered abuse or neglect" report that suspected child abuse to law enforcement or the Department of Social and Health Services ("DSHS"). RCW 26.44.030(1)(a). Physicians and hospitals who fail to report suspected abuse may be subject to civil liability. *See, e.g., Kim v. Lakeside Adult Family Home*, 185 Wn. 2d 532, 543, 374 P.3d 121 (2016); *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn. 2d 69, 77, 247 P.3d 421 (2011).

Where a healthcare provider demonstrates good faith via declaration, summary judgment of dismissal is appropriate. In *Whaley v. State, Dep't of Soc. & Health Servs.*, 90 Wn. App. 658, 956 P.2d 1100 (1998), a licensed child care provider, Darcy Hupf, and her employer were sued by the parents of a child in her care after she reported concerns of child abuse to CPS. Ms. Hupf and her employer moved for summary judgment dismissal, arguing

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that they were immune under RCW 26.44.060. *Id.* at 668. Ms. Hupf demonstrated good faith under RCW 26.44.060 via declaration stating that (1) she had no reason to believe allegations of abuse were untrue, (2) she did not intend to cause the separation the parent and child, (3) she reported allegations out of the concern for the "health and welfare" of the child, and (4) she reported the suspected abuse because she knew she was required by law to do so. *Id.* The Division I Court of Appeals found that, as a matter of law, Ms. Hupf's declaration sufficiently demonstrated good faith and granted immunity from the plaintiff's claims based on her reports of abuse to CPS. *Id.* The Court gave no weight to the plaintiff's argument that immunity should be denied because the information upon which Ms. Hupf relied ultimately proved to be false. *Id.* at 668-669.

Through their declarations, Dr. Migita, Dr. Metz, and Dr. Kodish have provided sufficient grounds to establish they similarly acted in "good faith." Migita Dec. at ¶ 4; Metz Dec. at ¶ 4; Kodish Dec. at ¶ 4. Each physician complied with CPS's investigation into the suspected child abuse in this case because they reasonably believed that abuse had occurred and were concerned for the health and welfare of J.L. and L.L. *See id.* Under *Whaley*, these declarations are sufficient to establish good faith and trigger immunity under RCW 26.44.060. Summary judgment is warranted. *See, e.g., Miles v. State*, 102 Wn. App. 142, 159, 6 P.3d 112 (2000) (physician immune from liability even if negligent when he worked with patient's other health care providers, and when "no reasonable person" could find the physician acted without good faith regardless of whether he was mistaken); *Whaley*, 90 Wn. App. at 669 (affirming dismissal of reporting claim when nothing in the record suggested the school director was dishonest in her reporting or acted with any unlawful purpose).

V. CONCLUSION

For the aforementioned reasons, defendants Darren Migita, M.D. Ian Kodish, M.D., and James Metz, M.D. request that this Court dismiss Plaintiffs' Complaints with prejudice. A proposed order to the same effect is provided herewith.

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DATED this 2nd day of February, 2016.

BENNETT BIGELOW & LEEDOM, P.S.

By _____
Bruce W. Megard, Jr., WSBA #27560
Attorney for Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.

I certify that this motion, not counting the caption or the signature block, contains 8265 words, in compliance with LCR 56(c)(3).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times material hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the foregoing in the manner indicated to the parties listed below:

Susan Chen Naixiang Lian P.O. Box 134 Redmond, WA 98073-0134	☐ ☐ ☐ ☑	Legal Messenger Facsimile Email/E-Service 1st Class Mail-- Priority Overnight
Naixiang Lian 17305 NE 135th St. Redmond, WA 98052-2174	☐ ☐ ☐ ☑	Legal Messenger Facsimile Email/E-Service 1st Class Mail-- Priority Overnight
Naixiang Lian 16061 NE 36th St Unit 1204 Redmond, WA 98052	☐ ☐ ☐ ☑	Legal Messenger Facsimile Email/E-Service 1st Class Mail-- Priority Overnight
Susan Chen 141 154th Place Bellevue, WA 98007 *Pro Se Plaintiffs*	☐ ☐ ☐ ☑	Legal Messenger Facsimile Email/E-Service 1st Class Mail-- Priority Overnight
Rando B. Wick Michelle S. Taft Johnson Graffe Keay Moniz & Wick, LLP 925 4th Avenue, Ste. 2300 Seattle, WA 98104 *Attorneys for Seattle Children's Hospital*	☐ ☐ ☑ ☑	Legal Messenger Facsimile Email/E-Service 1st Class Mail-- Priority Overnight

Dated in Seattle, Washington this 2nd day of February, 2017.

Linda J. Vandiver, Legal Assistant

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APP. F

The Honorable Hollis R. Hill

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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, Plaintiffs, vs. 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 WSHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CITY OF REDMOND, Defendants.	CASE NO. 16-2-26013-6 SEA PLAINTIFFS' REPLY ON MOTION FOR RECONSIDERATION

In these proceedings, Susan Chen and Naixiang Lian filed suit as parents and natural guardians of their children, Jason and Leo, against three doctors who were practicing at Seattle Childrens Hospital (SCH) as well as against SCH. Five other suits are pending, three in this Court (against Det. D'Amico, DSHS and the City of Redmond), one before Judge Ramsdell, also in Superior Court (against Dr. Halamay/Allegro Pediatrics), and one before Judge Robart in

Federal Court (against Det. D'Amico). The Halamay case has been continued to May 12 to allow the parents to obtain counsel and affidavits.

The facts in the case were fully explored in civil and criminal cases that covered the period October 2013 to September 2014. Jason Lian was diagnosed as autistic at approximately age 2. He also had extensive GI and digestive problems, which are sometimes associated with autism. He received care for these conditions from multiple providers, including specialists in autism and digestive issues. With a variety of early interventions, including ABA (applied behavior analysis), speech and occupational therapy, Jason made significant progress – he was responsive and generally cheerful, he could communicate, and he could figure out how to solve problems. His GI problems were addressed through diet, which caused him to lose weight but reduced his chronic diarrhea. He was slim but not as slim as his parents and brother.

On October 24, the three physician defendants, who operated in conjunction with the SCAN (suspected child abuse and neglect) team at SCH, disregarded the diagnoses and treatment plans of his treating physicians and alleged that Jason was not autistic, that he did not have the GI problems for which he was being treated (though they prescribed GI medications at discharge several days later), and that his conditions were caused by abuse and/or neglect by his mother. Dr. Migita refused to consult with Jason's parents or his treating physicians and therapists, and testified falsely at the shelter care hearing, misstating the laboratory reports and other findings. This resulted in the removal of both children, an eight month foster care stay for Jason, and the arrest of his mother.

In foster care, Jason was denied his prescribed therapy, and his autistic behaviors and GI problems worsened. Over nine months, his health, behavior and skills declined precipitously, to the point where he lost virtually all skills, and no foster family would keep him due to biting,

screaming and similar behaviors. His treating physicians and therapists objected vigorously to the diagnoses of the SCH doctor defendants and provided statements and declarations to the social workers, investigators and courts. Jason has not been able to regain the skills that he lost, and at nearly age 7 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, Mary Bridge, Swedish and in China, to no avail. Jason had none of these characteristics before the misdiagnoses of the SCH doctors and the disastrous nine month stay in eight different foster homes, with little therapy and minimal contact with his parents and brother.[1]

The family is represented in these proceedings by the mother, who has no legal training, speaks Chinese, and filed *pro se*. The defendant doctors moved for summary judgment on the ground that the mother 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 by the sheriff at their workplace rather than their homes). Drs. Metz and Kodish also claimed that the complaints against them should be dismissed because they were unsigned. All three doctors claimed that these technical defects could not be corrected since the statute of limitations had run shortly after the filing of the complaints. They also claimed that they had immunity for their reports and/or testimony, that the mother had provided no expert affidavits to support her claims, and that she should not be permitted a continuance to obtain an attorney and/or expert affidavits. SCH joined in these claims.

[1] Jason was returned to his father in July but it was two more months (eleven months total) before his mother was allowed to have unsupervised contact with him.

The Court denied the mother's request for a continuance[2] and granted the motion for summary judgment on all claims, but said that the parents could move for reconsideration. In the motion for reconsideration, the mother asked that the Court clarify that the grant of summary judgment is without prejudice to the children, whose statute of limitations will not begin to run until they reach of the age of majority. (Jason is now almost 7; Leo is 9.) In the alternative, she asked that the Court find the action on behalf of the minors to be a nullity due to the failure to appoint a GAL to bring the action. She pointed out that since there was no action on behalf of the minors for judicial consideration, there was no action to dismiss.

In their response, the defendants argue that the parents have not identified the specific grounds for reconsideration under CR 59(a)(1)-(9). The applicable sections are CR 59(7) (dismissal with prejudice against the children is contrary to law since the complaint has been declared void and their statute of limitations has not run) and CR 59 (9) (substantial justice has not been done, particularly for the children, who have suffered and continue to suffer irreparable harm). The defendants again argue that they are protected by immunity and that the plaintiffs were properly required to present opposing expert affidavits at this early stage, without a continuance, in response to the defendants' affidavits, which do not address the facts but instead state simply that they acted in good faith.

Childrens' claims. In their motion for dismissal, the defendant doctors (joined by SCH) stated repeatedly that the improper service and lack of signature on two of the complaints rendered the complaints void *ab initio*. Thus, they stated that:

- "this Court lacks personal jurisdiction because Plaintiffs failed to effect original service of process" (p 1):

[2] In the companion case filed by the parents against Dr. Halamay, a pediatrician, Halamay filed a similar summary judgment motion in which she claimed immunity for mandatory reporting and the lack of expert affidavits. A motion for continuance was granted to May 12, 2017. Case. No. 16-8-26019-5SEA.

- "Voided complaints have no legal effect and are not subject to later amendment because there is nothing to amend" (p 2);
- if the summons and complaint are not completed within 90 days, "the action is treated as if it had not been commenced" (p 13);
- "If the original complaint is void, there is nothing to amend (p 15); "Something that is "void" has no legal effect" (p. 16);
- "the filing of a void complaint does not commence a civil action" (p 17);
- "the complaint Plaintiff seeks to amend does not exist, it is a nullity because it was void ab initio and "there can be no 'relation back' to a pleading . . . that was a nullity from the start" (p. 17); and
- plaintiffs' complaints should be dismissed "because they were void *ab initio,* and therefore, they failed to confer subject matter jurisdiction upon this Court" (p 18).

The defendants claim that since the complaints were void *ab initio* and the statute of limitations has now run, the claims must be dismissed in their entirety. *However, this reasoning applies only to the parents.* As SCH recognized in its response, the statute of limitations for the children does not begin to run until the children reach the age of majority [in Washington, age 18]. SCH Response p. 6 note 1. It is contrary to law for the Court to deny the children an opportunity to present their claims *at all*, even though their statute of limitations will not expire until their twenty-first birthdays. If the children's complaints are void, they have not legally filed any actions, and have many years left to do so.

Immunity. It is an issue of fact as to whether the actions of the defendant physicians were taken "in good faith." Although the doctors claim that they merely referred the case to the SCAN team and DSHS, this does not explain, among other things, why Dr. Migita testified falsely on Jason's blood work and/or failed to consult with his treating doctors before making his diagnosis and testifying on behalf of DSHS. At the shelter care hearing, the judge was outraged

that Dr. Migata never tried to review the child's medical records, talk with the child's main treating physicians, or talk with the parents; indeed, the judge had to order him to talk with Dr. Green.

Expert reports. The defendants claim that they are entitled to summary judgment because the plaintiffs have not "identified any expert witness, qualified or not, that will testify to the standard of care of Dr. Migita, Dr. Kodish or Dr. Metz, or that any alleged action fell below that standard." This claim is disingenuous. The defendants are well aware that Jason's treating doctors – including those relied upon by the State – were shocked by Dr. Migita's diagnosis, which they found well below the standard of care. Exhibit 6 to the defendant doctors' motion for summary judgment lists the treating providers who testified to this effect, including Dr. Green and Dr. Gbedawo, Jason's two main treating physicians, and Brooke Greiner, Jason's occupational therapist, who provided a report.[3]

For eight months, Jason's autism specialists told the State that the diagnosis by the defendant doctors was flat-out wrong and that the parents were providing appropriate treatment. In addition to her report, Ms. Greiner advised the Assistant Attorney General via e-mail:

> Jason Lian has autism and is not a subtle presentation of autism. He needs and deserves the usual recommended services and supports for treatment of autism. I believe this is what his parents have been providing since learning Jason is autistic.

Ex. 1. In addition to his testimony, Dr. Green, a former emergency room physician who specializes in treatment for autism and related GI issues, advised by email:

> A detective called me, and I told her what I've said otherwise – that you are not guilty of any harmful behaviors.

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[3] Other experts in the underlying cases who are expected to testify in these proceedings include Dr. Chan, psychologist/autism specialist; Dr. Chung, Jason's ABA therapist; Anastasiya Shapovalova, behavioral analyst; and Dr. Hugeback, Ph.D. in Statistics and author of paper on autism. In addition, Sally Ongaro, visitation supervisor, kept a record of Jason's continuing GI problems during foster care.

Ex. 2.[4] After reviewing all medical records and CPS files, Jason's court-ordered pediatrician, Dr. Julia Bledsoe from the University of Washington, confirmed that Jason has severe autism and GI issues, and strongly supported Jason returning to his parents. Even CPS' witnesses agreed that the defendant doctors were wrong, as stated in an email from the mother's dependency attorney, Ms. Roberts, to the Attorney-General:

> Okay, I just finished up making copies of Dr. Quinn's interview where he states that he did not think the mother was starving Jason, and she acted appropriately given she did get Jason to the hospital on the 20th and he was released. There is a load of excellent information from him which again shows that the parents did nothing wrong. He admits to making a decision without all the information.
>
> This case needs to be dismissed. Period. The department concerns are based on incomplete and just plain wrong information. Thus far, every witness on the State's list that I have spoken to is going to be a defense witness. I am not even remotely kidding about this. Your main witnesses, Dr Quinn and Halamay [treating pediatricians] are my witnesses.

Ex. 3.[5] Immediately after receiving this e-mail, the Department dismissed the dependency petition without conditions.[6] The criminal charges were also dismissed within days "due to evidence discovered after the time of filing."

It is evident from the records in the underlying cases, much of which is described in the materials submitted by the defendants, that multiple experts are willing to testify in person or via affidavit that the SCH doctors fell well below the standard of care by ignoring Jason's medical history and rejecting the diagnoses and successful treatment plans of the treating doctors and

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[4] In another e-mail, Dr. Green stated "I think it's damning that Dr. Migita did not bother to obtain the previous evaluation records before jumping to his conclusions about autism and abuse/neglect." Ex. 2.

[5] The father's attorney, David Hoekendorf, stated that the father was in full agreement with unconditional dismissal of the dependency and that "it appears as if DCFS intervention was not necessary in this matter." Ex. 3.

[6] The AAG, David La Raus, had advised earlier that since he had now "seen the records showing *(contrary to what was reported by the SCAN team report)* that mom did take Jason in to SCH ER on 10/20, and they did release Jason to go home" (emphasis added), the Department may be amenable to dismissing the case if the parents agree to provide proper care for Jason (which we had always done).

therapists who were monitoring his progress carefully, causing great harm to Jason and his family. Because the mother, who speaks Chinese and has no legal training, was not able to provide affidavits on demand, or even to understand what they were or why they were needed, she asked for a continuance to obtain an attorney, which was denied. If the Court wishes to revisit this issue, a continuance should be granted so that formal affidavits may be obtained.

Interest of justice. It is not in the interest of justice to dismiss the parents' claims against the doctors who set in motion the events that have caused serious damage to Jason Lian and his family. It would, however, be an even more extreme miscarriage of justice to dismiss the children's complaints with prejudice when they have had no opportunity to present their claims and their statute of limitations will not run for more than a decade. This miscarriage of justice is particularly great in view of the extreme and irreparable harm that both children – but especially Jason – have suffered and will continue to suffer in the decades to come.

Respectfully submitted,

Susan Chen

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

Date: March 24, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that the foregoing was delivered to the following persons in the manner indicated:

Bruce W. Megard, Jr. Bennett Bigelow & Leedom, P.S. 601 Union Street, Suite 1500 Seattle, WA 98101-1363 Attorney for Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.	[x] Hand Delivery [ ] U.S. Mail, postage prepaid [ ] Overnight Mail [ ] Facsimile [ ] Via Electronic Mail
Rando B. Wick Michelle S. Taft Johnson Graffe Keay Moniz & Wick, LLP 925 4th Avenue, Suite 2300 Seattle, WA 98104 Attorneys for Seattle Children's Hospital	[x] Hand Delivery [ ] U.S. Mail, postage prepaid [ ] Overnight Mail [ ] Facsimile [ ] Via Electronic Mail

Dated this 24th day of March, 2017.

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

EXHIBIT 1

IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

From: <brookegreiner@comcast.net>
Date: Thu, Feb 6, 2014 at 12:17 PM
Subject: Re: Neurodevelopmental evaluation
To: "LaRaus, David (ATG)" <DavidL2@atg.wa.gov>, Ivy Chung <ivy@magnoliabehaviortherapy.com>
Cc: "Kegel, Jill C. (DSHS/CA)" <KegelJC@dshs.wa.gov>, lian naixiang <liannaixiang@gmail.com>, David Hoekendorf <dmhoekendorf@yahoo.com>, "Barnhouse, Kathryn" <Kathryn.Barnhouse@kingcounty.gov>, Caren Goldenberg <caren.goldenberg@gmail.com>, Hillary Winslow-Simpson <HillaryWS@childhaven.org>, Anastasiya Shapovalova <anastasiya@magnoliabehaviortherapy.com>

Mr. La Raus,

Thank you very much. It is my strong opinion that Jason has autism. The doctor's recommendations lack key services that children with autism receive. It will be helpful to see her report; I appreciate that Jill Kegel willl be sharing it.

Throughout the time Jason has been separated from his parents, there have been multiple statements that question whether or not Jason has autism. I have found this extremely surprising. I have provided occupational therapy to children with autism since 1978. I have participated in team evaluations of children and have contributed to team decisions about whether or not a child has autism (Boyer Children's Clinic in Seattle and Providence Hospital Children's Center in Everett).

Jason Lian has autism and is not a subtle presentation of autism. He needs and deserves the usual recommended services and supports for treatment of autism. I believe this is what his parents have been providing since learning Jason is autistic.

Respectfully,

Brooke Greiner
206.595.5245

EXHIBIT 2

From: **John Green** <johnagreenmd@gmail.com>
Date: Tue, Jan 14, 2014 at 2:42 PM
Subject: Re: updates from Susan
To: lian naixiang <liannaixiang@gmail.com>

yes, do you have record of their statement that he had visited with me? Also, 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. JG

From: **John Green** <johnagreenmd@gmail.com>
Date: Fri, Feb 7, 2014 at 11:22 AM
Subject: Re: criminal charge document for Lian.
To: lian naixiang <liannaixiang@gmail.com>

I knew about the criminal charge in October or so, and I believe I conveyed something of it to you. If I didn't, I'm sorry, as I also figured you'd be notified. A detective called me, and I told her what I've said otherwise--that you are not guilty of any harmful behaviors. JG

EXHIBIT 3

On Wednesday, September 10, 2014 4:00 PM, Lorraine Roberts <lorraine.roberts@defender.org> wrote:

Okay, I just finished up making copies of Dr. Quinn's interview where he states that he did not think the mother was starving Jason, and she acted appropriately given she did get Jason to the hospital on the 20th and he was released. There is a load of excellent information from him which again shows that the parents did nothing wrong. He admits to making a decision without all of the information.

This case needs to be dismissed. Period. The department concerns are based on incomplete and just plain wrong information. Thus far, every witness on the State's list that I have spoken to is going to be a defense witness. I am not even remotely kidding about this. Your main witnesses, Dr Quinn and Halamay are my witnesses.

These parents have done nothing wrong and how one feels about the mother is not a basis for dependency. Given what I know now, I would be ten times worse than Susan if someone did this to my family. For every day this case stays open Jason is being harmed by the Department. It needs to be dismissed.

I hope to hear from the State that this matter will be dismissed with no conditions before weeks end.

Lorraine Roberts

From: David Hoekendorf [mailto:dmhoekendorf@yahoo.com]
Sent: Thursday, September 11, 2014 7:48 AM
To: Lorraine Roberts; LaRaus, David (ATG); Kegel, Jill C. (DSHS/CA); Maria's Gmail (joyful561@gmail.com) (joyful561@gmail.com)
Subject: Re: Chen/Lian

All:
Father is in full agreement with unconditional dismissal of the dependency. Both boys are doing well in father's care and it appears as if DCFS intervention was not necessary in this matter. We are hopeful that further damage to the family can be minimized by dismissing these matters asap.
david hoekendorf

APP. G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SUSAN CHEN, et al.,	)	
	)	
Plaintiffs,	)	COA No. 79685-2-I
	)	
v.	)	Cause No. 16-2-26013-6 SEA
	)	
DARREN MIGITA, et al.,	)	
	)	
Defendants.	)	

HEARING

The Honorable Ken Schubert Presiding

December 14, 2018

TRANSCRIBED BY: Reed Jackson Watkins

Court-Approved Transcription

206.624.3005

I N D E X

DECEMBER 14, 2018

-o0o-

THE COURT: All right. Boy, it seems like it's a long time coming. Let's have the Chen matter heard.

Hello.

MS. TAFT: Good afternoon, Your Honor.

THE COURT: And let's make room for everybody --

MS. TAFT: Yes.

THE COURT: -- because there's lots of people here.

MS. CHEN: Good afternoon, Your Honor.

THE COURT: Hi, Ms. Chen.

MS. CHEN: I am sorry, I have a new problem with my eyes, if you don't mind.

THE COURT: It's -- I don't mind whatever. No problem at all.

MS. CHEN: Thank you so much.

THE COURT: You're fine, as always.

MS. CHEN: Thank you.

THE COURT: Let's make room. Can he squeeze in there and, Ms. Taft, you could scoot just a -- or, you got a ledge there?

MS. TAFT: I got a ledge.

THE COURT: All right.

MS. TAFT: But I can --

THE COURT: Then don't scoot any further.

MS. TAFT: -- lean against the ledge.

THE COURT: All right. And then I want the interpreter to be in a place where he can hear everyone and I need to have him identify himself first for the record.

INTERPRETER WU: Good afternoon, Your Honor.

THE COURT: Hi.

INTERPRETER WU: Thomas Wu. I'm the Mandarin interpreter, but not permanent sweared [sic].

THE COURT: Okay. So but you have provided interpreting services in our courts before.

INTERPRETER WU: Yes, Your Honor.

THE COURT: I know I recognize you.

INTERPRETER WU: Yes.

THE COURT: All right. Hold on one second. All right. Thank you for raising your right hand.

Do you solemnly swear or affirm that you will accurately, completely, and impartially interpret these proceedings from English into Mandarin and Mandarin into English to the best of your skill and judgment?

INTERPRETER WU: I do, Your Honor.

THE COURT: Thank you.

So I want to remind everybody, we have someone that has one of the most difficult jobs you can have. He's

going to try to interpret everything that we're saying to the people that need it.

INTERPRETER WU: And then, Your Honor --

THE COURT: What's that?

INTERPRETER WU: -- and there's another interpreter here --

THE COURT: Oh, we have another interpreter?

INTERPRETER HO: Yes, right here.

THE COURT: Two interpreters.

MR. ANDERSON: Cantonese and Mandarin, Your Honor.

INTERPRETER WU: -- for the lady.

THE COURT: Okay.

INTERPRETER HO: Yes.

THE COURT: Tell me about yourself.

INTERPRETER HO: I work at Michael Ho Washington State Certified Court Interpreter, Cantonese --

THE COURT: Okay.

INTERPRETER HO: -- permanently sworn with AOC, and I'm the designated interpreter for Ms. Chen.

THE COURT: And your oath is on file with the AOC?

INTERPRETER HO: Yes, it is.

THE COURT: Okay. I don't need to swear you in, but I need you to be in a place where you can talk to Ms. Chen and she'll be able to hear you, so even more complicated than normal. So let's do our best to not

interrupt each other. I'll try my best and to talk slowly.

MR. ANDERSON: Okay. And one thing I would suggest is that, since we've got interpretation in two languages, I know normally it's normal to cluster here, but I suspect the interpretation will go better if the two plaintiffs are actually a little bit separated apart from each other --

THE COURT: Yes.

MR. ANDERSON: -- if that makes sense to kind of -- yeah, maneuver as best you can.

THE COURT: I just want to remind him that you're interpreting everything we're saying.

INTERPRETER HO: Yes.

THE COURT: All right. Ms. Taft, your name for the record and who you represent.

MS. TAFT: Good afternoon, Your Honor. I'm Michelle Taft and I represent Seattle Children's Hospital.

THE COURT: Okay.

MR. NORMAN: Good morning -- or good afternoon, Your Honor. David Norman. I represent the physician defendants, Dr. James Metz, Dr. Ian Kodish, and Dr. Darren Migita.

THE COURT: Thank you.

MR. NORMAN: Thank you.

MR. ANDERSON: I'm Jason Anderson. I'm appearing on a limited basis on behalf of Jason Lian, who's a minor plaintiff.

THE COURT: With the Court's appreciation.

MR. ANDERSON: Thank you.

THE COURT: Thank you for doing that.

Okay. So and then, Ms. Chen, you're here representing yourself?

MS. CHEN: (In English) Yes, sir. Yes. I'm pro se.

THE COURT: All right. And then are you also here to represent the interests of your other son?

MS. CHEN: Yes. Yes.

THE COURT: Okay. So I've been reading about this case for almost it seems like half a year. I'm pretty familiar with what happened on summary judgment in terms of the arguments that were raised. I'm not clear as to the basis that Judge Hill based her decision in granting it for any of the parties.

I saw a motion for reconsideration that was denied without an explanation, and since then all of the motions seem like they've been in front of me. And so I have read the motion for the order to show cause, I've read the opposition to it, obviously, and I've read the reply that Mr. Anderson drafted in support of it.

So technically it's the parties opposing the motion to show cause that under the order to show cause have the burden to show cause, so I'm happy to hear from them as to why I should not vacate the motion or the order granting summary judgment in the -- essentially also the order, the accompanying order denying the motion for reconsideration.

Who wants to go first?

MR. NORMAN: I will go first, Your Honor.

THE COURT: Okay.

MR. NORMAN: And I'll try my best to speak slowly to make sure that everything gets interpreted and there's plenty of time and no overlap.

So the Court has already indicated that it's familiar with the procedural facts of this case. Plaintiffs filed a series of complaints in October and December 2016. They filed all but one of them through King County's eFiling system. I believe the first one, filed on October 24th, was filed by hand. The rest were e-filed, which is important in terms of e-service.

Plaintiffs' claims allege medical negligence or, alternatively, false reporting claims. We argued both in the alternative because we couldn't tell by the nature of the claims what exactly the allegations were.

The plaintiffs allege vicarious liability claims

against Seattle Children's, which Ms. Taft can speak to, and we're only in the case for vicarious liability. There was no corporate neg claim -- negligence claim. Sorry. The plaintiffs never served any of the individual defendants, the physicians. They still haven't.

THE COURT: Isn't that kind of a critical fact?

MR. NORMAN: Yes.

THE COURT: Because if the Court never has personal jurisdiction over a litigant, how could the Court reach the merits of any claims in relation to that litigant? The Court, when faced with that situation, should dismiss without prejudice to allow for service to be made on that party and then for that party to appear substantively to defend.

I want to -- I'm not sure why Ms. Taft is raising her hand.

MR. NORMAN: Okay. What I --

THE COURT: This is a question that I'm asking --

MS. TAFT: Okay.

THE COURT: -- the only party that wasn't served, because there's no allegation that the hospital wasn't served.

MS. TAFT: Correct, Your Honor.

THE COURT: Right. So that's why I want to hear from

you about that.

MR. NORMAN: What I would say is in our motion we also brought substantive grounds.

THE COURT: I know you did.

MR. NORMAN: We can't -- we can't tell from Judge Hill in the oral ruling, except that I did say -- because Judge Hill initially said, I believe at page 14 of the transcript, Exhibit 20 to Mr. Megard's declaration, that this was a procedural motion. And I corrected the Court that this is also on substantive grounds. And she said, "I agree. My mistake. Go on." And we laid out the grounds.

And here's the issue. The plaintiffs asked for more time for to gather evidence under 56(f), which would have been relevant to the substantive claims. They needed the records and an expert. The Court ruled on that at the time because they couldn't meet the Turner factors. All three of them were present. Under Pelton if any one of them are present, the Court is justified under the law in denying the motion for a continuance.

That wouldn't have even been part of the Court's ruling if she wasn't considering the substance of the claims as to the absence of a med mal evidence, including an expert, or any evidence rebutting the immunity of the physicians.

THE COURT: I half agree with you, because Cascade had been served and Cascade joined in the motion for -- is it Cascade? What's the name of the --

MS. TAFT: Seattle Children's.

THE COURT: Seattle Children's. I'm sorry. That's Cascade Hospital has nothing to do with this at all.

-- Seattle Children's had joined in the motion for summary judgment on the substantive aspect of it, obviously not the procedural because it didn't apply to them.

MR. NORMAN: Right.

THE COURT: And I know what you just said Judge Hill said --

MR. NORMAN: Yeah.

THE COURT: -- but the 56(f) would apply certainly to Children's, right?

MR. NORMAN: Well, that's another argument that the Court just raised that -- or an important point the Court just raised. The reason Seattle Children's was dismissed with prejudice -- and they raised this with-or-without-prejudice argument on reconsideration -- the premise behind the liability was premised on the liability of the agents. They were dismissed because the claims against the agents were dismissed, not on a personal -- I'm sorry, I'm sorry --

MS. TAFT: It's okay.

MR. NORMAN: -- we're a little tight here -- not on a personal defense, which is a personal jurisdiction defense -- failure to serve, failure of process of service personal defenses, those are for the immunity statute -- Seattle Children's was dismissed because the Court ruled on the merits. They wouldn't have been dismissed if that wasn't the case.

THE COURT: No, I got that. But the problem that I have is I don't think that you can -- and no one provided me with a case, but maybe Ms. Taft knows of one, which is why she was raising her hand -- no one to my knowledge provided me with a case where a party can both defend on procedural grounds and say, "Hey, I was never served. Your Honor, with all due respect, you don't have jurisdiction over me. But, by the way, go ahead and reach the merits and dismiss these claims against me with prejudice, even though you've never had jurisdiction over me." To me that doesn't make sense.

Why wouldn't a Court ever reach the merits of a defense when the party is, as a preliminary matter, saying, "You don't even have jurisdiction over me"? You deal with jurisdiction first. That's the way it's always been, in my opinion. That's the way it should have been here.

So the first thing that Judge Hill -- and no offense to Judge Hill, great judge, great person -- but in my view as to the parties that had allegedly not been served, you address that first and you say, "If you weren't served, then you're dismissed. I don't have jurisdiction over you. Have a good day. Now I'll turn my attention to the hospital."

And this may be a distinction without a difference to an extent, because if the hospital has on the merits prevailed, unless there's a reason for me to overturn that, then I don't know why these doctors couldn't potentially use that as a defense in a subsequent lawsuit against them --

MR. NORMAN: Correct.

THE COURT: -- for -- I don't know if it's collateral estoppel or res judicata, I always get those two confused -- right? But and so this may be one of those things where you might win the battle, but the war is not looking so good.

But it seems to me that the one error that I would -- the one bone I would pick with Judge Hill is she should have, in my view, taken the jurisdictional always first. And then if there's no jurisdiction over your clients, then we wish them well and we dismiss.

MR. NORMAN: I appreciate the Court's comments and

you zeroed in on the fundamental weakness of this motion. Every single one of the grounds of error is an error of law. We are on court -- we are on review in Division I on the exact issues that the Court just zeroed in on. We cited at page 7 of our joint response:

> "Case law is ironclad that alleged errors of law are not appropriate for a determination under CR 60(a) or (b)."

Burlingame v. Consolidated Mines says this at 106 Wn.2d 328. State v. Price says this:

> "Motions to vacate are not a substitute for an appeal."

What the plaintiffs are attempting to do is take a third bite at the apple with the same arguments. And it's inappropriate because none of the grounds under 60(a) or (b) apply, or even the Court's observations, which while astute don't fall under CR 60, they fall for -- they fall under a brief of appellant.

For an appeal these are alleged errors of law by Judge Hill that need to be argued on appeal. This isn't about a Scrivener error in the order. This isn't about a party name being wrong. None of those grounds apply. This isn't about fraud based on records that the plaintiff could have obtained in 2013.

And we can get -- we can avoid the timeliness arguments regarding the time of the motion under (b)(1), (b)(2), or (b)(3) or whether it's reasonable, by focusing on the fact that these errors are errors of law.

Whether the Court applied the facts to the law correctly is exclusively right now, and plaintiff has tried to appeal this matter twice and it's still on appeal now. And the Court of Appeals, I think, I don't know, is waiting to see what this Court does before it moves forward with an appeal. We're in a holding pattern. I think the last brief filed in the case was in October.

THE COURT: But isn't there a contention that the second appeal was untimely?

MR. NORMAN: That -- there is a contention on that. But the Court --

THE COURT: So --

MR. NORMAN: -- has not reached that issue.

THE COURT: So how would I be doing justice today if I deny the motion and then it turns out next week the appeal is dismissed and she gets no further justice from a court? How does -- how have I done my job if that's the scenario? Because I thought there was a clear allegation that the second appeal was 75 --

MR. NORMAN: Seventy-one days, Your Honor.

THE COURT: -- 71 days late.

MR. NORMAN: And we have not brought that issue before the Court through a motion to dismiss. I don't know if we will. Frankly, it's not my decision. But --

THE COURT: Why wouldn't you? A clean kill is a clean kill.

MR. NORMAN: Right. Well, that's not my decision, Your Honor. But I will say that whether you feel it's justice for the plaintiff, this is the application of the law.

THE COURT: All right. Give me those cites again because I think it's important to recognize that CR 60 is not a substitute for an appeal, but there's nothing that -- I think that the rules of appellate procedure, which I've cited in one of my earlier orders --

MR. NORMAN: Yes.

THE COURT: -- in this very case -- in fact, whoever came up with the bright idea to move for reconsideration of my order to show cause, I reminded them that actually the rules of appellate procedure expressly allow a Court to consider changing an order that is on appeal. We just need to get permission from the Court of Appeals before we actually formally enter

that order.

MR. NORMAN: Which is what our motion said. The Court can deny it without permission. It needs --

THE COURT: Your motion for reconsideration didn't say that. Your motion for reconsideration said I shouldn't rule because it's on appeal, and then went on to a whole bunch of procedural stuff that I disagreed with.

MR. NORMAN: Okay.

THE COURT: Let's not --

MR. NORMAN: Sure.

THE COURT: -- fester on that too long --

MR. NORMAN: Sure, I understand.

THE COURT: -- because, as you probably saw from my order, I found it a little annoying --

MR. NORMAN: I understand.

THE COURT: -- to see that motion for reconsideration. But it's not the end of the world.

MR. NORMAN: So page 7, Your Honor, of our joint response cites --

THE COURT: You're just going to hit me with the cites that you --

MR. NORMAN: Absolutely.

THE COURT: -- told me in your order.

MR. NORMAN: So 106 Wn.2d --

THE COURT: Yep.

MR. NORMAN: -- 328.

THE COURT: And that's the Pin cite or --

MR. NORMAN: That's -- no, that's not the Pin cite, Your Honor.

THE COURT: All right. I'll find it fast enough.

MR. NORMAN: State v. Price is the next case.

THE COURT: Hold on. I can only look at one at a time.

MR. NORMAN: Understood.

THE COURT: All right.

MR. NORMAN: I have three others, Your Honor.

THE COURT: All right. Just give me a sec.

Okay. So the Burlingame, if that's how you say it, Consolidated Mines case, first we're talking about an error of law. Well, there they say:

> "Insufficiency of the evidence is not an error that is extraneous to the action or affects the regularity of the proceedings."

Here, the argument that I just talked with you about, relates to the evidence before the Court. So it's not extraneous -- or it's not insufficiency of the evidence, it is a procedural, in my opinion, anomaly, of how the Court proceeded.

MR. NORMAN: But their --

THE COURT: That's not correctable under CR 60?

MR. NORMAN: I don't think so, because under -- we moved under the grounds that they lacked an expert, they presented no expert. That's a sufficiency of evidence. The Court's ruling was justified by the record before it. The Court's ruling on 56 (f) was justified when none of the Turner factors were addressed.

THE COURT: I think the Court's ruling was justified as to Children's --

MR. NORMAN: Okay.

THE COURT: -- in that regard. I'm still going to hear from them, obviously. But in terms of what the record was in front of the Court, regardless of how I would have ruled personally on the 56(f) issue, once you move ahead, Judge Hill got it 100 percent right as to the hospital.

My quibble is when you don't have jurisdiction over a party and when they make that point to you, to me that should be the very first thing that you consider as the judge. And if you can rule on that issue, you rule on that and that's it. That party shouldn't get the benefits of a substantive order at the same time that they're saying to the Court, "You don't have jurisdiction over me." You shouldn't be able to get it

both ways.

You want to get out of the case because of a procedural problem like lack of service, lack of jurisdiction, get out of the case, but you don't -- you shouldn't get the benefit of a dismissal with prejudice in that scenario.

And so you've got -- you've got the best of both worlds. "I've got a Court that never had jurisdiction over me. Hey, and I got a dismissal with prejudice." That's my problem.

MR. NORMAN: I don't know whether the Court agreed with my argument. Plaintiffs' attorney -- plaintiffs argued that they had been served.

THE COURT: How is service in dispute? Either you did or you didn't.

MR. NORMAN: It shouldn't have been. But the Court -- the plaintiffs argued that they had been served.

THE COURT: Well, this wasn't Mr. Anderson's argument.

MR. ANDERSON: I --

MR. NORMAN: No, he has not --

MR. ANDERSON: I --

MR. NORMAN: He wasn't involved in the case yet.

THE COURT: I know. She's -- she was doing her best

to represent herself and her kids, maybe with a little bit of help from --

MR. ANDERSON: Somebody.

THE COURT: It may or may not be Twyla Carter --

MR. NORMAN: Okay.

THE COURT: -- right?

MR. NORMAN: But what I would say is -- okay. Yeah, their -- I believe their argument, that is correct, and we attached that evidence in support of our joint response, that they claim that the service by the sheriff to Seattle Children's was sufficient service of process under --

THE COURT: It's not.

MR. NORMAN: -- the statute.

THE COURT: I don't think it's -- I don't know how that could possibly be.

MR. NORMAN: That's what we argued, it's not.

THE COURT: Yeah, I agree with you. They need personal service.

MR. NORMAN: Right. But we don't know whether the Court ruled on the merits and our interpretation -- and this is for the Court of Appeals to sort out. If the Court had grounds to rule on the merits, if the Court rejected the personal jurisdictional argument, for whatever reason, and ruled on the merits, the order is

valid. That's really not in dispute.

And she wouldn't have denied the motion for reconsideration if she didn't rule on the merits.

THE COURT: But again, she provided no explanation in her order.

MR. NORMAN: Isn't that for the Division I, Your Honor, to correct if that's a mistake of law?

THE COURT: But...

MR. NORMAN: Because they can't tell whether they can affirm on any ground. It's a summary judgment, it's de novo review, that's why it should be a Division I. It is a Division I and they've had the case for a year.

THE COURT: Yeah. It's just frustrating because it seems like it should be within my purview. If I was the judge that had done this, always with the benefit of hindsight, I would have liked to have think that I would have made clearer the basis for my ruling.

Having failed to do that in this situation, why not -- why is it not for the trial Court to make clear the basis for the ruling? Why should I not have the ability to do that, to clarify the record on appeal and say, look, I've looked at everything in this case. I've been involved as essentially the judge by default because I've been chief this year. I'm very familiar with this case, having had Ms. Chen appear before me,

having considered the many motions that she has brought, so I know this case backwards and forwards.

And so why would I not have the benefit under 60(a) to say, look, there was an omission here. What the omission was is to clarify whether or not the dismissal was with or without prejudice as to the doctors, because it doesn't say. It just says, "Summary judgment motion is granted. Motion for reconsideration is denied," that's all it says.

MR. NORMAN: But that was their only argument on recon, Your Honor. It wouldn't have been denied if the Court agreed that it should have been without prejudice, that's my point. And also 60(a) only -- we cited Tegland, page 8 of our response. 60(a) is for grounds meant to deal with mechanical or Scrivener errors, quote, such as an arithmetical miscalculation or a minor, unintentional mistake in a property description. That is Tegland, 15 Washington Practice, Civil Procedure, Section 39.4.

THE COURT: Yeah. I just had a big order or a motion on a CR 60(a), and unfortunately it was one of these things where, you know, they waited until every judge that had touched it until me had retired already. And I got to go back and say was this a clerical mistake or not. And I concluded the mistake that was made there

was not a clerical mistake. Even though it was completely unsupported by the factual findings and conclusions of law, the judge, when entering the judgment, was very clear: Judgment is against both of these parties jointly and severally.

There's no findings to support it. I said that's not a clerical mistake, it was essentially intentional. It was a mistake, in my opinion, because there was nothing to support it, but that's -- you know, that's why you should have filed an appeal or brought it to the judge's attention soon after she filed the judgment.

So, unfortunately, you've got a decent argument on CR 60(a) as well --

MR. NORMAN: Yeah.

THE COURT: -- but this is -- this is as close as I can see of how the other side could arguably prevail against the doctors. And they've got even more of an uphill climb against the hospital, in my opinion.

MR. NORMAN: Can I just add one more thing?

THE COURT: Yeah.

MR. NORMAN: The only argument they raised under 60(a) was regarding whether or not the summary judgment should properly be granted before discovery commences. They didn't even argue 60(a) applies to the grounds that this Court is pointing out. 60(a), we put -- it's

in their opening papers, they cite a couple of out-of-state cases that are directly contrary to Young v. Key Pharmaceuticals, establishing, as this Court knows, that a defendant can bring, on the absence of evidence, a summary judgment any time.

In fact, the Guile v. Ballard Community Hospital, that was a year out from the trial date. If you don't present evidence, you don't present an expert on standard of care from a qualified expert establishing causation, that the negligence caused the alleged injury, under 7.70.040 you have to dismiss. How can Judge Hill's ruling in those circumstances be seen as error?

THE COURT: Well, the only way is is what I've told you --

MR. NORMAN: Right.

THE COURT: -- is that she should have addressed jurisdiction first.

MR. NORMAN: Which is what they're going to address in their brief of appellant.

THE COURT: Yeah. All right.

MR. NORMAN: We also have other arguments regarding the timeliness of the motion, but do you want me to go through --

THE COURT: Well, I thought his argument was actually

a decent one about the timeliness based on -- so the orders entered by Judge Hill were in April and May.

MR. NORMAN: Yeah. No. March and April.

THE COURT: Oh.

MR. NORMAN: March 3rd for the summary --

THE COURT: Yeah, I'm sorry.

MR. NORMAN: -- judgment.

THE COURT: You're right, April 10th was the latest one.

MR. NORMAN: Yes.

THE COURT: But things did not become appealable until all of the cases -- all the claims were dismissed. In fact, that was the problem with their appeals. They said, "Wait a minute, this wasn't a CR" -- what is it? -- 56(e) or something.

MR. NORMAN: Yeah. All the claims against all defendants had not been dismissed.

THE COURT: Right.

MR. NORMAN: And you use certification to get it --

THE COURT: It's a way for that --

MR. NORMAN: Right.

THE COURT: -- is what they said.

And so I was thinking to myself about that and I thought, you know, how could it be that if they had continued prosecuting their case for the next year,

that their rights under CR 60 would expire, even though they hadn't even filed an appeal yet, a timely appeal, because all the claims hadn't been resolved yet. And that didn't make a lot of sense to me. Do you see what I'm saying?

MR. NORMAN: I do. And I know -- frankly, Your Honor, I looked into this. I know of no authority saying that the definition that applies to a final order under RAP 2.2, for purposes of being able to file your notice of appeal, is in any way related or restricts whether or not a plaintiff -- under 60(a), we have the language here, there's nothing indicating it needs to be a final order. It only needs to be a judgment --

THE COURT: Oh, for 60(a).

MR. NORMAN: Any, any of the grounds, that it needs to be a final -- here you go, Your Honor, if you --

THE COURT: Well, no. I've got the rule right here.

MR. NORMAN: Oh. All right.

THE COURT: Sixty -- under 60(b)(11) it talks about "after the judgment, order, or proceeding was entered or taken." That's the -- that's from the time that it starts.

MR. NORMAN: Right. And the order at issue was taken March 3rd, 2017. The final order triggered their

ability to appeal, but there was nothing keeping plaintiff from filing a motion to vacate under any ground after March 3rd. Instead they did a recon, and that was denied in April. They could have filed a motion to vacate either order immediately after that ruling. They didn't.

And, in fact, they did file one -- they filed a motion to vacate in March under different grounds, and I'm sure I'm going to hear from Mr. Anderson that that makes it timely. It doesn't. It was under different grounds. They were arguing for -- they were entitled to counsel. And they supplied no evidence. There was no evidence they got the medical records from Seattle Children's, no evidence of any attempt.

THE COURT: Yeah.

MR. NORMAN: Instead, the motion that actually has the evidence is the one that was filed in September, which is undisputedly after the one-year cutoff. And even besides the one-year cutoff, the case law that we cited shows it can be less than a year --

THE COURT: Oh, sure.

MR. NORMAN: -- depending on the grounds. There was nothing keeping them from getting their own child's medical records at any point after 2013.

THE COURT: Yeah. So "reasonable time" is the

language.

MR. NORMAN: Well, with reasonable diligence.

THE COURT: It says, "The motion shall be made within reasonable time."

MR. NORMAN: Um-hum.

THE COURT: So it's the reasonableness of the filing.

MR. NORMAN: Well, "reasonable time for (1), (2), and (3)...or proceeding was entered or taken" -- where is it?

THE COURT: No, no, no. "The motion shall be made within a reasonable time and for (1), (2), or (3)" and "not more than one year after the judgment...."

MR. NORMAN: Right.

THE COURT: So for those there's a ceiling, shall we say.

MR. NORMAN: You are correct. Exactly.

THE COURT: On all of them --

MR. NORMAN: Yes.

THE COURT: -- it's within a reasonable time. Although what's funny is the cases say except for (5), because a void judgment is --

MR. NORMAN: It's like subject matter jurisdiction.

THE COURT: -- it can be challenged any time.

MR. NORMAN: Yes.

THE COURT: So the rule is a little bit inartful in

that relation.

But, yes, I agree with you. I'm very familiar with the cases that say that the amount of time can be less than a year. It's what's reasonable.

MR. NORMAN: And, for instance, they provided an expert dec out of nowhere from Dr. Green. I believe it's Exhibit E to Ms. Chen's reply declaration. Where was that? Now they're saying that that was -- that's standard of care and causation testimony that gives merit to their claim, which is the threshold requirement for getting -- having a CR 60 granted. You have to show that the claims are meritorious.

What took so long to get that declaration? He's a treating provider providing care to JL, the minor, since at least 2012, based on Ms. Chen's own declaration. Why couldn't they get a declaration from him at any point to where he was critical?

THE COURT: Well, isn't the notable difference the fact that they have counsel?

MR. NORMAN: But the law --

THE COURT: He has counsel.

MR. NORMAN: I understand that. The law requires this Court --

THE COURT: I know.

MR. NORMAN: -- and even the Supreme Court to treat

pro se's the same way they do for other represented parties. That's the law. The Supreme Court has said that.

THE COURT: I know.

MR. NORMAN: Edwards v. La Duc I think is one case off the top of my head.

THE COURT: I'm relatively familiar with that too.

So all right. Okay. One other thing to throw at you, because their motion for reconsideration -- Judge Hill struck their reply, so she didn't consider it. Their motion for reconsideration was based solely on whether it was with or without prejudice. She -- and they asked for clarification on that. What I think is interesting is she just denied, she didn't provide clarification.

Now, you could read that one of two ways.

MR. NORMAN: Yeah.

THE COURT: One, she didn't feel clarification was necessary or I guess really just she didn't feel clarification -- I don't know what the second way was. I had it for a second but it's gone. She didn't think clarification was necessary.

MR. NORMAN: Right.

THE COURT: Now, the clarification not being necessary could be seen one of two ways.

MR. NORMAN: Yes.

THE COURT: That's what it is.

MR. NORMAN: Yes.

THE COURT: "I didn't need to clarify because it was obviously with prejudice" or "I didn't need to clarify because it was obviously without prejudice."

MR. NORMAN: But if that was the case, wouldn't she have directed that the order get amended to indicate that it was without prejudice?

THE COURT: Maybe she thought it didn't need clarity because she thought it was clear.

MR. NORMAN: Okay.

THE COURT: Right? Do you see what I'm saying?

MR. NORMAN: But she denied their motion. And our response to -- or our opposition to the motion said that it was without -- with prejudice -- and it doesn't need any clarification, and she denied their motion asking for the opposite. I think you can infer that the Court agreed with the defendants' position that it is with prejudice and she didn't need to clarify.

THE COURT: The thing is, though, is we have a court rule, although not directly applicable to this situation, that says that when there is a dismissal --

MR. NORMAN: Yeah.

THE COURT: -- under CR 41 --

MR. NORMAN: Yes. Voluntary dismissal.

THE COURT: Right. I'm familiar. Right. But you know where I'm going.

MR. NORMAN: I do.

THE COURT: I don't know why that's not analogous, because what it says to me is, hey, if the Court doesn't say, at least in that context, then it's presumed to be without prejudice.

MR. NORMAN: Right.

THE COURT: So at least in the context of a voluntary dismissal, the lack of clarity, the default means without prejudice in that scenario.

So but where is there ever a scenario that a lack of clarity means with prejudice?

MR. NORMAN: Well --

THE COURT: Where's that case? Where's that rule?

MR. NORMAN: Well, first of all, I don't think there's a lack of clarity because, again, we opposed the motion and she denied the motion asking -- which only asks for one relief.

Part two, with voluntary dismissals, it's not being decided on the merits. It's presumed that a plaintiff who brought a claim and voluntarily dismisses it doesn't want it to be fatal to their claim for all times. With a 56(f) I have never seen a unopposed

CR 56 -- or, I'm sorry, a CR 56 ever. It's always opposed, it's always contested. That's why there's no presumption.

THE COURT: All right. Ms. Taft, what do you want to argue?

MS. TAFT: So, Your Honor, I think you very astutely pointed out that defendant Seattle Children's Hospital was dismissed on the merits because Seattle Children's does not have the procedural defenses that the physician defendants have.

Your Honor, I would like to remind the Court that again the errors of law that plaintiff brings up are not the appropriate basis for a CR 60. So to the extent that plaintiffs would like the order against Children's vacated, that's not appropriate and the Court of Appeals should decide those issues.

I would also like to point out to the Court that -- and this applies to both defendants -- the CR 60 motion is really moot because they still have no way to prove their claims in front of the trial court. I will point to the Green declaration that my co-counsel cited that was actually submitted by Ms. Chen, not her attorney. Ms. Chen doesn't say when she contacted Dr. Green or why she waited so long, but she did.

Dr. Green isn't even a psychiatrist, like one of the

physician defendants, or a pediatric hospitalist, like the other two defendants, he is just a general practitioner.

MR. NORMAN: Family.

MS. TAFT: Or, I'm sorry, family practice doc. So he's not qualified to opine on the standard of care or causation for either of those defendants, which means that their claims against both Children's and the physicians would still fail as a matter of law.

THE COURT: Well, where is the --

MS. TAFT: Doctor --

THE COURT: Does anyone have a copy of his declaration?

MR. NORMAN: Yes, Your Honor. I'll give it to you.

THE COURT: All right.

Keep going, Ms. Taft.

MS. TAFT: Sure. Not only is Dr. Green not qualified to opine on the standard of care or causation, but Dr. Green doesn't actually state the basis of his opinions. The only thing he talks about is one 5-minute call in 2013 on an unidentified day with Dr. Migita, who's only one --

MR. NORMAN: I'm sorry it's (inaudible).

MS. TAFT: -- sorry -- who's only one defendant, and he concludes from that call that apparently Dr. Migita

violated the standard of care and caused all the damages alleged. He doesn't talk about what the standard of care actually required, what he reviewed in order to determine that and why he thinks that.

Now, I point the Court to the Reyes case, where the Court of Appeals and the Supreme Court both held that an expert can't just come to conclusions that the defendant physician or defendant provider breached the standard of care and caused damages. They actually have to show the evidence upon which they're basing their conclusions and they have to explain why the provider breached the standard of care based on that actual evidence.

I think the Court in Reyes said that it doesn't "require talismanic words," they used that phrase, but they do have to say what it is and why. Dr. Green doesn't do that.

So this declaration, even if we got past the whole CR 60 threshold and plaintiffs could show why they were entitled -- are entitled to have this order vacated -- they still do not have claims that will survive.

And again, he is not competent to --

THE COURT: I've heard he's not competent.

MS. TAFT: -- provide this, so...

THE COURT: Yeah.

MR. NORMAN: Well, you know, the specialty rule, Your Honor.

MS. TAFT: Yes, Your Honor. And I can provide some citations for that if you want the specialty rule.

THE COURT: Well --

MR. NORMAN: There's two other potential experts, Your Honor. I don't want to interrupt Ms. Taft --

MS. TAFT: It's okay.

MR. NORMAN: -- but they're cited in Mr. Anderson's declaration where, in fact, one of the experts that Mr. Anderson says he's contacted is a U-Dub employee, which is --

THE COURT: Okay.

MR. NORMAN: -- our client.

THE COURT: Which is what?

MR. NORMAN: Our client. So there's an affiliation between Seattle Children's and the University of Washington. I really highly doubt that Dr. Bledsoe actually is going to be an expert against people that she probably works with or has worked with.

And the other expert, neither of them is there an articulation that they're willing to sign a declaration. But even aside from that, we're a year and a half past when these decs needed to be provided.

MS. TAFT: Correct, Your Honor. And just to

piggyback off of what Mr. Norman said, the other two experts cited by plaintiffs' counsel, one of them is a clinical psychologist who's not even a physician. He is not licensed to practice medicine, he does not have a medical degree. So even if he provided a declaration, he's the only one who has the plaintiffs' counsel cited any substantive opinions from, even if he provided a declaration that could possibly say how each defendant violated the standard of care and caused damages, he's not qualified because he's not a medical practitioner of any kind. He's a clinical psychologist, he's a Ph.D. So his license is different, his training is different, his practice is different.

The other -- as Mr. Norman pointed out, the other expert who was cited but didn't actually provide any opinions is a U-Dub physician who is affiliated obviously with both of the defendants and who didn't provide a declaration.

So, Your Honor, even with all of the representations by both Ms. Chen and Mr. -- and counsel for JL -- (inaudible) --

MR. ANDERSON: Mr. Anderson.

MS. TAFT: -- sorry, Mr. Anderson -- (inaudible) Jason -- and Mr. Anderson, it wouldn't matter because

CR 60 would -- it wouldn't do anything for plaintiffs. We would just bring another motion and the claims would be dismissed again.

THE COURT: Okay. Mr. Anderson, you've been waiting patiently.

MR. ANDERSON: Yeah. Yeah. So I won't try to rehash everything. A couple of things I do want to point out is that, you know, I've looked at the motion for reconsideration and I've looked at the very bare nature of Judge Hill's two orders, both on summary judgment and on reconsideration, and there are -- there are multiple grounds on which she could have entered those orders, either on the substance or on a procedural ground, such as lack of jurisdiction. And the way that Ms. Chen in her motion inartfully lumps all of the defendants together in one makes it quite plausible that Judge Hill could have not distinguished between them all.

Certainly as to Children's Hospital she had grounds to dismiss with prejudice, and so I think -- I believe that an order for clarification is still appropriate. Add to --

THE COURT: Well, that's not what this is. That would be a CR 59 motion, right? Wouldn't that be the appropriate situation there?

MR. NORMAN: Yes.

MR. ANDERSON: Well, a CR -- it would be a CR 59 motion if there's a clear error, if you're basically coming to the judge and saying there's an error. I think you can come at any point under a 60(a) and say this order is silent, right? If an order is silent, that's different from saying it's unclear under Rule 59.

So we would submit that it's still appropriate. There's this open question that's never been directly answered by Judge Hill, which is: Are these four dismissals with or without prejudice when they're a different bases for the four different defendants? And it's appropriate for this Court to fill in that gap and say this is -- this is what's -- there's a hole in this order and this is how we fill in the hole.

THE COURT: But the problem that I have is, first of all, that's, well, personally what I saw as your best argument. But secondly, the response to it is really persuasive. She was given the opportunity under a CR 59 to make that exact correction. For her own reasons she declined to do so. And that would have been the best opportunity to do it. I'm not in her mind, I wasn't then, I don't know why she chose not to. It's a good reminder to me, in my opinion, to provide

that kind of clarity when I'm asked, but it didn't happen here.

So with the record in front of me, how could I possibly think that she made a clerical mistake when the mistake, if any, was actually brought to her attention and she did nothing about it?

MR. ANDERSON: Well, it's -- you go to the relief that was requested and the order that was granted. The relief requested was an order as to all defendants, that all are dismissed without prejudice.

THE COURT: Without prejudice? Who wanted that order?

MR. ANDERSON: That was Susan Chen's motion for reconsideration.

THE COURT: Oh, the reconsideration.

MR. ANDERSON: Right. She denies it but there was no clarification in the relief there as requested as to the defendants one at a time. And so you'd contend that there's still a gap there that's never been filled in.

THE COURT: No, there's gaps that haven't been filled in. I'm just not convinced that the absence of that being filled in was the result of a clerical error, that's the problem.

MR. ANDERSON: Yeah.

THE COURT: I agree with you, I would -- I share Ms. Chen's frustration with this whole thing.

And you'll get a chance, Ms. Chen, to talk because you're representing yourself here.

MR. ANDERSON: Yeah. And, for example, I mean, Rule 60(a) is not just a clerical error. Any omission, right? "Omission" is a pretty big word. So if there's an omission, that omission can be corrected at any time.

THE COURT: But it's an error arising from oversight or omission may be corrected by the Court. And had there not been a CR 59 motion, that might be more persuasive, but she brought the appropriate motion for relief, to her credit. Not an attorney, but she brought a CR 59 motion and said, "Hey, Judge, your order could be read to dismiss everything with prejudice. You didn't really mean to do that, did you? These are kids. And by the way, they argued that they didn't have jurisdiction. Come on, it's not really with prejudice for all of us."

And she said, "Denied."

How can I now, a year and a half later say, "Ah, with the benefit of this additional briefing and Mr. Anderson being here, clearly that was an omission."

It's not how I would have written the order. And

again, I've got hindsight, so I'm not trying to criticize my colleague -- my former colleague -- but I don't know how I can rule that that was an error resulting from an omission because the omission was called to her attention and she didn't correct it.

MR. ANDERSON: Well --

THE COURT: So therefore, in her mind at least, it wasn't erroneous, it was purposeful.

MR. ANDERSON: Well, yeah. But we've still got an order that's never been clarified. There's just a denial. It's an empty denial.

THE COURT: And I think, unfortunately, that's where the Court of Appeals is going to have to stand in.

MR. ANDERSON: Okay.

THE COURT: And they're going to have to be the ones. And hopefully they agree with me, because if I was in the Court of Appeals, well, first of all, I would get my input from two colleagues. But I would hope that the three of us would say, "You know what? You deal with jurisdiction first." That's what I always think that you do. If you don't have jurisdiction over a party, then that's -- you're done with that party. You wish them well and you dismiss them. And in some instances you might award fees under a long-arm statute, right? But that's what you do.

You don't reach the merits. They don't get the benefit of a substantive order as to the merits at the same time that they're saying, "You don't have jurisdiction over me." You can't get both, in my opinion. But we'll see what Court of Appeal says. That's why they're there and I'm here.

So any other arguments you got before I turn it to Ms. Chen?

MR. ANDERSON: Yeah, two small ones. I mean, I will --

THE COURT: Can I talk to you for a quick second?

MR. ANDERSON: Yeah.

THE COURT: -- because you -- at first when I was reading your brief, you mentioned the failure to sign the complaints. And I thought, wow, if that's the case, under CR 11, if that was called to their attention and it wasn't corrected, CR 11 is mandatory that the complaints have to be stricken and that should have been the end of it. And I thought, "Aha."

But then I looked back at the complaints and they were signed, so what did I miss? Because it looked like there was one that wasn't signed maybe, but there were many of them that were signed, including one that said -- there was like seven complaints. It's super confusing.

MR. NORMAN: The ones against the first physician, which was Migita, was signed. The one against Kodish and Metz were not signed.

THE COURT: Ever?

MR. NORMAN: Not that I've seen.

THE COURT: Because there are -- you know there's like --

MR. NORMAN: Yes. And they signed the ones against the City of Redmond.

THE COURT: -- one, two, three, four, five, six -- six complaints were filed.

MR. NORMAN: Yes. And we attached them to the Bruce Megard declaration, Your Honor.

THE COURT: So which one -- the ones against your clients were never filed -- I mean never signed?

MR. ANDERSON: Two of them.

MR. NORMAN: Two of the three.

MS. CHEN: Two of them never signed.

THE COURT: So CR 11 requires that those be stricken, because if you called that to their attention under CR 11 in your opposition and said, "Ah, they weren't signed," CR 11 is not discretionary. It doesn't say "may be stricken," it says "shall."

MR. NORMAN: So here, Your Honor, if I can hand the Court some copies, Exhibit 3 to the --

THE COURT: Well, I've got all the complaints --
MR. NORMAN: Okay.
THE COURT: -- on ECR right here. So I just wanted to make -- it was hard for me to match them all up --
MR. ANDERSON: Yeah.
THE COURT: -- because there's six of them and I was going, "Whoa." Some are signed, some aren't signed. There should be only one operative complaint, obviously -- we all know that -- and that should list many parties with many claims. So that wasn't done here.
But if there was a separate complaint filed in this cause number against two out of three of your clients that was not signed, and if that was brought to the attention of the party, which it was, as I understand it --
MR. NORMAN: It was.
THE COURT: -- then that complaint should have been stricken under CR 11.
MR. NORMAN: Right. And I think that --
THE COURT: And if the complaint is stricken, then you never reach the merits.
MR. NORMAN: But it's an issue of law whether or not -- and there's nothing in the record from Judge Hill saying she even entertained that argument.

There's actually contrary authority to that. We did raise that argument, but I don't believe it's actually automatic.

THE COURT: But it's mandatory.

"If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

Here it was called to the attention of the pleader or movant in the motion for summary judgment. It was not promptly signed. It was never signed. CR 11 is mandatory, "it shall be stricken," not discretionary.

MR. NORMAN: I understand, Your Honor. And I don't know whether she considered these four names e-signatures. They did write their names.

THE COURT: But how could you when you look at the complaints? The other ones actually have so-called wet signatures on them.

MR. NORMAN: Correct. But I would argue that just because the first one did have a wet signature doesn't mean that the Court couldn't have concluded this is actually signed, because you can e-sign -- e-sign pleadings and --

THE COURT: Yeah, but how do you indicate something's

been e-signed?

MR. NORMAN: Usually an S slash.

THE COURT: Exactly right.

MR. NORMAN: Definitely. I don't know --

THE COURT: It didn't happen here.

MR. NORMAN: -- what -- I don't know if Judge Hill even entertained that argument.

THE COURT: But you have to. That's my problem is, I mean, like we're kind of --

MR. NORMAN: And the Court of Appeals could agree with you and kick it back and say, "This is" -- "this is an error. It should have been fixed by the trial Court" --

THE COURT: Yeah.

MR. NORMAN: -- "it was brought to their attention." But error of law, it -- I mean, I'm looking at Presidential Estates Apartment Associates v. Barrett 129 230 [sic], it does not apply to judicial errors.

THE COURT: Yeah, I hear you. All right. It's frustrating.

MR. NORMAN: Well, alleged judicial errors. Sorry. Sorry, Your Honor.

THE COURT: Mr. Anderson, what's your last gasp before we turn things over to Ms. Chen?

MR. ANDERSON: Well, I mean, the case he cited, it's

been a week since I read it, but I don't think it was dealing with an allegation that a judgment was void. And --

THE COURT: So would a complaint that should have been stricken but yet was considered on the merits, does that make the judgment that was entered as a result void?

MR. ANDERSON: That's if you take the language from their brief and the out-of-this-jurisdiction cases that the doctor cited, absolutely, it's void.

THE COURT: Give me that case.

MR. ANDERSON: Let's see. 2015 WL 9943593 --

THE COURT: Hold on. Four -- nine -- I'm sorry. 2015 WL 9?

MR. ANDERSON: Here, have the plaintiffs hand this to you.

THE COURT: Oh. Just read it to me, though, because I'm typing. I just was not --

MR. ANDERSON: Okay.

THE COURT: -- expecting a WL cite.

MR. ANDERSON: 2015 WL 9943593.

THE COURT: Okay.

MR. ANDERSON: And that's page 4.

THE COURT: The Vandergriff?

MR. ANDERSON: Yes.

THE COURT: All right. And this dealt with CR 11, with the signing?

MR. ANDERSON: No. This deals with what something means when it's void. And actually it's looking -- I'm working off of his brief, but it was the Beard Court quoting Vandergriff. And I might not have actually cited the Beard --

THE COURT: Hmm, this is interesting. All right.

MR. ANDERSON: -- citation.

THE COURT: I like this cite here, although it's citing Tennessee Rule of Civil Procedure.

MR. NORMAN: There is no Washington case that says this, Your Honor, I tried.

THE COURT: "Because the complaint was void as to Catherine's claims, it was insufficient to commence an action on her behalf, and neither Catherine nor her claims were properly before the trial court."

And although the rule that they're citing is a rule that we have, providing that every civil action commences when a complaint is filed -- I'm pretty darn sure we have a very similar rule, although the commencement of a claim is also when served.

MR. NORMAN: Yes.

THE COURT: But in order for it to be a valid

complaint, it's got to be signed, under CR 11.

MR. NORMAN: I understand.

THE COURT: So if it's not ever a valid complaint, why isn't the complaint void?

MR. NORMAN: And they can raise that in appeal. That's an error of law. That's -- whether or not or not Judge Hill should have corrected the record, should have --

THE COURT: No. But that makes the judgment void. Judgment void is something that we -- that's specifically provided for under CR 60(b)(5), void judgment.

MR. NORMAN: I know of no --

THE COURT: Don't we have something?

MR. NORMAN: -- idea -- there's another case, Your Honor.

THE COURT: Does it deal with this issue?

MR. NORMAN: No case in Washington deals with this issue.

THE COURT: Well, Vandergriff does. It's just citing for some reason --

MR. NORMAN: That's not a Washington --

THE COURT: -- Tennessee law.

MR. NORMAN: That's not a Washington case. None of the cases --

THE COURT: Oh. I thought it was a Washington case it cited because it was --

MR. ANDERSON: No.

THE COURT: -- Westlaw cite. I was like, oh, this is a --

MR. ANDERSON: No, no. It's a --

MR. NORMAN: Your Honor, there's no Washington case that says --

THE COURT: Oh.

MR. NORMAN: -- what the Court just repeated.

MR. ANDERSON: Yeah. We've got to rely on persuasive cases.

MR. NORMAN: Again, errors of law cannot form the basis for a successful CR 50, they must be raised on appeal. And this is --

THE COURT: No, I got that. You guys have beaten that horse.

MS. CHEN: I don't see a Washington case.

THE COURT: Although, they don't want us to --

MS. CHEN: In Division --

THE COURT: PETA, I think, doesn't want us to say "beating a horse" anymore.

MS. CHEN: 44500-0 Division II.

MR. NORMAN: Is it?

MS. CHEN: And the Supreme Court has the decision on

that (inaudible) --

THE COURT: Hold on, Ms. Chen. Give me the cite again, Ms. Chen.

MS. CHEN: You can check the unpublished opinion from Division II.

THE COURT: Yeah. What's the cite?

MS. CHEN: 44500-0.

THE COURT: That can't be the cite. Hold on. We'll get it. What's the name of the case, ma'am?

MR. ANDERSON: The case is Todd M. Place --

THE COURT: What is it?

MR. ANDERSON: In the Matter of the Detention of Todd M. Place.

MS. CHEN: And that's Supreme Court.

THE COURT: In re Detention of Todd --

MR. ANDERSON: Yeah.

THE COURT: -- M. Place? That's really his name?

MS. CHEN: The Supreme Court said here, the Supreme Court make it very clearly a judgment can be void (inaudible) personal jurisdiction. And since Judge Hill does not obtain any personal jurisdiction over the two minor kids due to the unsigned complaint and also no service upon these two kids, especially no appointment for the guardian ad litem for two kids. So Judge --

THE COURT: I guess I'll hear from Ms. Chen now. Go ahead.

MS. CHEN: So Judge Hill -- I mean, this Court has no personal jurisdiction over two kids, because of two unsigned complaints and then absence of guardian ad litem and no service (inaudible) two kids. So according to the Supreme Court's opinion, a judgment will be void for lack of personal jurisdiction.

And then according to CR 60(b)(5), the judgment -- a void judgment is something this Court can be deciding under CR 60(b)(5) because it's a void, the judgment is simply void.

Another argument for a void judgment is because Judge Hill should be disqualified from this case because she was the presiding judge over my dependency case in 2013. She made multiple important decision for my case. She has conflict of interest.

According to Code of Judicial Conduct 2.11, she should be -- she is required to disqualify for this case. Based on case law, a disqualified judge -- any judgment made by a disqualified judicial official is void.

So for (inaudible) grants, this -- any judgment entered by Judge Hill should be void. And this Court has -- this Court is required to vacate the

void judgment.

This is just one part for the void judgment. I still have another parts. This --

THE COURT: Keep going, you're doing great.

MS. CHEN: Okay. Another part is about I notice that the defendants, they argued my motion to vacate was not brought timely. As I explained in my reply --

THE COURT: Which motion? The motion to vacate?

MS. CHEN: Yeah. Motion to vacate --

THE COURT: Okay.

MS. CHEN: -- was not timely brought. But this is absolutely law. As I made argument in my reply, this is -- the orders were not final until September 22nd, 2017, as recognized by the defendants in their response to the appeal court's motion to determine appealability. At page 5 they argue that this appeal is not appealable because they're not final.

And also according to CR 60(b), their motion to vacate should be brought until it's final decision, a final judgment. You can see clearly CR 60(b) -- (b) second I believe. Let me see. It should be, yeah, CR 60(b), it says the motion is something relatable case, should be related to final judgment. It's clear, "final." You can see that this word clearly in it, "final." Because it's not final until September, so

there's no -- defendant's argument is without merit because I brought this motion five months after it becomes final.

Anyway, even the defendants argue that Judge Hill's order was entered on March 3rd, I still fight my motion to vacate on March 2nd. So and then, you know, us agree by defendants within one year's time line, so there's no argument for this not timely.

And I'm sorry I'm a bit nervous.

THE COURT: You're doing great, Ms. Chen. You always do a good job arguing.

MS. CHEN: I'm sorry.

And then my other argument is I believe this order should be -- the judgment should be vacated because of the procedure irregularities, as the record clearly saw that defendants did not comply with CR 65 for providing me 28 notice. The record shows I received -- I received the documents on February 17. The hearing was held on March 3rd. And then last (inaudible) 28 --

THE COURT: What about e-service?

MS. CHEN: I'm sorry?

THE COURT: You e-filed your complaint --

MS. CHEN: Yes.

THE COURT: -- so that means you signed up for e-service --

MS. CHEN: No.

THE COURT: -- which means that once they e-file anything, it's served on you at the same time.

MS. CHEN: No. This is not true. They did not e-file me at all. I did not receive.

And later they send me a notice. They said, "Ms. Chen, do you realize you did not e-service, you did not assign any e-file, and then you need to (inaudible) e-file, e-serve."

And then you can check the court record, they never e-service me on that day, it's very clearly. You can check it very clearly. No service on that day.

If they did serve me through e-file, through an e-service, it should have been in the court record. It's very clear, no record at all. I did not receive any documents until February 17th.

MR. NORMAN: You can --

THE COURT: Yeah. Well, someone will address that.

Mr. Interpreter?

INTERPRETER HO: May I use the rest room real quick? I'm not feeling very well. I just need to come --

THE COURT: Sure.

INTERPRETER HO: Give me three minutes?

THE COURT: Yeah. Okay. We'll take a --

INTERPRETER HO: Okay. Thank you. She seems to be

doing great.

MS. CHEN: No, no. I -- no. I tried to save --

THE COURT: Well, we have to --

MR. ANDERSON: Okay. Let's take a break.

THE COURT: Are you comfortable with him -- since you're speaking in English this entire time, can he use the rest room and can you keep arguing --

MS. CHEN: Yeah.

THE COURT: -- because so far you're arguing without him.

INTERPRETER HO: Thank you.

THE COURT: All right. We'll see you Mr. Interpreter. Come on back.

Okay. Keep going, Ms. Chen. You're doing great.

MS. CHEN: And then us just now -- I'm sorry. What do we stop?

THE COURT: You just talked about service --

MS. CHEN: Oh, yeah.

THE COURT: -- and that they didn't give you the 28 days.

MS. CHEN: Yes.

THE COURT: Yeah.

MS. CHEN: You know, for the -- they said I should e-service, but this is not a requirement for non-attorneys, as you can see, based on LGB [sic] 30 --

LGB 30(b)(4)(A). This is not a requirement for me at all because I'm not an attorney. I'm not licensed attorney in Washington court.

And then -- and then also if defendants claim they e-service me on that day, they need to prove. And there's evidence they didn't e-service on that day. No court record, so they ever e-service me.

Of course, there no court record even, so any proof that they e-service Mr. Lian and two other kids on that day as well. Based on the whole record for this court, no service upon these two minors for all the time.

Based on Supreme Court's decision -- let me see. I want to point the Supreme Court's decision State vs. Douty, 92 Wn.2d 930, 603 P.2d 373, 1979. The Supreme Court pointed out simply that the (inaudible) through -- the (inaudible) don't name in the action was never served. Consequently, he's not before this Court.

Since the Court has -- since the childrens have never before the Court, I just want to question. Since the Court has no jurisdiction over these kids, how can they enter any judgment against these two children? What's the grounds for if the Court has no jurisdiction over the kids? Any order against the kids should be void because they have no jurisdiction.

THE COURT: And you don't think there was jurisdiction of the children because there was no guardian ad litem?

MS. CHEN: No. This is another argument.

THE COURT: Is that what you're arguing?

MS. CHEN: I mean, no guardian ad litem and no service and also unsigned complaint. These are all the issues related to children.

THE COURT: Okay.

MS. CHEN: So I just want to present to this Court that this Court has no jurisdiction over the kids. And then she -- Judge Hill has no jurisdiction to assign any order against these two children. Her order about these two children should be void.

And also, as I pointed out to you just now, Judge Hill has conflict of interest. She's required to disqualify herself from the very beginning when she was presiding this case. According to our case law, a disqualified judge -- any order entered by a disqualified judge should be void as well.

THE COURT: But she was never disqualified.

MS. CHEN: She is required to disqualify herself.

THE COURT: You never -- you never filed a motion to disqualify -- an affidavit of prejudice, what it was called back then, now it's called a notice of

disqualification -- you never did any of those things.

MS. CHEN: I understand. I want to -- this is for something I want to explain to this Court.

THE COURT: Okay.

MS. CHEN: Because I am not -- you know, I am not a native English speaker, and then I do have some problems remember the people's name, English names. Actually, when she was in the court, I do not recognize her at all. I don't know until at a later time somebody told me she was the (inaudible) judge. I said, "No," because I'm not sensitive to her names.

Another example is, you know, I have been working with (inaudible) attorneys for more than one year. When I send an email to my attorney, I even -- I just call -- I write the long names at all. I just spelling the names, you know, all the time, so this is -- this is not an issue I doing it deliberately. It's because I might -- I don't have the sensitive to English names.

I hope you can understand this as an excusable neglect. It's just because my -- you know, the Chinese names and English names are totally different. We have the last name first and then first name followed. And then you --

THE COURT: Right. But you appeared in front of her in open court, you saw her in person --

MS. CHEN: I understand.

THE COURT: -- and you still didn't bring it up at the summary judgment motion.

MS. CHEN: Okay. Even -- okay.

THE COURT: Right?

MS. CHEN: Even this, we still have other grounds to argue that her judgment is void.

THE COURT: Okay.

MS. CHEN: I think it's already sufficient enough to argue, to support my argument her judgment should be void.

THE COURT: Okay.

MS. CHEN: And also -- is that okay?

THE COURT: You're doing great.

MR. ANDERSON: Keep going.

MS. CHEN: And then -- and then my other argument is, as I said just now, that procedure irregularities. And then also for the -- oh, no. For the 28 days notice, this we have talked about just now. And then you -- and anyway, the defendants contend that I -- they e-service me, but this is not something in the record in the system. I never received the documents until February 17th. This is the truth undisputed.

Okay. Another argument is this order should be void because it's the mistake for a misrepresentation in

(inaudible) this order. The record clearly indicating the defendant Darren Migita's (inaudible) record was never before this Court; however, an order in his favor be entered.

According to the court record, defendant submitted a (inaudible) record from Dr. Russell Migita. This person only have the same last name of defendant Darren Migita. Russell Migita is not never a person in this case. I consider this is a mistake from this Court.

I also consider this is the misrepresentation of the opposing party. They try to bring a different (inaudible) record from a different doctor to obtain a judgment for the defendant's favor.

You know, when a person -- you know, Darren, Dr. Darren Migita's (inaudible) is something in dispute for this matter, and then so his medical record should be before this Court, for this Court to review and made a decision base on the (inaudible) record to see if he fell below the standard of care or not.

But since his record now before this Court, how can a Court made a decision so when likely Judge Hill's decision was based upon the (inaudible) record of Dr. Russell Migita. It's a mistake.

THE COURT: Okay. I understand the argument.

MS. CHEN: And then --

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

In WITNESS WHEREOF, I have hereunto set my hand this 8th day of April, 2019.

_____

Bonnie Reed, CET

APP. H

COURT OF APPEALS, DIVISION ONE

OF THE STATE OF WASHINGTON

Susan Chen et al *Appellants* *vs.* Darren Migita *et al* *Respondents*	No. 79685-2-I STATEMENT OF ADDITIONAL AUTHORITIES (RAP 10.8)

Pursuant to RAP 10.8, Appellants cite the following additional authorities, with regard to issues in their opening brief, i.e., (1) whether trial court lacking personal jurisdiction can reach merits (*e.g.*, Brief at P. 20- 24) and (2) whether minors had been properly before the court (*e.g.*, Brief at P. 31; 39):

Melo v. U.S. 505 F 2d 1026 (8th Cir. 1974) ("Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but rather should dismiss the action.")

28 U.S. Code § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel…".).

John v. County of San Diego, 114 F. 3d 874, 877 (9th Cir. 1987) ("a nonlawyer 'has no authority to appear as an attorney for others than himself")

Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn., 91 Wn.2d 48, 586 P.2d 870 (1978) ("[o]rdinarily, only those persons who are licensed to practice law in this state…

"[t]he 'pro se' exception are quite limited and apply only if the layperson is acting solely on his own behalf."

RCW 2.48.170 ("Only active members may practice law").

Respectfully submitted this 15th of April, 2020

/s/ Susan Chen

Susan Chen, *pro se* petitioner

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 15th day of April, 2020

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

SUSAN CHEN - FILING PRO SE

April 15, 2020 - 4:42 PM

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Appellate Court Case Title:	Susan Chen et al, Resp-Cross App v. Darren Migita, MD et al, App-Cross Resp

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APP. I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

Susan Chen *et al* *Respondents/Cross-Appellants* v. Darren Migita *et al* *Appellants/Cross-Respondents*	No.79685-2-I MOTION FOR RECONSIDERATION AND NOTION TO PUBLISH

INTRODUCTION AND RELIEF REQUESTED

Pursuant to RAP 12.4 and RAP 12.3, Respondents/Cross-Appellants Chen ("Chen") request that the Court's reconsider and publish its June 22, 2020 Opinion.

Over two months prior to this Court entered an opinion on the appeal, Chen submitted Statement of Additional Authorities pursuant to RAP 10.8 about whether children had been properly before the trial court and how the trial court lacking jurisdiction can reach the merits. Specifically, Chen submitted a list of authorities:

Melo v. U.S. 505 F 2d 1026 (8th Cir. 1974) ("Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but rather should dismiss the action.")

28 U.S. Code § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel…")

John v. County of Sand Diego, 114 F.3d 874, 877 (9th Cir. 1987) ("a nonlawyer 'has no authority to appear as an attorney for others than himself.")

Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn., 91 Wn.2d 48, 586 P.2d 870 870 (1978) ("[o]rdinarily, only those persons who are licensed to practice law in this state…the 'pro se' exceptions are quite limited and apply only if the layperson is acting solely on his own behalf.")

RCW 2.48.170 ("Only active members may practice law")

This Court did not address any of the above authorities and did not explain how the court can reach the merits when it lacks jurisdiction; and how minors had been before the court absent representation of licensed attorneys.

In the instant case, minors were not represented by counsel or even a guardian ad litem, and *pro se* parents are legally prohibited from representation. *e.g., Wash. State Bar Assn. v. Great W. Union Fed. Saw. & Loan Assn.*, 91 Wn.2d 48, 586 P.2d 870 (1978) (holding non-licensed lawyers' legal activities constitute "unauthorized practice of law" and "[t]he "*pro se*" exceptions are quite limited and apply only if the layperson is acting solely *on his own behalf*") (emphasis in original). As this Court recently made clear, "*Only legal counsel can advocate for the legal rights and interests of a child.*". In the Matter of the Dependency of E.M., Julia Morgan Biryukova v. State of Washington, Department of Child, Youth and Families (No 78985-6-I) (Division I) (February 24, 2020) (emphasis added). In this case, J.L. – who deteriorated in state custody to the point that he lost, seemingly permanently, all speech, toilet training and responsiveness – was deprived of legal counsel and his claims dismissed with prejudice more than a decade before his statute of limitations would have run. Since Chen's representation of J.L. and L.L. was legally prohibited, any judgment against the children was invalid. At minimum, any dismissal as to the children should be "without prejudice."

ARGUMENT

Jurisdiction is the ***first*** issue to address. As stated by the Supreme Court of the United States, "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . ." *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). This Court stated that the jurisdictional challenge about Judge Hill is a legal error but did not address. This Court did not explain how Judge Hill can render a judgment when facing jurisdictional challenge.

Further, minors had not been properly before the courts. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel..." *See*, 28 U.S.C. § 1654. Similarly, Washington courts have long recognized that only licensed lawyers can practice law. *e.g., Washington State Ass'n v. Washington Ass'n of Realtors,* 41 Wn.2d 697, 699, 251 P.2d 619 (1952). In *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 586 P.2d 870 (1978), the Washington Supreme Court reiterated that "[o]rdinarily, only those persons who are licensed to practice law in this state". RCW 2.48.010 *et seq*; APR 5, 7. Having recognized the "pro se exception", the Supreme Court made clear that "[t]he 'pro se' exception are quite limited and apply only if the layperson is acting solely *on his own behalf*." (emphasis in original). *Id.*

General Rule (GR) 24 (a) defines the practice of law as follows, in part:

> (a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:
>
> (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

> (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
>
> (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

Per GR 24, any legal activities such as "drafting or completion of legal documents" or "representation" are considered the practice of law. *Also see Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 302, 45 P.3d 1068 (2002) (quoting *State v. Hunt*, 75 Wn. App. 795, 802, 880 P.2d 96 (1994) (quoting *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 55, 586 P.2d 870 (1978)).

In order to practice laws in Washington courts, one is required to be an active member of Washington State Bar. Prior to admission, one is required to complete the require legal training, pass the bar exam, and receive an order from the Supreme Court of Washington admitting one to practice law. Chen does not meet any the above requirements and can therefore only represent herself under "pro se exception". The same is true for Lian. Without authorization to practice law, the parents cannot represent others, including two minors.

There is no question but that the parties in this case were *pro se*.. Even with the knowledge that Chen was *pro se*, this Court mistakenly stated, "A parent may initiate a lawsuit as a guardian on behalf of a minor child.". Opinion at 17. In making this conclusion, this Court cited *Taylor v. Enumclaw Sch. Dist. No. 216,* 132 Wn. App. 688, 694, 133 P.3d 492 (2006) but *Taylor* is factually distinguished: parent in *Taylor* was <u>*not*</u> pro se but was represented by counsel, specifically, by a law firm named Tyler K. Firkins, of Vansicien Stocks & Firkins.

In making a determination that the *pro se* parents could represent their minor children in this case, the Court improperly granted them privileges of unauthorized practice of law, which is prohibited by laws. A search of data base in Washington courts generates no results that a *pro se* litigant is authorized to represent others in Washington courts. In this case, moreover, the parents were representing the minor children, including a severely disabled child, with no regard for whether there might be conflicts between the parents and the children, or whether the parents were capable of representing the children's best interests. When a severely disabled child was without benefit of a guardian ad litem or counsel, it is a gross miscarriage of justice. Since and the *pro se* parents were legally not allowed to represent the parents were legally not allowed to represent their minor children, J.L. and L.L. were never before the court, and should not be bound by the judgment.

CONCLUSION

In light of the foregoing, Chen respectfully asks the Court to reconsider and publish its opinion. At minimum, this Court should revise the orders against the minors J.L. and L.L. to read "without prejudice."

DATED this 9th day of July 2020.

Respectfully submitted.

/s/ Susan Chen
Susan Chen, *pro se*
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 9th day of July, 2020.

/s/ Susan Chen
Susan Chen, *pro se*

PO BOX 134, Redmond, WA 98073

APP. J

NO.79685-2

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

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

Plaintiffs/Respondents/Cross-Appellants

v.

DARREN MIGITA, M.D., IAN KODISH, M.D., JAMES METZ, M.D.,

Defendants/Appellants/Cross-Respondents

SEATTLE CHI'DREN'S HOSPITAL

Defendants/Cross-Respondents

RESPONDENTS/CROSS-APPELLANTS' RESPONSE AND OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

A. This appeal is premature because the order vacating a pre-discovery and pre-trial summary judgment is interlocutory and unappealable

By law in most jurisdictions, an interlocutory order is generally not accepted for immediate appeal. In ***Maybury v. City of Seattle***, 53 Wn.2d 716, 721, 336, P.2d 878 (1959), Washington Supreme Court declined to grant review of a pre-trial summary judgment, holding that a pre-trial order is "interlocutory" and "[o]nly a final judgment may be appealed." The ***Maybury*** Court explicitly pointed out that, "Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business," because "[i]t is not the function of an appellate court to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case" and "[the appellate court] is not in a position to evaluate properly the correctness of the various interlocutory rulings of the trial judge." (citation omitted).

Judge Ken Schubert's January 28, 2019 order is interlocutory. Darren Migita, James Metz, Ian Kodish (collectively "SCH physicians")'s appeal is premature. By clearing the procedural irregularities and vacating an ambiguous pre-discovery and pre-trial summary judgment, Judge Schubert puts the case back into pre-summary judgment, pre-discovery and pre-trial mode, leaving all the disputes unresolved and unaddressed. Judge Schubert writes, "[t]he parties (and the appellate court) are entitled to know the legal effect of this Court's orders…The silence of this Court's orders in that regard creates a question of regularity of the proceedings that justifies relief from the operation of those orders. Accordingly, this Court GRANTS the motion for reconsideration.". Judge Schubert's order does not discontinue the action or put an end to the case, nor does he dispose any of the claims. SCH Physicians' rights are not affected: their rights to appeal are not deprived, they can bring summary judgment again. At the same time, Ms. Chen are afforded an opportunity to conduct discovery.

RAP 2.2 (a) (10) does not automatically grants an appeal right. SCH Physicians' reasoning that RAP 2.2 (a) (10) guarantees a right to appeal does not make any sense. - **if the right to appeal can be easily obtained through an order on motion to vacate, litigants will be motivated to file frivolous motions to vacate *any* trial court decisions, only aiming to obtain an appeal right,** which is at odds with the ***Maybury*** Court's holding that "[t]he orderly administration of justice demands that we refrain from reviewing pretrial orders in advance of trial". Indeed, this Court declined to accept for a review on a series of orders including order on motion to vacate. See, this Court's decision in #64832-2-I.

In a case involving multiple parties and multiple claims, partial decision is not a final decision. RAP 2.2 (d) and CR 54 (b) apply to cases involving multiple parties and multiple claims. Absent certification as required by CR 54 (b) and RAP 2.2 (d), an interlocutory decision not resolving all claims and all parties is not appealable as a matter of right. ***Lindsay Credit Corp. v. Skaperud,*** 33 Wn. App. 766, 772, 657 P.2d 804 (1983). Consistent with Washington case laws, this Court has consistently declined to review an interlocutory decision not disposing all claims. For example, in No. 73815-1-I, Commissioner Kanazawa dismissed a premature appeal *after* briefing. In 2017, this Court declined to accept for review of the underlying summary judgment order "not disposing of all claims as to all the parties". See Ruling on #76824-7-I.

There is *no dispute* that Judge Schubert's order is interlocutory because it was "intervening between the commencement and the end of a suit which decides some point or matter but is not a final decision of the whole controversy." BLACK'S LAW DICTIONARY 731 (5th ed. 1979). Multiple claims and disputes remain in this case but Judge Schubert's order addresses none of them, except for clearing the procedural ambiguities and irregularities, leaving multiple issues unresolved and unaddressed moving forward. Judge Schubert's order does not end the action, it is

thus interlocutory in nature, which SCH Physicians did not dispute in their Answer before the supreme court in #97526-4. Indeed, they *conceded* in their Answer in #97527-2 that "[an interlocutory order] was not appealable and the trial court retained authority to 'revisit interlocutory orders' in order 'to correct any mistakes prior to entry of final judgment.' ***Chaffee v. Keller Rohrback LLP***, 200 Wm. App. 66, 76-77, 21, 401 P.3d 418 (2017). SCH Physicians did not cite even one single case holding that an interlocutory decision not disposing of the claims of all parties had ever been accepted for appeal as of right under RAP 2.2 (a) in Washington courts.

Although discretionary review may be requested under RAP 2.3, such piecemeal review is highly disfavored. ***Fox v. Sunmaster Prods., Inc.***, 115 Wn.2d 498, 503, 798 P.2d 808(1990). An interlocutory decision such as the one presented here will not be reviewed unless the trial court committed an obvious error which would render further proceedings useless, or committed a probable error that substantially alters the status quo or limits the freedom of a party to act, or significantly departs from the accepted and usual course of proceedings. RAP 2.3 (b).

Judge Schubert did not commit an obvious error in deferring to the Supreme Court's decision in ***State v. Nw. Magnesite Co.***, 28 Wn.2d 1,182 P.2d 643 (1947), a *controlling* precedent. The trial court's decision does not render further proceedings useless, substantially alter the status quo, or substantially limit he freedom of a party to act within the meaning of that rule. Instead, under his decision, the remaining claims proceed to resolution, at which point either party may appeal from the final judgment in the ordinary and usual manner.

"Denial of a motion for summary judgment is generally not appealable order" ***DGHI, Enters v. Pac. Cities, Inc.***, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). Vacating summary judgment akin to denying summary judgment is not unappealable. Appellant physicians' rights are not affected for being denied a premature appeal. As Supreme Court Commissioner Walter Burton pointed out,

"As [Appellant] does not have a right at this point...once a final judgment is entered...[appellant] may appeal. That there may be delay om the entry of final judgment does not alter the fact that there is currently no appealable final judgment...". *See,* Ruling in #94547-1 (Court of Appeals No. 73815-1-I).

In light of the foregoing, Respondents respectfully ask this Court to dismiss this premature appeal.

B. This appeal is frivolous in that Appellants ask this Court to reinstate a decision that they conceded had legal errors

This is a frivolous appeal. It has long been the rule in Washington that motion to vacate and motion for reconsideration are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion. ***Morgan v. Burks***, 17 Wn.App. 193, 197, 563 P.2d 1260 (1977); ***State v. Scott***, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). The SCH Physicians explicitly avoid identifying the appropriate standard for review. Throughout the brief, SCH Physicians' purported arguments relied solely upon misrepresenting Judge Schubert's order. Specifically, Appellant physicians (mistakenly) alleged Judge Schubert vacated the summary judgment on grounds of "error of law" but these words were *not at all* present in the order. Instead, Judge Schubert explicitly articulated, "[t]he silence of this Court's order in that regard creates a question of regularity of the proceedings...". Judge Schubert properly exercises his discretion on vacating an ambiguous order constituting procedural irregularity, which affects "how the court proceed" (RP 19). SCH Physicians cite *no* authorities to show that Judge Hill's failure is regular, and unambiguous, nor did they cite any cases to show that Judge Schubert abuses his discretion in following a controlling precedent. SCH Physicians *conceded,* moreover, that Judge Hill's order was erroneous in multiple instances. In just one example, SCH Physicians *admitted* Judge Hill committed an "error of law" (RP 49, 52) at failing to strike Chen's unsigned

complaints, a CR 11 *mandatory* requirement. RP 46-48. Judge Schubert pointed out that, "if the complaint is stricken, then you never reach the merits" (RP 47), and that CR 11 is "mandatory" (RP 48). SCH Physicians did not dispute Judge Schubert's conclusion, and *conceded* "[t]hat's an error of law." RP 52.

Appellant SCH Physicians were fully aware that Judge Hill erred in rendering judgement against minors absent appointment of guardian ad litem. In ***Anderson v. Dussault,*** 181 Wn. 2d 360, 333 P.3d 395 (2014), a six-year-old minor, Rachel, represented by SCH Physicians' *present* counsel, specifically articulated,

> "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 eliminate 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 Supreme Court held in ***Anderson*** that absence of guardian ad litem who could receive notice, minor's statute of limitation was tolled. Here, the trial court did not appoint guardian ad litem *even after* the issue was brought to its attention (CP 524-525, 563, 771). Here, both J.L. and L.L. are under ten. Should these two minors be denied their court day through no fault of their own but their age?

What is remarkable in the Appellant SCH Physicians' brief is their failure to address arguments they made before the trial court to obtain summary judgment. These arguments at summary judgment were than the lack of signature on two of the complaints rendered the complaints void *ab initio*. Thus, they stated that,

- "If the original complaint is void, there is nothing to amend (CP 302)."

- "Something that is "void" has no legal effect." (CP 303).
- "the filing of a void complaint does not commence a civil action." CP 304.
- "the complaint Plaintiff seeks to amend does not exist, it is a nullity because it was void ab initio and "there can be no 'relation back' to a pleading… that was a nullity from the start" CP 304.
- Plaintiffs' complaints should be dismissed "because they were void ab initio, and therefore,
- they failed to confer subject matter jurisdiction upon this Court." CP 305.

Appellant SCH Physicians claimed that since the complaints were void *ab initio* and the statute of limitations has now run, the claims must be dismissed in their entirety. However, ***this reasoning applies only to the parents.*** As SCH recognized in its response (CP 639), the statute of limitations for the children does not begin to run until the children reach the age of majority [in Washington, age 18]. CP 639. It is contrary to law for the Court to deny the children an opportunity to present their claims at all. If the children's complaints are void, they have not legally filed any actions, and have many years left to do so.

By filing this frivolous appeal, SCH Physicians apparently placed themselves in an above-the-law position: Notwithstanding the *controlling* precedent, SCH Physicians ask this Court to disregard Judge Schubert's decision which is consistent with controlling precedent ***NW Magnesite Co.***, and to reinstate Judge Hill's order which they know (and have admitted) to constitute "error of law".

This is a case involving multiple parties and multiple claims. Judge Schubert's order does not resolve the claims as to all parties and is unappealable. In ***Maybury v. City of Seattle***, 53 Wash.2d 716,721, 336 P.2d 878 (1959), the Supreme Court explicitly announces, "It is not the function of an appellate court to inject itself into the middle of a lawsuit and undertake to direct the trial court judge in the conduct of the case". Ms. Chen respectfully asks this Court to dismiss

this inappropriate appeal, or in the alternatively, affirm the decision vacating summary judgment as to SCH Physicians, and reverse the summary judgment as to SCH.

II RESPONDENTS/CROSS-APPELLANTS' ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Judge Schubert abused his discretion for failing to vacate *all* irregularities in Judge Hill's order, including summary judgment in favor of SCH. CP 889. In particular:

a. The trial court abused its discretion when it failed to vacate the summary judgment order after learning (i) that the issue of a lack of a guardian ad litem had been raised but not addressed; (ii) the children's interests were clearly not being adequately represented.

b. The trial court abused its discretion when it failed to vacate the summary judgment order after considering the irregularities associated with the failure to abide by multiple rules and local rules governing its procedures such as CR 56 (c) & (f), CR 5 (b)(2)(A), CR 11 (a)(4).

c. The trial court abused its discretion when it failed to vacate the summary judgment order based on Judge Hill's failure to grant a continuance of the summary judgment hearing when Respondent/Chen moved for an extension of time more than six months before the discovery cutoff.

d. The trial court abused its discretion when it failed to vacate the summary judgment order in whole based on Judge Hill's failure to recuse herself from the case based on previously presiding over the Respondent/Chen's dependency case.

2. In addition to the assignment of errors in the underlying summary judgment order stated in 1, Judge Hill *also* erred in granting SCH and SCH Physicians' summary judgment when their

initial burden as moving party had not been met; and failed to recuse from the case. Code of Judicial Conduct Rule 2.11 (A) (6)(d).

B. Statement of Issues

1. Standard of Summary judgment (AOE No. 1 &2)

a. Are Plaintiffs obligated to produce facts to show the presence of an issue of material fact when Defendants had not met their initial burden of showing the absence of an issue of material fact?

b. Did Judge Hill err in granting summary judgment when the records show that there were genuine issues of material fact?

c. Did Judge Hill err in denying a continuance for Plaintiffs to conduct discovery and obtain expert affidavit in opposition to summary judgment, when Defendants suffered no prejudice since discovery cutoff was six months away, deadline for dispositive motion was seven months away?

2. Due Process Rights, Guardian ad Litem Statute (RCW 4.08.050) (AOE No. 1 &2)

a. Were the minors parties to the action when they were not appointed (and represented) by guardian ad litem who could receive notice of the proceedings?

b. Were the minors properly before the court where there was no evidence that minors were ever personally served?

3. Ambiguous Order and procedural irregularities (AOE No. 1 &2)

a. Should Judge Hill's order be interpreted as "without prejudice" in light of CR 41 (a)(4)?

b. Should Judge Hill's order be interpreted as "without prejudice" in light of CR 41 (b) (3) and CR 52 (a)(1) when no entry of findings to support a dismissal on merits?

c. Should Judge Hill's order be interpreted as "without prejudice" in light of supreme court's decision in ***State v. Nw. Magnesite Co.***, 28 Wn.2d 1, 182 P.2d 643 (1947)?

d. Should the court dismiss with prejudice or strike the unsigned pleadings in light of CR 11?

4. Code of Judicial Conduct (AOE No. 2)

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

III. RESTATEMENT OF THE CASE

A. SCH Physicians failed to provide an accurate procedural and factual history, as required by RAP 10.3 (a) (5)

RAP 10.3 (a) (5) requires "a fair statement of the facts and procedure relevant to the issues presented for review." SCH Physicians' statement of facts was comprised of six pages' factual background (BR 3-8) and thirteen pages' procedural history (BR 9-21). SCH Physicians' *so-called* factual background rely *almost entirely* (see, BR 3-7) upon the misstatement made by Appellant James Metz which both Assistant Attorney General and three King County prosecutors determined to be *contrary* to J.L.'s medical record. CP 264. 786. Indeed, the state and the prosecutors' dismissal decisions were mainly due to the finding that James Metz significantly misrepresented the facts. In the March 3, 2017 Orders granting summary judgment, the trial court provides no factual background relevant to this case, and unbelievably, SCH now use information they've known to be false to mislead this Court, in violation of RPC 3.3 ("Candor towards the tribunal"). Ms. Chen presents these relevant facts.

Since Ms. Chen and the two minors, J.L. and L.L. were the nonmoving parties on summary judgment, the facts must be viewed in the light most favorable to them. ***Dowler v. Clover Park Sch. Dist. No. 409,*** 172 Wn.2d 471, 484, 258 P.3d 676 (2011). But in this case, this distinction is less important since Ms. Chen's account was endorsed by both the state and the prosecutor's dismissal of the claims (available as public record) as well by professional witnesses (see, e.g.,

Declaration of John Green, M.D., CP 829-831, and Twyla Carter, WSBA No. 39405, CP 700-804) and the declaration of Ms. Chen (review of J.L.'s 600 pages of medical record that had been withheld by SCH prior to summary judgment, CP 806-827).

As set forth in the complaint and supporting documents, in 2013, without consulting with J.L.'s main treating physicians or reviewing his medical history available in their own institution, *i.e.*, Seattle Children's Hospital ("SCH"), the SCH physicians jumped to several medical conclusions including but not limited a 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. *e.g.*, CP 188. At the initial hearing, the Dependency Court found it "outrageous" that SCH Physicians never tried to talk with parents, and J.L.'s main treating physicians and had to order Darren Migita talk with Dr. Green. CP 106, 234, 803, 830. Darren Migita misrepresented J.L.'s condition to the Court by citing an outdated labs number. CP 802, 817. "The Dependency Court relied upon Darren Migita's testimony that J.L. was diagnosed as malnourished and Migita's misrepresentation about J.L.'s ability to consume and absorb foods". CP 803 (Attorney witness/Carter Decl.). Dependency and criminal prosecution were dropped with a conclusion from the state that SCH Physicians' statements were directly *contrary* to the facts in J.L.'s medical record. CP 264. 815-816. Also, CP 800 Attorney witness/ Carter Decl. ("It readily apparent that the medical providers with the most experience with Ms. Chen and J.L. and the most knowledge with 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 apparent that the providers (Dr. 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 judgment based on inaccurate assumption.").

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. These harms would not have happened if the SCH physicians had adequately investigated J.L.'s medical history and consulted with main treating physicians, or even reviewed his medical records at their own institution. Instead, they misstated the facts to the state and later the court. As a result of their reckless misdiagnosis – which they failed to correct -J.L. not only regressed but lost all the abilities he had previously achieved through appropriate care for his autism and GI difficulties (below). At age 9, he is still in diapers, cannot speak, and scream uncontrollably, sometime for hours, at any actual or possible separations from his parents. CP 893, also CP 768-775. Given the severity of the damages, Chen sued detective who participated in the proceedings, the federal court after reviewing the merits of the case, decided to appoint counsel to assist with the litigation, Dorsey & Whitney took the representation in the federal case while Chen *pro se* sought legal redress against SCH and SCH Physicians in state court. In state court, no guardian ad litem was appointed (CP 524-525), two complaints were unsigned (CP 209, 221 302, 525), no discovery was conducted before the trial court judge Hollis Hill (who also presided Chen's dependency matter three years ago) granted SCH Physicians' pre-discovery summary judgment relying upon 20 pages' medical records. The order was silent in language whether the order was with or without prejudice, CP 558-560) and Judge Hill further denied Chen's motion for clarification, again silent in the order. This Court did not accept Chen's appeal (#76824-7-I) because an interlocutory decision is not appealable as of right. RAP 2.2 (d), CR 54 (b). ***Fox v. Sunmaster Prods., Inc.***, 115 Wn.2d 498, 503, 798 P.2d 808 (1990); ***Lindsay Credit Corp. v. Skarperud***, 33 Wn. App. 766, 772, 657 P.2d 804 (1983). Chen later dismissed the remaining defendants and appealed for the summary judgment which was accepted by this Court. While the appeal was pending, Chen obtained J.I.'s

600 pages' medical records through the separate federal action and moved for a CR 60 motion to vacate before Chief Civil Judge Ken Schubert who granted Chen's motion for reconsideration to vacate March 3, 2017 summary judgment as to SCH Physicians (Darren Migita, James Metz, Ian Kodish) on grounds of procedural irregularities, but *not* SCH. SCH Physicians now appeal Judge Schubert's order vacating partial summary judgment.

B. J.L. is a minor with complicated medical history, including a diagnosis of autism in 2012 and medical history of distress that was well-documented before he was wrongfully removed in October 2013

Contrary to their assertion, J.L.'s complicated medical history preceded October 20, 2013 and was well-known to SCH. J.L. was diagnosed as autism by Lakeside Autism Center in September 2012, and further suffered from the extensive gastrointestinal ("GI") and digestive problems which are often associated with autism. CP 260. Before the unlawful CPS removal occurred on October 24, 2013, his history of GI problems was well documented at SCH. *Id.* 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 the problems. CP 254, 892. His GI problems were addressed through SCD diet, which is endorsed by Dr. David Suskind, a leading pediatric gastroenterologist at SCH. SCD is a dietary regime used to limit a certain type of carbohydrates to treat GI problems. In a 2013 publication in the Journal of Pediatric Gastroenterology and Nutrition, Dr. Suskind and his colleagues wrote that in one case using SCD treating pediatric digestive disease, "all symptoms were notably resolved at a routine clinic visit three months after initiating the [SCD] diet." In a 2018 publication, the authors (Dr. Suskind as the first author) concluded, "SCD therapy in IBD

(inflammatory bowel disease) is associated with clinical and laboratory improvements as well as concomitant changes in the fecal microbime."

On October 20, 2013, J.L.'s parents sought medical care at the SCH ER because he appeared to be sick. Several hours later J.L. was released by 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 followup with primary care provider." CP 424. On the morning of October 23, 2013, J.L. followed up with his Primary care physician, Dr Gbedawo who reached the same conclusion as SCH ER doctor that J.L. is medically stable such that he only needs to follow up with her in ten days. CP 233. Later that day, J.L.'s parents took him to follow up with Dr. Kate Halamay at Pediatric Associates, as advised by SCH ER doctor. Dr. Halamay was not J.L.'s PCP but was an urgent care provider who saw J.L. three times and was not familiar with his conditions. *Id.* When Ms. Chen *complained* Dr. Halamay about her rudeness, Dr. Halamay filed a CPS referral, alleging (falsely) that J.L. had "life-threatening" kidney failure and needed to be urgently removed. She omitted that J.L. was just released from SCH ER and that this was a routine follow up in accordance with SCH instruction. *Id.* Halamay later *admitted* to the defense attorney Ms. Carter that her CPS referral cannot be supported by medical facts in J.L's medical records. CP 800-801. That night, a CPS social worker (Brian Davis) was assigned to remove the child from the family. Davis visited the family and described J.L. as "sleep peacefully and soundly". *Id* At SCH, it was quickly determined that Halamay's allegation of "kidney failure" was baseless since his "creatine" (a number for kidney function) was 0.5, clinically normal number for kidney function. This was consistent with conclusion of SCH ER doctor and Dr. Gbedawo, J.L.'s regular doctor. *Id.* Despite these undisputed findings available to SCH Physicians, J.L. was removed from his home and placed in foster care based on the claims of the SCH physicians.

C. The Dependency Court found it "outrageous" that the attending physician, Darren Migita's below standard care. Attorney General concluded that James Metz's report (main resource of factual statement in SCH Physicians' brief) was "contrary" to medical record.

Unknown to the parents, a SCH child abuse pediatrician, James Metz had pre-arranged a removal. CP 114.Throughout the CPS removal action, the three SCH Physicians (Darren Migita, James Metz and Ian Kodish) operating in conjunction with the SCAN team at SCH, disregarded the diagnoses and the treatment plan of his treating providers. CP 800. Instead, they alleged that J.L. was not autistic, that he did not have GI problems (though Darren Migita prescribed GI medications during hospitalization as well as at discharge, CP 892), and that his conditions were caused by abuse and neglect by his mother. *Id.* CP 769. Appellant and the attending physician, **Darren** Migita refused to consult with J.L.'s parents, treating physicians or therapists, repeatedly misrepresented the laboratory results and other findings, and later used Dr. **Russell** Migita's treatment record to obtain a dismissal in his favor. CP 425), 802 -803, 816. Appellant James Metz provided a SCAN report full of falsehood and highly misleading statements that Attorney General Mr. LaRaus and King County prosecutors later determined contrary to the medical records. CP 144-145. 264. Appellant Ian Kodish submitted a 40-minutes' mental health evaluation based upon "largely unknown history" alleging J.L. has reactive attachment disorder, autism is low on the differential. CP 147-150. These misdiagnoses resulted in the removal of both children, almost one year's foster home stay for J.L. and the arrest of his mother, Ms. Chen. *e.g.*, CP 188, 217.

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. CP 892-3.His treating physicians and therapists objected vigorously to the diagnoses of the SCH Physicians and provided testimonies to the state. *Id.* J.L.

had 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 SCH Physicians and the disastrous one year stay at eight different foster homes, with little therapy and minimal contact with his parents and brother. *Id.*

The dependency court found it "outrageous" that SCH physicians never tried to talk with the minor patient's main treating physicians or parents and ordered Darren Migita to talk with Dr. Green. *e.g.*, CP 803, 830. In September 2014, the dependency and criminal matters were dismissed. The AG, Mr LaRaus explicitly concluded, "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 264. The nearly 600 pages of SCH medical records obtained by Dorsey & Whitney, Ms. Chen's assigned counsel by federal court, confirm that the SCH records alone should have altered the SCH physicians' conclusion to J.L.'s conditions and prevented a misdiagnosis that has left him severely disabled.

D. Judge Hollis Hill denied Chen's very first request for continuance to conduct discovery while discovery cutoff is still six months away and instead granted SCH physicians' motion for summary judgment

In October 2016, Ms. Chen filed a lawsuit in King County Superior Court *pro se* alleging that the three SCH Physicians misdiagnosed J.L. and their misrepresentation, below-standard care and false information led to the adverse out-of-home placement decision for J.L., causing severe, and permanent damage to J.L. and his family. CP 185-192, 202-209, 215-221. The case Order set discovery cutoff date on September 5, 2017, deadlines for disclosure of witnesses on July 3, 2017, trial date on October 23, 2017. CP 469.

On February 2, 2017, SCH Physicians moved for summary judgment on grounds that trial court lacked personal jurisdiction over them due to Chen's improper service at their office, rather than their homes. CP 295-299. Metz and Kodish also claimed that the unsigned complaints against them should be dismissed under CR 11. CP 302-305. In a less than 90 words' affidavit without factual statement addressing the allegation in the complaint, SCH Physicians also argued that good faith was established to trigger immunity under RCW 26.44.060. CP 194-195, 211-212, 223-224, 308-309. SCH joined in the motion but admitted that SCH was properly served within 90 days of filing. CP 411. SCH physicians further *unilaterally* scheduled the hearing without checking Ms. Chen's availability.

Ms. Chen filed a response requesting a continuance based on grounds: (1) the plaintiffs were not timely served the documents for motion for summary judgment and needed more time to review and prepare for the response; (2) they need time to conduct discovery; (3) (due to the absence of guardian ad litem) the parents cannot represent their children; and (4) they are in the process of obtaining an attorney. CP 474-480. SCH and SCH Physicians argued that Ms. Chen, acting *pro se*, should not be allowed one continuance.

At the hearing held on March 3, 2017, SCH Physicians argued that the minors not represented by guardian ad litem cannot bring an action because "[minors] are considered incompetent as a matter of law" CP 524-525. Ms. Chen once again asked a continuance for discovery under CR 56 (f) and indicated that if provided a continuance, they would be able to serve SCH Physicians at their homes, conduct discovery, and obtain an expert affidavit. CP 547-550. Ms. Chen's former criminal defense attorney, Ms. Twyla Carter appeared at the hearing, identified herself as a witness who was familiar with the case, and its dismissals, and advocated on the merits on behalf of access to justice. CP 541-545.

Judge Hill denied Chen's request for continuance and granted SCH Physicians' summary judgment against all plaintiffs (Chen and two minors), silent in language as to whether it is an order with or without prejudice. CP 558-560. Chen moved for reconsideration, asking the court to clarify the order against the minors was "without prejudice" due to the absence of guardian ad litem. CP 562-564. In response to SCH Physicians' argument that the unsigned complaints and improper service rendered the complaints void ab initio and the statute of limitations has now run, the claims must be dismissed in their entirety (CP 302-305), Chen pointed out that, "*this reasoning applies only to the parents*". CP 772, 895. (emphasis in original). Judge Hill denied the motion, with no explanation. CP 659-660.

Chen's first appealed (#76824-7-I) was not accepted by this Court due to the other pending defendants, and "absence of finding" required by CR 54. Chen's second appeal was accepted after dismissing the remaining defendants.

Chen later obtained J.L.'s 600 pages' medical records through a related federal civil action and moved for a CR 60 motion to vacate March 3, 2017 summary judgment before Chief Civil Judge Ken Schubert who entered a Show Cause Order. SCH Physicians objected to the Show Cause Order (an interim order) arguing that the trial court does not have authority to hear a CR 60 motion, which was denied by Judge Schubert. CP 1525-1528. After an oral argument at the Show Cause Hearing and an extensive motion practice, on January 28, 2019, Judge Schubert initially denied but eventually granted Chen's motion for reconsideration for order denying motion to vacate March 3, 2017 summary judgment as to SCH Physicians (but *not* to SCH) on grounds of procedural irregularity. SCH Physicians appealed the January 28, 2019 order. In doing so, they omitted *numerous* key points in this case. For example, they were silent on the following:

- Darren Migita mispresented to the Dependency Court that J.L. has no digestive distress, directly contrary to his *own* clinical notes. *e.g.,* CP 1255, 1271.
- SCH Physicians' medical conclusions were without consulting with J.L.'s main treating physicians (whom Appellant SCH Physicians *already* knew), and reviewing his medical history. *e.g.,* CP 800, 822.
- The Dependency Court found it "outrageous" that Darren Migita's below-the-standard care and had to order him to talk with Dr. Green. CP 803, 816, 830.
- Both Attorney General's Office and King County Prosecutor's office found James Metz's statement was "contrary to" the children's medical records. CP 264. 815-816.
- Defendant/Appellant Darren Migita utilized Dr. Russell Migita's treatment record to obtain a summary judgment in his favor while Darren Migita's treatment was withheld from the trial court. CP 425.
- The summary judgment was entered in favor of SCH Physicians prior to *any* discovery had been conducted in the context of a medical malpractice claim. CP 469 (discovery cutoff is 9/5/2017), CP 558-560 (the dismissal order was entered on 3/3/2017). Note: zero discovery had ever been conducted for the instant case.
- The summary judgment was entered in favor of SCH Physicians absent of appointment of guardian ad litem, CP 563 ("there was no appointment of guardian ad litem to prosecute the minors' claims" 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."). CP 563, 894.
- SCH Physicians and SCH submitted 20 pages' medical records in total to obtain a summary judgment in their favor while J.L.'s actual medical records were 600 pages. CP 807.
- SCH physicians argued that their less than 90-words' affidavit "are sufficient to establish good faith and trigger immunity" CP 309.

SCH Physicians also *omits* significant records including but not limited to: (1) Ms. Chen's March 24, 2017 Reply in support of the motion for reconsideration addressing the merits of the

case. (CP 768-775; CP 891-900); (2) SCH Physicians' September 17, 2018 motion for reconsideration on the trial court's Order to Show Cause, arguing that the trial court lacks authority to rule on a CR 60 motion (CP 915-927); (3) the October 3, 2018 Order denying SCH Physicians' motion for reconsideration and objection to court's order to show cause (CP 1525-1528); (4) *Ms. Chen's submission of J.L.'s 600 page treatment record to Judge Schubert, in support of her motion to vacate the March 3, 2017 order grating summary judgment (CP 928-1524).* SCH Physicians did not mention Ms. Chen's December 10, 2018 Reply in support of Plaintiffs' motion to vacate (CP 692-698); and *supporting documents and affidavits at CP 699-760, including expert testimony from John Green, M.D. addressing SCH Physicians' below-the-standard care for failure to investigate J.L.'s medical history.* [1]

Simply put, SCH physicians misdiagnosed J.L., misrepresented the facts leading to Chen's false arrest, and J.L. wrongful removal and permanent loss. SCH Physicians' negligence was true, damages done to Chen and her family were devasting.

IV. ARGUMENT IN RESPONSE TO OPENING BRIEF

A. The standard of Review is abuse of discretion – SCH has waived any challenge that Judge Schubert abused his discretion in complying supreme Court precedent.

The standard of review for a decision to grant a motion to vacate and motion for reconsideration is manifest abuse of discretion. ***Little v. King,*** 160 Wn.2d 696, 161 P.3d 345 (2007) (Decision on motion to vacate "is reviewable only for a manifest abuse of discretion"); ***Coggle v. Snow,*** 56 Wn. App 499, 784 P.2d 554 (1990) (The ruling on the motion for reconsideration "is within the discretion of the trial court and is reversible by an appellate court only for a manifest

[1]. In their brief, SCH Physicians attempted to divert this Court's attention that only minors filed a reply, but parents also filed a reply (CP 692-697), together with supporting documents and affidavits. e.g., 722-776. Indeed, SCH Physicians reference of CP 854-55 points to an irrelevant document. Br 19

abuse of discretion"). "Abuse of judicial discretion is not shown unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable." *Id.*

B. Judge Schubert properly exercised his discretion in finding that the summary judgment order was ambiguous and constitutes "a question of regularity of the proceedings."

Judge Schubert's finding that the March 3, 2017 order constitutes "a question of regularity of the proceedings" (CP 888) is supported by extensive evidence. The summary judgment order at issue does not specify whether this was a dismissal with or without prejudice. Washington law clearly states that if the court does not have personal jurisdiction over a party, the court cannot rule on the merits of the claims. ***State v. Nw. Magnesite Co.,*** 28 Wn.2d 1, 182, P.2d 643 (1947). Judge Schubert properly vacates summary judgment as to SCH Physicians.

While the languages in March 3, 2017 order was silent as to whether it was a dismissal with or without prejudice, SCH Physicians asserted that it was a dismissal with prejudice on both jurisdictional and substantive grounds, at odds with our supreme court's holding in ***State v. Nw Magnesite Co.,*** 28 Wn.2d 1, 182 P.2d 643 (1947) ("However, we do not agree with the trial court that the order dismissing those respondents should be with prejudice to the state's cause of action against them. The court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties."). SCH Physicians' assertion that the dismissal was on the merits were *not* supported by *direct* evidence on the records. CP 545 (At the summary judgment hearing, Judge Hill articulated: "THE COURT: No, I don't...need to hear the merits of her case"). *If the merits of the case had never been heard by Judge Hill, how can she decide on the merits.* SCH Physicians' assertion is further inconsistent with their *own* admission at the Show

Cause Hearing that they don't know whether the court ruled on the merits. RP 22 ("Mr. Norman (SCH Physicians' counsel): But we don't know whether the court ruled on the merits").

SCH Physicians' argument was also inconsistent with CR 41 (b) (3) ("If the court renders judgment on the merits against the plaintiff, the court *shall* make findings as provided in rule 52 (a)"). CR 52 (a)(1) (written findings are required for all disputed facts.). also, ***State v. Kingman***, 77 Wn.2d. 551, 463 P.2d 638 (1970). 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,*** 160 Wn.2d 696 (2007), the supreme court held.

> "the trial court could have reasonably concluded that the lack of findings and conclusions was as "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 light of ***Little*** Court's decision, Judge Hill's dismissal cannot be on the merits. Even if this is a dismissal on the merits (which was denied), then Judge Hill's failure to enter the mandatory findings required by CR 52 (d) and CR 41 (b)(3) still warrants CR 60 (b)(1) relief as "procedural irregularity."

Finally, SCH Physicians do not dispute that ***Nw Magnesite Co*** is a controlling precedent, nor do they contend the trial court's reasons for vacating summary judgment against them are unreasonable, untenable, or an abuse of its discretion. Instead, throughout their brief, SCH Physicians explicitly avoid identifying the appropriate standard. Specifically, they repeatedly and mistakenly argued that Judge Schubert "erred" rather than "abused the discretion", a deferential review standard applicable to review on motion to vacate and motion for reconsideration. See, *e.g.*,

Br 1 ("the trial court *erred* in vacating a previous judge's order…); Br 2 ("The trial court *erred* in granting Plaintiffs' motion for reconsideration…); Br 22 ("The trial court *erred* in vacating the order dismissing Plaintiffs' claims against physicians…"); Br 23 ("The trial court *erred* in vacating the order dismissing plaintiffs' claims against physicians…"); Br 26 (" The trial court also erred in vacating the order dismissing plaintiffs' claims against Physicians…"). Because they rely on an inapplicable (and mistaken) standard of review for an order on motion to vacate and motion for reconsideration, SCH Physicians' arguments fail as a matter of law.

Judge Schubert does not abuse his discretion because his decision was in full compliance with the supreme court's decision in ***Nw Magnesite Co.***. which is clear and unambiguous. This Court should therefore affirm his decision.

C. SCH Physicians' novel argument that a trial lacking personal jurisdiction has authority to further adjudicate on the merits, directly conflicts with the Supreme Court's holding in *Nw Magnesite Co.* and is not supported by their own citations or their previous position in the underlying summary judgment.

Jurisdiction is the prerequisite for the court to properly exercise its authority. In ***Wampler v. Wampler,*** 25 Wn.2d 258, 170 P.2d 316 (1946), the Supreme Court articulated that, "only the court…had power to pass on the merits – had jurisdiction, that is, to render the judgment." SCH Physicians attempt to divert this Court's attention to two distinguished cases involving significantly different facts and legal issues. ***Parentage of Ruff***, 168 Wn. App. 109, 116, 12, 275 P.3d 1175 (2012) is distinguished. ***Ruff*** involves the issues of competing jurisdictions entering conflicting interstate child custody orders and discusses subject matter jurisdiction. ***In re Marriage of Robinson***, 159 Wn. App. 162, 170-71, 24, 248 P.3d 532 (2010) also suggests that the subject matter jurisdiction in dissolution proceedings exists if one of the parties is a resident of Washington during the proceedings. These two cases do not support SCH Physicians' mistaken suggestion that a party does not consent to personal jurisdiction can make argument on the merits. Notably, SCH

Physicians' novel argument was not even supported by the case they cited. Specifically, the ***Robinson*** Court articulates,

> "Unlike subject matter jurisdiction, a party may consent to personal jurisdiction. Here, the parties consented to personal jurisdiction by [then] asking for affirmative relief or [further] making an argument on the merits. *See*, ***In re Marriage of Maddix***, 41 Wn. App. 248, 251-52, 703 P.2d 1062 (1985)."

The parties may consent to personal jurisdiction but *undisputedly* that SCH Physicians *never* consent to the trial court's personal jurisdiction. While the SCH Physicians seem to suggest the court's jurisdiction over the SCH applies to them, this argument is without merit: SCH admitted proper service and consented to the court's jurisdiction. CP 537 ("the personal defense as to that complaint and a signature would not apply to Seattle Children's Hospital, because it was signed, and we were served properly with that complaint."). In contrast, the SCH Physicians consistently claimed the court lacked personal jurisdiction over them due to Chen's improper service and two unsigned complaints. CP 288, 294-298, 303. Because they did not consent to trial court's personal jurisdiction, they were prohibited from making arguments on the merits.

SCH Physicians' novel argument was also inconsistent with their previous position at trial court. For example, in their Motion for Summary judgment, SCH Physicians argue, "statutory service requirements must be complied with in order for the court to ***finally adjudicate*** that dispute.' ***Farmer v. Davis***, 161 Wn. App. 420, 433, 250 P.3d 138 (2011)." (emphasis added). CP 297. This argument is consistent with the January 28, 2019 order that due to Chen's improper service upon SCH Physicians, the trial court was thus lacking authority to "finally adjudicate that dispute" or rule on the merits, as argued by SCH Physicians two years ago for the underlying summary judgment.

The Appellant SCH Physicians, having made this argument previously, should be judicially estopped from arguing to the contrary here. See ***Arkison v. Ethan Allen, Inc.,*** 160 Wn.3d 535, 538, 160 P.3d 13 (2007) ("Judicial Estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."). [2]

At the Show Cause hearing, Judge Schubert spent an inordinate time to discuss that when the trial court is deprived of personal jurisdiction due to improper service, it can never reach the merit of the case. RP 13. Specifically, Judge Schubert articulated,

> "No one to my knowledge provided me with a case where a party can both defend on procedural grounds and say, 'Hey, I am never served. Your Honor, with all due respect, you don't have jurisdiction over me. But, by the way, go ahead and reach the merits and dismiss these claims against me with prejudice, even though you've never had jurisdiction over me." To me that doesn't make sense.
>
> Why would a Court ever reach the merits of a defense when the party is, as a preliminary matter, saying, "You don't even have jurisdiction over me"? You deal with jurisdiction first. That's the way it's always been. That's the way it should have been here."

Notably, SCH Physician *again conceded* that Judge Schubert's reasoning at the Hearing that a court lacking personal jurisdiction cannot adjudicate on merits was "correct". RP 14.

As stated *supra*, ***Nw Magnesite Co.*** is a *controlling* precedent that discusses *exactly the same* issue as the instant case, *i.e.*, improper service deprives trial court's personal jurisdiction to further render judgment on the merits, which SCH Physicians do not dispute. Rather than apply the supreme court's controlling precedent, SCH Physicians attempt to suggest this Court to

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[2] Throughout the whole litigation, Respondents made multiple inconsistent arguments. *e.g.*, CP 303 (Respondents argued that unsigned complaint deprived trial court of jurisdiction); *cf.* CP 868 (Respondents argued that a plaintiff's failure to sign a complaint does not strip the Court of jurisdiction").

disregard such authority and apply several irrelevant sentences from 11th Circuit. Br. 28. This Court should disregard this effort to circumvent Washington law.

D. SCH Physicians fail to perfection a complete record, Judge Schubert's finding is required to be treated as verities that was uncontested by SCH Physicians at the hearing

Appellant bears the burden of providing a sufficient record on appeal from which the reviewing court can make a ruling that accurately follows the law. **In re *Estate of Lint*,** 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998). While challenging Judge Schubert's order vacating summary judgment based on Chen's CR 60 motion, SCH Physicians provide an incomplete submission of Chen's motion. In supporting Plaintiffs' motion to vacate, Chen submitted J.L.'s 600 pages' treatment records. CP 928-1524, which was *omitted* in Appellant SCH Physicians' designation of clerks' papers and later supplemented by Chen.

SCH Physicians' only one assignment of error is to challenge Judge Schubert's finding that Judge Hill's order is ambiguous and "creates a question of regularity of the proceedings". Br 1. On review, evidence is viewed "in the light most favorable to the prevailing party", and deference is given to the trial court's determinations. ***Weyerhaeuser v. Tacoma- Pierce County Health Dept,*** 123 Wn. App. 59, 65, 96 P. 3d 460 (2004).When Appellant challenges the trial court' s findings and there is conflicting evidence presented at trial in regard to that finding, the reviewing court need only consider the evidence that is most favorable to the respondent in support of the challenged finding. ***In re Estate of Lint,*** **135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).**

When the Appellants challenging Judge Schubert's finding that the prior findings constitute irregularities, SCH Physicians bear the burden of perfecting the record so that the reviewing court has before it *all* relevant evidence. ***Bulzami v. Dep' t of Labor & Industries,*** 72 Wn. App. 522, 525, 864 P, 2d 996 (1994). Notwithstanding SCH Physicians' omission of relevant parts of the

record form their designation of the record, the record they have provided does not support their contentions or rebut the Judge Schubert's finding of fact and conclusions of law. The primary theme of SCH Physicians' assignments of error is that Judge Hill's failure to provide a clear order is not an irregularity because "she denied Plaintiffs' motion for reconsideration" Br 2. SCH Physicians' argument was inconsistent with their previous position at the Hearing. Judge Schubert properly finds that the order was ambiguous due to Judge Hill's failure to provide clarification. because "you can read that one of two ways."Mr. Norman (SCH Physicians' *present* counsel) agreed with Judge Schubert's interpretation. RP 32-33. Specifically,

The Court:	One, [Judge Hill] didn't feel clarification was necessary or I guess really just [Judge Hill] didn't feel clarification ...[Judge Hill] didn't feel clarification was necessary."
Mr. Norman:	***Right.***
The Court:	Now, the clarification not being necessary could be seen one of two ways.
Mr. Norman:	***Yes.***
The Court:	That's what it is.
Mr. Norman:	Yes.
The Court:	"I didn't need to clarify because it was obviously with prejudice" or "I didn't need to clarify because it was obviously without prejudice."

There was, in short, no disagreement over the fact that Judge Hill's denial of the motion for reconsideration increased, rather than resolved, the critical ambiguity that was at the heart of the summary judgment. "There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." ***State v. Merrill,*** 183 Wn. App. 749, 755, 335 P.3d 444 (2014). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. ***Pilcher v.***

Dep't of Revenue, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), *review denied,* 149 Wn.2d 1004 (2003). A fair-minded and rational person will agree that a judicial officer's decision is bound to the supreme court's controlling precedent, here, ***Nw. Magnesite Co.***. A fair-minded person will further agree that it is reasonable for a judge to uphold justice and respect minors (J.L. and L.L.)'s Constitutional rights of access to the Courts which had been mistakenly and unfairly deprived by the March 3, 2017 order. In ***Anderson v. Dussault,*** 180 Wn.2d 1001, 321 P.3d 1206 (2014), the Supreme Court announces that the six-year-old minor, Anderson's claim was not barred due to the absence of guardian ad litem who could receive a notice of the proceedings. Notice is the threshold requirement for Due Process but both two minors, J.L. and L.L. were not represented by a guardian ad litem who could receive a notice on their behalf, their rights of access to the court had therefore been mistakenly deprived by Judge Hill when signing her March 3, 2017 order.

Judge Schubert properly exercises his sound discretion for doing what "a fair-minded person and a rational person" would have done to uphold justice and respect minors' constitutional rights; and complying with controlling authority as a judicial officer. Highest deference should be afforded to Judge Schubert's reasonable decision.

E. Judge Schubert properly vacated the decision, as was within his sound discretion.

On appeal, Appellants bear the burden to prove Judge Schubert has abused his discretion on entering an order vacating pre-discovery summary judgment. ***Morgan v. Burks***, 17 Wn. App. 193, 563 P.2d 1260 (1977) (motion to vacate are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion). SCH Physicians fail to do so. Instead, they argued Judge Schubert committed a legal error. *e.g.*, Br 1("the trial court erred in vacating…").

Throughout the brief, Appellant SCH Physcians misrepresented that Judge Schubert's decision by saying "the trial court vacated the dismissal of respondents' claims against Physicians not due to any "irregularity" but because it believed Judge Hill committed an error of law by failing to specify the basis of her summary judgment order." BR 23. They also claimed that Judge Schubert "erroneously held that Judge Hill committed an error of law in dismissing the claims" Br 26. The above misrepresentation is simply *baseless*. Indeed, Judge Schubert states in his January 28, 2019 Order that, "The silence of this Court's orders in that regard creates a question of regularity of the proceedings that justifies relief from the operation of those orders." Taking a closer look at Judge Schubert's order, the alleged language of "error of law" and "legal error" throughout SCH Physicians' brief was ***not at all*** observd in the challenged order.

On the contrary, SCH Physicians *conceded* that Judge Hill's silence in language is a "failure" Br. 22. "Failure" is synonym of "neglect". *Merriam-Webster online dictionary*. A vacation is therefore justified on grounds of "neglect" under CR 60 (b) (1). Judge Hill's order is *undisputedly* ambiguous, as *conceded* by SCH Physicians that they were unaware of the grounds for Judge Hill's order and *admission* that Judge Hill's order could be read from either way. At the Hearing. Judge Schubert's suggestion that Judge Hill's order can be interpreted one of the two ways. *i.e.*, with or without prejudice had been explicitly supported by SCH Physicians' counsel. RP 32-33. Specifically,

> The Court: "...Their motion for reconsideration was based solely on whether it was with or without prejudice...they asked for clarification on that. What I think is interesting is she just denied, she didn't provide clarification. Now you could read that one of two ways."
>
> Mr. Norman: **Yeah.**

The Court: "One, she didn't feel clarification was necessary or I guess really just she didn't feel clarification…she didn't think clarification was necessary."

Mr. Norman: "***Right.***" (emphasis added)

The Court: "Now, the clarification not being necessary could be seen one of the two ways".

Mr. Norman: "***Yes.***" (emphasis added)

The Court: "That's what it is."

Mr. Norman: "***Yes.***" (emphasis added)

The Court: "***I didn't need to clarify because it was obviously with prejudice" or "I didn't need to clarify because it was obviously without prejudice.***" (emphasis added). (RP 32-33)

The Court further explains why the March 3, 2017 may be interpreted as "without prejudice". RP 33-34. Specifically.

The Court: "The thing is, though, is we have a court rule…that says that when there is a dismissal …under CR 41.." (RP 33)

The Court: "…what it says to me is, hey, if the court doesn't say, at least in that context, then it's presumed to be without prejudice." (RP 34)

Mr. Norman: **Right.**

The Court: "So at least in the context of a voluntary dismissal, the lack of clarity, the default means without prejudice in that scenario. So but where is there ever a scenario that a lack of clarity means with prejudice?" (RP 34)

Obviously, Judge Schubert correctly interprets that Judge Hill's order is ambiguous because it can be understood in either way, which SCH Physicians did not contest. Judge Schubert also provides reasonable ground for his interpretation that the order lacking language of

"with/without prejudice" as "without prejudice" and SCH Physician s did not provide one single case that an order lacking "with/without prejudice" should be interpreted as "with prejudice."

Even if Appellants' assertion is accepted that Judge Schubert erred in language specifying the grounds of vacation (which is denied), the error is harmless, and will not lead to reversal, because it is "trivial, or formal, or merely academic, and was not prejudiced to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." ***Mackay v. Acorn Custom Cabinetry, Inc.***, 127 Wn.2d 302, 311 898 P.2d 284 (1995). Appellant SCH Physicians were not prejudiced because this order is *not* a final outcome of the case (but merely an interlocutory decision), and they did not claim prejudice.

As explained by Judge Schubert at the Hearing, "[the silence of language in order] is procedural…anomaly, of how the court proceeded." RP 19. The observed and *agreed* ambiguity justifies a vacation. Therefore, Judge Schubert properly and reasonably exercises his discretion to vacate the irregularities. This Court should affirm under differential standard of review.

By cherry picking one isolated sentence from the transcript, SCH Physicians asserted that Judge Schubert affirmed Judge Hill's dismissal as to SCH. Br 20. SCH Physicians are disingenuous. Judge Schubert did not affirm dismissal as to SCH but was persuaded by SCH and SCH Physicians that Judge Hill's erroneous decisions as to SCH should be corrected at appeal. SCH Physicians' assertion is highly misleading (and simply false) by simply ignoring the whole context. RP 19-21. When discussing whether the trial court has jurisdiction to dismiss SCH with prejudice, Judge Schubert believes so because, "SCH did not move for dismissal based on lack of personal jurisdiction and thus, there is no ambiguity as to the legal effect of the dismissal of plaintiffs' claims against SCH.". CP 889.

F. SCH Physicians improperly ask this Court to reinstate an order that concededly ambiguous and clearly erroneous.

SCH Physicians claim that the March 3, 2017 should be reinstated through arguing that Judge Hill's intent was "clear". Br 34. They fail to adequately argue that Judge Hill's order should be affirmed because it is correct and has complied with controlling authorities. This Court should exercise its revisory jurisdiction to correct the mistakes presented in Judge Hill's orders which are at odds with multiple *controlling* precedents. For example:

- When Judge Hill's dismissal order was entered, *zero* discovery had been conducted while discovery cutoff is more than 6 months away. ***Putman v. Wenatchee Valley Med. Ctr., P.S.***, 166 Wn.2d 974, 983, 216 P.3d 374 (2009) (Supreme court holding that requiring medical malpractice plaintiffs to submit a certificate of merit from a medical expert prior to discovery violates the plaintiffs' right of access to the court, which "includes the right of discovery authorized by the civil rules.")
- When Judge Hill's dismissal order was entered against two minors, no guardian ad litem was ever appointed even after the absence of GAL has been brought to its attention. e.g., CP 563. ***Mezere v. Flory,*** 26 Wn. 2d 274, 173 P.2d 776 (1946) ("the appointment of a guardian ad litem is mandatory."). ***Dependency of A. G.,*** 93 Wn.App. 268, 968 P.2d 424 (1998) ("The [guardian ad litem] statute is mandatory, and the children's interests are paramount."). ***Newell v. Ayers,*** 23 Wn. App. 767, 598 P.2d 3 (1979) ("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."). ***Anderson v. Dussault***, 181 Wn.2d 360, 333 P.3d 395 (2014) (the supreme court holding minor's action "was not statutorily time barred because the statutory time limitation was tolled while the plaintiff was a minor without a guardian ad litem who could receive a notice"). ***State v. Douty,*** 92 Wn.2d 930, 603 P.2d 373 (1979) ("it should be noted that the child, though named on the action, was never served. Consequently, he is not before the court.").
- When Judge Hill's dismissal order was entered, the merits of the case had *never* been heard and addressed. CP 545 ("THE COURT: No, I don't...need to hear the merits of her case.").

"The law favors resolution of cases on their merits." ***Barr v. MacGugan,*** 119 Wn. App. 43, 78 P.3d 660 (2003). Indeed, Defendant/Appellant Darren Migita's treatment was never before Judge Hill before an order in his favor entered; that was discovered later in the federal case.

- Code of Judicial Conduct ("CJC") Rule 2.11 (A)(6)(d) *mandatorily* requires a judge to recuse from hearing the case when the judge had "previously presided as a judge over the matter in another court." "As a general rule, the word "shall" possess a mandatory or imperative character". ***State v. Hall***, 35 Wn. App. 302, 666 P.2d 930 (1983). As the presiding judge over Chen's underlying dependency matter, Judge Hill's failure to recuse erred as a matter of law.

The primary function of appellate courts is to correct trial court errors and uphold justice. To reinstate an order that is ambiguous, erroneous, and inconsistent with *multiple* Washington controlling precedents would achieve the opposite. SCH Physicians' appeal should be dismissed.

V. ARGUMENT SUPPORTING CROSS-APPEAL

A. Judge Hill's March 3, 2017 Order should be reviewed de novo, with all allegations in the complaint being treated as factually correct.

Appellant SCH physicians filed a CR 12 (b)(2) motion, which was converted to CR 56 when introducing evidence beyond the motion, CP 288-310. Appellant SCH Physicians challenged the trial court's lack of personal jurisdiction over them due to Chen's 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 cannot be treated the same as CR 56 if the motion was brought prior to discovery. ***State v. LG Elecs., Inc.***, 185 Wn. App. 394, 406, 341 P.3d 346 (2015). The court is required to treat all the allegations in the complaints as established for the purpose of determining personal jurisdiction. *Id.* In ***State v. LG Elecs., Inc.***, this Court articulated:

> "[O]ur 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…

'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 a motion to dismiss for lack of personal jurisdiction, we accept the nonmoving party's factual allegations as true and review the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party. ***Freestone***, 155 Wn. App. at 653-54; *accord* ***Walden v. Fiore***, ___ U.S. ___, 134 S. Ct. 1115, 1119 n.2, 188 L. Ed. 2d 12 (2014).

Even where the trial court has considered matters outside the pleadings on a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established." ***Freestone***, 155 Wn. App. at 654; *accord* ***State v. AU Optronics Corp.***, 180 Wn. App. 903, 912, 328 P.3d 919 (2014); ***FutureSelect I***, 175 Wn. App. at 885-86; ***SeaHAVN, Ltd. v. Glitnir Bank***, 154 Wn. App. 550, 563, 226 P.3d 141 (2010); ***Shaffer v. McFadden***, 125 Wn. App. 364, 370, 104 P.3d 742 (2005); ***CTVC of Haw. Co. v. Shinawatra***, 82 Wn. App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996); ***Hewitt v. Hewitt***, 78 Wn. App. 447, 451-52, 896 P.2d 1312 (1995); ***In re Marriage of Yocum***, 73 Wn. App. 699, 703, 870 P.2d 1033 (1994); ***Harbison v. Garden Valley Outfitters, Inc.***, 69 Wn. App. 590, 595, 849 P.2d 669 (1993); ***MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.***, 60 Wn. App. 414, 418, 804 P.2d 627 (1991); *see also* ***Raymond v. Robinson***, 104 Wn. App. 627, 633, 15 P.3d 697 (2001) (Division Two); ***Precision Lab. Plastics, Inc. v. Micro Test, Inc.***, 96 Wn. App. 721, 725, 981 P.2d 454 (1999) (Division Two); ***Byron Nelson Co. v. Orchard Mgmt. Corp.***, 95 Wn. App. 462, 467, 975 P.2d 555 (1999) (Division Three). Our Supreme Court has recognized this approach and adopted the same. *See* ***FutureSelect II***, 180 Wn.2d at 963-64 (standard applies when full discovery has not been conducted); ***Lewis v. Bours***, 119 Wn.2d 667, 670, 835 P.2d 221 (1992)."

Since the SCH Physicians' motion was brought prior to discovery, all the allegations in Chen's complaints are required to be treated as true and established.

B. Judge Hill abused her discretion in failing to grant a continuance to allow Plaintiffs to conduct discovery

1. Judge Hill deprived Plaintiffs of their rights to a full record and an impartial tribunal

After *unilaterally* scheduling the March 3, 2017 hearing without asking Chen's availability and without timely serving Chen, SCH Physicians objected to Chen's request for a continuance to conduct discovery under CR 56 (c) by misinterpreting ***Turner v. Kohler***, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (CP 485, 506, 534). The current case is distinguished from ***Turner***. This Court affirmed the denial, pointing out that (1) ***Turner***'s lawyer did not mention CR 56 (f) or explicitly requested a continuance; and (2) ***Turner*** had been granted two continuance prior to the dismissal. But here, Chen explicitly articulated a request for continuance under CR 56 (f) in both the affidavits and at the hearing. CP 1-5, CP 547 ("I am requesting a continuance on this summary judgment motion hearing, pursuant to civil Rule 56 (f) and in the interest of justice."). Unlike ***Turner***, this is the *very first* request for continuance made by *pro se* litigant and it was made six months before the discovery cutoff (CP 469). Unlike ***Turner***, in the current case, Plaintiffs were appearing *pro se* while the ***Turner*** court especially noted that leniency and exception be afforded to *pro se* litigants.

Washington's liberal 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 ***Putman*** Court announced that Plaintiffs' "right of discovery authorized by the civil rules" embodies their rights of access to the court. Here, Judge Hill denied Chen's right to a full record and an impartial tribunal, effectively depriving them of access to the Courts.

2. The primary consideration on grant a continuance is justice.

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); ***Butley 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).

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 299-300; ***Coggle,*** 56 Wn. App. at 508. Here, justice requires continuing the summary judgment hearing to allow *pro se* plaintiffs an opportunity to obtain discovery, and to be represented by counsel. In this case, *pro se* were hobbled by Appellant SCH Physicians' untimely and defective service and, lacked the time and attention needed to ensure an adequate response to summary judgment, which was brought prior to discovery. While discovery cutoff is six months away, and deadline for dispositive motion is still seven months away, Appellant SCH Physicians would have suffered no prejudice if Judge Hill 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 Appellant SCH Physicians – is itself an abuse of discretion because "any reasonable person" would have made a different decision. ***Coggle v. Snow.***

C. Procedural irregularities affected ordinary process of the proceedings, resulting in an injustice and meriting vacation of the summary judgment.

This case is riddled with multiple procedural irregularities, partly due to *pro se* litigants' lacking legal knowledge and partly due to appellant physicians' taking full advantage of *pro se.* To exacerbate the procedural hurdles, Judge Hill failed to recuse from the case as mandatorily required by CJC Rule 2.11 (A)(6)(d) and then entered an ambiguous order, its silence and lack of clarity creates a procedural irregularity and affects the future proceedings. There is *no dispute* that two complaints were unsigned, which SCH Physicians claimed to be "void ab initio" ("that which

is void in the beginning"). CP 303. There is also *no dispute* that SCH physicians challenged trial court's personal jurisdiction due to the "insufficient service of process" (CP 295) and "statutory service requirements must be complied with in order for the court to *finally adjudicate* that dispute." (CP 297). SCH Physicians' arguments provide support that the dismissal was on procedural grounds.

Judge Hill entered an order, silent in language as to whether it was a dismissal with or without prejudice. Due to the lack of clarity, then "you could read that one of two ways" (RP 32). Judge Schubert correctly recognized this mistake is "procedural" because it affects "how the court proceeded" (RP 19) in that case and in future cases, and he properly exercises his discretion "to clarify the record on appeal". RP 23. Judge Schubert's decision is supported by well-established legal principle that "a court has authorization to hear and determine a cause or proceeding only if it has jurisdiction over the parties and [3] the subject matter." ***Mendoza v. Neudorfer Eng'rs, Inc.,*** 145 Wn. App. 146, 185 P.3d 1204 (2008). Judge Schubert's decision is consistent with controlling precedent ***NW Magnesite Co.,*** . Judge Schubert did not abuse his discretion, and Appellant SCH Physicians provided no argument that a judge's compliance with controlling precedents is an abuse of discretion.

D. Judge Hill erred in failing to comply with mandate of guardian ad litem to protect minors' interest.

The failure to comply with mandate of statute is reviewed under the clearly erroneous standard. In Washington, appointment of a guardian ad litem is mandatory. RCW 4.08.050. ***Newell v. Ayers***, 23 Wn. App. 767, 598 P.2d 3 (1979) ("appointment of a guardian a litem is

[3] SCH Physicians mistakenly argue that only subject matter jurisdiction affects a court's legal authority. Br 27. This argument is meritless in light of the ***Medoza*** holding.

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 ***Dependency of A.G.,*** 93 Wn. App. 268, 968 P.2d 424 (1998), this Court imposed sanctions upon Department of Social and Health Services (DSHS) and the trial court because they "failed to comply with the mandate of the guardian ad litem statute."

Under the applicable legal standards, "[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.

While the dismissal as to parents is proper is still in dispute, even this argument is accepted, it *only* applies to parents, the adult plaintiffs, 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) (the Supreme 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 that "Due process requires adequate notice be given to interested parties" of the pendency of the actions and afford them an opportunity to present their objections." CP 296.

Here, 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 innocent mistake for improper service? Ironically, SCH Physicians' positions changed on this very point: at the first summary judgment hearing, 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 525. SCH Physicians are judicially estopped from making an inconsistent argument. ***Arkison.***

Procedural due process 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 no been made a party to the action." ***State v. Santos***, 104 Wn.2d 142 (1985) (internal citation omitted). 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 Process also 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.").

Throughout the litigation, records before this Court support an *undisputed* fact that minors were *never* personally served. The following filings, for example, were never served minors:

- CP 311 (SCH Physicians' Motion for Summary judgment);
- CP 316 (Declaration of Bruce Megard and supporting documents for Motion for summary judgment);
- CP 416 (SCH's joined to co-defendants' motion for summary judgment);
- CP 579 (SCH Physicians' Response to Plaintiffs' Motion for Reconsideration);
- CP 643 (SCH's Response to Plaintiffs' motion for Reconsideration);
- CP 652 (SCH's Motion to strike Plaintiffs' Reply);
- CP 656 (SCH Physicians' joinder to SCH's Motion to strike Plaintiffs' Reply).

The trial court's ambiguous orders, again, were similarly never served upon minors. For example,

- CP 558-560 (Order Granting Defendants' Motion for Summary judgment);
- CP 659-660 (Order Denying Plaintiffs' Motion for Reconsideration);
- CP 662-663 (Order Granting SCH's Motion to strike Plaintiffs' Reply).

The records before this Court are clear that minors were not appointed guardian ad litem who can receive notice on their behalf, and they were never personally served. They were not personally provided a copy of any orders issued by Judge Hill. *It does not make sense to deprive minors' rights when they never receive a notice and/or judgment.* In any event, SCH Physicians cite *no* authority for their novel argument that a minor medical malpractice plaintiff, unrepresented by guardian ad litem [5], has satisfied the Due Process' threshold requirement, *i.e.*, notice.

E. Judge Hill erred in granting Appellant physicians' motion for summary judgment

1. Appellant SCH physicians bore the initial burden of showing the absence of an issue of material fact.

As stated *supra*, even where the trial court considered matters outside the pleadings on a CR 12 (b)(2) motion challenging personal jurisdiction, for the purpose of determining jurisdiction, the court is required to treat the allegations as established. ***Freestone***. Here, Chen alleged that Appellant physicians, Darren Migita, Ian Kodish and James Metz (i) "made a misdiagnosis for the plaintiff, J.L." CP 187, 204, 217; (ii) "breached his standard of care by refusing to contact Plaintiff, J.L.'s parent, and plaintiff, J.L.'s main treating physicians, and reviewing his full medical records." CP 187, 204, 217. Chen also alleged Darren Migita and Ian Kodish "had failed to deliver an accurate information to CPS and the court and his intentional misrepresentation..." CP 188, 218. Chen additionally alleged James Metz "had failed to deliver an accurate information to CPS, and had failed to exercise the degree of care and skill ordinarily exercised by the experts in the field..." CP 205.

The first issue here is whether Darren Migita, Ian Kodish and James Metz bore their initial burden of showing the absence of a material 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 Chen did not have any basis for their claims.The statues relating to CPS involvements 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.

The Supreme 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. Park-Davis, Inc.,*** 98 Wn.2d 460, 468, 656 P.2d 483 (1983). At trial, Chen and two minors, J.L. and L.L. have the burden of showing each necessary element. But when SCH Physicians 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).

SCH physicians further argued that they are entitled to summary judgment because Chen fail to provide an expert affidavit to support their claims. CP 306-307. This is an outrageous argument indicating that SCH Physicians' above-the-law position. First. Washington law does not require medial malpractice plaintiffs to provide an expert affidavit prior to discovery. ***Putman v. Wenatchee Valley Med. Ctr., P.S.,*** 166 Wn.2d 974, 983, 216 P.3d 374 (2009). Discovery cutoff for the instant case is six months away when the case was dismissed. CP 469. Second. SCH

Physicians' negligence is so obvious (not investigating J.L.'s medical history and consulting with his main treating physicians) that both dependency and criminal court dismissed the cases without expert testimonies. Under such circumstances, trial court should adopt Doctrine of *Res Ipsa Loquitur* ("the thing speaks for itself"). Supreme Court has enumerated 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 ordinally happen in 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.2d 884, 239 P.3d 1078 (2010). CP 792-794.

As said, SCH Physicians bear the initial burden of showing of absence of an issue of material fact requiring trial. 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,*** 56 Wn.2d 678 (1960). Also, ***Trautman, Motion for Summary Judgment: Their Use and Effect in Washington,*** 45 Wash. L. Rev. 1, 15 (1970).

2. SCH and SCH Physicians had not met their initial burden of showing that there are no issues of material fact; hence, the grant of summary judgment was improper.

To grant summary judgment, the trial court was required to make the inquiry: Had SCH Physicians met their initial burden of showing that no genuine issues of material facts requiring trial? Here, Appellant SCH Physicians were required to provide evidence to prove that the alleged "misdiagnosis" was wrong; and that the alleged failure to meet the standard of care for having consulted with J.L.'s treating physician was false, and that the alleged "misrepresentation" did not exist. In their summary judgment, SCH Physicians did not even attempt to address any of these raised allegations: they failed to provide *any* evidence to show their diagnoses were correct or within the standard of care (Notably, Darren Migita did not even provide his treatment record

before the trial court). In light of the dismissal in the dependency action and AG's conclusion that James Metz *did* provide false information, then, James Metz needed to address why and how his false information could support his "good faith" assertion. The Dependency Court said it was "outrageous" that Darren Migita's below the standard care for failing to consult with the patient's main treating physician prior to a medical conclusion (CP 187), but Darren Migita provided no evidence to rebut the allegation. A reasonable person would ask, how can a pediatrician meet the standard of care without investigating the patient's medical history? How can a medical provider establish good faith for providing plainly false information to CPS?

We find no answers to the above inquiries in filings submitted by SCH Physicians who merely claimed immunity in less than 90 words' affidavit without any factual evidence to support their "good faith" assertion. CP 195, 212, 224.The limited medical records provided by SCH do not, moreover, support their claims. In their records, James Metz recommended "obtain[ing] records from Dr. Green..." CP 429. Had the contact actually happened? and if not, why he failed to do so? Again, the answer could not be found in SCH Physicians' motion and submission. Notably, when Darren Migita's treatment record was never before the trial court, a summary judgment was entered in his favor.

Simply put, SCH Physicians' summary judgment was based upon an incomplete (indeed, a very small amount) medical record. Even so, SCH Physicians' motion for summary judgment and their several sentences' affidavits provide no answer in opposition to these allegations. In ***Hash. V. Children's Orthopedic Hosp.,*** 49 Wn. App. 130, 741 P.2d 584 (1987), this Court held,

> "Without that information, a court cannot conclude that there are no material issues of fact to be resolved in deciding the issues of proximate cause and liability. The record is simply deficit. It does not tell us either by facts sworn to under oath or by admissible opinion just how, mechanically, the facture occurred.

> The issue of causation is normally a factual issue. ***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). Under these circumstances, a summary judgment dismissing plaintiff's complaint should not be granted."

SCH Physicians' summary judgment do not resolve the disputed issues. Their less-than ninety (90) words' affidavits without factual evidence do not resolve the alleged the issue of causation which is a question of fact. ***Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,*** 162 Wn.2d 59 (Wash. 2007). Nor did their several sentences' statement do not resolve the claimed "good faith" which is established through undisputed facts. ***Whaley v. State,*** 90 Wn. App. 658, 668, 956, P.2d 1100 (1998). SCH and SCH Physicians submitted only 20 pages' treatment record to argue that they are entitled to summary judgment while in fact J.L.'s SCH medical records turn out to be 600 pages, which had been in SCH's sole possession. Chen was blindsided and the Court was misled.

Here, the record before the court does not tell us either by facts sworn under oath or by admissible opinions how SCH Physicians have met the standard of care, requirement of good faith. There is *no dispute* that the prosecutors' office dropped the criminal charge against Chen, and the state dropped the dependency case (caused by SCH physicians' false allegation). CP 264. Given these undisputed facts, a proper inquiry for a reasonable person should be, if SCH Physicians' allegations are true, then Chen is undoubtedly a child abuser. Why do both the state and prosecutors drop the cases against Chen? A reasonable inference is that SCH Physicians' allegation about Chen is wrong. At no point do SCH Physicians' affidavits provide the Court with a factual description of what false information had been included in their CPS involvement, and how they had been in good faith for making these false allegations.

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 that moving party is entitled to judgment as a matter of law. ***Hartley v. State,*** 103 Wn.2d 768, 774, 698 P.2d 77 (1985). In sum, multiple disputed issues were present, a grant of summary judgement is thus improper. This Court should reverse.

3. Procedural irregularities require setting aside summary judgment.

In obtaining summary judgment, SCH Physicians' service was defective. They did not comply with "28 calendar days" service requirement to summary judgment. CR 56 (c). Chen received the 18 summary judgments on February 17 (14 days prior to the Hearing unilaterally scheduled by SCH and SCH Physicians) through email. CP 750-752. SCH Physicians claimed that they sent the pleadings on February 2, even this is true, they still fail to satisfy the CR 56 (c) requirement when they elected to serve by mail. The service is considered complete on February 6 because February 5 was Sunday. *See,* CR 5 (b) (2) (A) (three days are added for service by mail, excluding weekend and holidays). SCH Physicians bear the burden to show that the documents were indeed served Chen on the prescribed date by providing "Plaintiffs' acknowledged receipt with signature." Division II's unpublished opinion in ***Love v. State***, 46798-4-II (2016).

4. In light of this Court's decision in *State v. LG*, the court was required to treat all the factual allegations as true if a summary judgment was brought challenging jurisdiction prior to discovery.

SCH Physicians brought a CR 12 (b) motion challenging trial court's personal jurisdiction. CP 294-299. When deciding matters outside the submission, the CR 12 (b) is treated as summary judgment. In ***State v. LG Elecs., Inc.***, 185 Wn. App. 394, 341 P.3d 346 (2015), this Court explicitly articulates,

> "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...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...when reviewing a grant of a motion to dismiss for lack of personal jurisdiction, we accepted the nonmoving party's factual allegations as true and review the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party...Even where the trial court has considered matters outside the pleadings on a CR 12 (b)(2) motion to dismiss for lack of personal jurisdiction, '[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established."

Here, Chen alleged SCH Physicians reached their conclusions without consulting J.L.'s treating physicians and reviewing his medical history, even at their own institution. Chen further alleged that SCH Physicians misdiagnosed J.L., delivered false information to CPS. CP 187, 204, 217. Since SCH Physicians' motion was brought prior to discovery, all these factual allegations were required to be treated as true and established when deciding a CR 12 (b) (2) motion. SCH Physicians provided no factual evidence to rebut these allegations. They did *not* deny the allegations in an answer (they actually did *not* file an answer), nor did they provide an innocent explanation for not consulting J.L.'s treating physicians or reviewing his medical records before jumping to a medical conclusion that disrupted his treatment and destroyed his health.

SCH Physicians argue that they were acting in good faith for *pre-arranging* this removal, and later engaging in CPS action, thus immune under RCW 26.44.060. CP 308-309. RCW 26.44.060 (1) provides immunity for engaging in alleged child abuse in good faith. It does not, however, provide immunity for outrageous misconduct and mistreatments. RCW 26. 44. 060 (4). Relying heavily upon ***Whaley v. State,*** 90 Wn. App. 658, 668, 956 P.2d 1100 (1998), SCH Physicians claimed in their summary judgment that they sufficiently established "good faith"

through a less than 90 words' statement without any factual evidence. CP 195, 212, 224. Does this short declaration not supported by any fact satisfy the court who readily accepts it as "good faith"?

Given this argument, Chen digs into thousands of pages of original court in ***Whaley v. State***. What Chen found was 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 instant case and ***Whaley*** are distinguished given the completely different factual background and significantly different procedural history. ***Whaley*** Defendants brought a pure CR 56 motion while SCH in the current case brought a CR 12 (b) (2) motion (converted summary judgment). The ***Whaley*** plaintiffs were represented by counsel and were granted continuance to conduct discovery and obtain expert affidavits in opposition to summary judgment, in this case, the plaintiffs were *pro se* and were denied a continuance to conduct discovery or obtain expert affidavits. In ***Whaley,*** the claim was over an eight day separation between Plaintiff and her son, and the defendant established good faith by producing extensive (over 50 pages) documentation in support of her summary judgment motion, including detailed and direct fact affidavits from multiple witnesses. This is very different than the several-sentence declarations without factual support offered in this case to demonstrate "good faith".

The presence or absence of good faith must be tested under the facts. Although the CPS allegations in Whaley and in the current case both turned out to be false, the difference is obvious. In ***Whaley***, the false CPS allegation were based on statement from Whaley's son while defendant 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 knowledge about the allegation); here they are based on the failure of the SCH Physicians to conduct a reasonable investigation before rejecting the diagnoses and treating plans of J.L.'s

treating doctors and instead diagnosing abuse. The failure to investigate included the failure to discuss J.L.'s medical issues with his parents; the failure to consult these issues and treatment plan with his treating doctors; and the failure to review J.L.'s medical records in their own institution. These failures preclude a finding of good faith. "Good faith is a state of mind indicating honesty and lawfulness of purpose." ***Tank v. State Farm***, 2015 Wn.2d 381, 385, 715 P.2d 1133 (1986). It is, moreover, evident that the reports of the SCH physicians were not honest: the AG explicitly found that James Metz's written statement was contrary to the facts, and it is equally well-established that Darren Migita provided false information on the lab results and further reported that J.L. had no GI distress (even though he was prescribing GI medications for him). Without providing any evidence to establish good faith and honesty, a good faith defense fails. RCW 26.44.060 (bad faith CPS involvement).

Since SCH physicians 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 SCH Physicians' favor. ***Clapp v. Olympic View Pub. Co.,*** 137 Wn. App. 470, 476, 154 P.3d 230, 234 (2007) (internal citation omitted) ("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 summary judgment in light of the clear evidence that the dependency and criminal actions were dismissed in Chen's favor when the state learned the information (provided by SCH Physicians) on which they had relied was false. Given this and other genuine disputes, the grant of summary judgment was based upon untenable grounds. This Court should reverse.

F. Judge Schubert failed to vacate summary judgment as to SCH, which had withheld critical medical evidence from the trial court

The situation in current case was very similar to the willful withholds in ***Roberson v. Perez***, 123 Wn. App. 320, 96 P.3d 420 (2004). The ***Roberson*** court held that, "in this case 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 ***Robertson*** argued that Plaintiffs never asked for Defendant Perez's medical file or his Labor and industries file, the court rejected this argument, and further vacated judgment in plaintiffs' favor. Specifically, the court finds that (1) was willful or deliberate and (2) substantially prejudiced the opposing party's ability to prepare for trial. The reviewing court, Division Three affirmed ***Roberson*** Court's decision and articulated,

> 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 involving 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).

Here, J.L's 600 pages' medical records is material and the failure to disclose it was severely prejudiced to Chen – and misleading to the Court – since these records showed what the SCH physicians would have learned had they taken the trouble of looking up J.L.'s medical records at their own institution. SCH did not deny that they had intentionally withheld 571 pages' evidence from Chen (Attorney Heather Kirkwood was one of the witnesses, CP 759) and the court (CP 807) but argued at the hearing that Chen did not ask. This is disingenuous. As shown in an email, Chen did ask for J.L.'s medical records (with professional witnesses) but was declined by SCH. Had Judge Hill not granted summary judgment before discovery, moreover, Chen would have obtained

these records in discovery, just as Dorsey & Whitney obtained from them in the federal case. Judge Schubert was aware of SCH's summary judgment was obtained through significant withholds but did not vacate the summary judgment as to SCH under CR 60 (b) (11) as ***Roberson*** Court. Judge Schubert's failure to vacate the summary judgment as to SCH should be reversed.

VI. CONCLUSION

As stated, multiple errors and procedural irregularities mandate a trial in this case. And that trial should extend to a trial of whether SCH physicians acted negligent and in bad faith. These issues should remain open for resolution in the present suits or in new suits on behalf of the children.

DATED this 24th of October 2019.

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

s/ Naixiang Lian
Naixiang Lian

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 October, 2019.

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

APP. K

NO.79685-2

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al.

Plaintiffs/Respondents/Cross-Appellants

v.

DARREN MIGITA et al

Defendants/Appellants/Cross-Respondents

SEATTLE CHILDREN'S HOSPITAL

Defendants/Cross-Respondents

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

RAP 10.4 (b) requires "Appellant's reply brief should not exceed 25 pages.". *Also*, ***Nowogroski Ins., Inc. v. Rucker,*** 88 Wn.App. 350, 362, 944 P.2d 1093 (1997) (This Court striking Appellants' last eight pages exceeding RAP 10.4 (b)'s ***25 pages limit.***). Appellants Darren Migita, James Metz and Ian Kodish (collectively "SCH Physicians") submitted ***37 pages' overlength Reply***, in which contained multiple new arguments *for the first time* on appeal.

It is the responsibility of the moving party to raise all the of issues for consideration by the Court in its *initial* filing. *e.g.,* ***Cowiche Canyon Conservancy v. Bosley,*** 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). Therefore, this Court should decline to consider SCH Physicians' multiple *new* arguments in *overlength* Reply that were not properly raised in their opening brief. For example,

- SCH Physicians' failure to designate the proper reviewing standard as "abuse of discretion" in their opening brief, now at Reply 5-20 should not be considered.
- SCH Physicians' baseless novel argument for the first time in their Reply that minor J.L. abandoned appeal should not be considered (Reply 2 &34). They provided no evidence to support their position that any counsel was authorized to act on J.L.'s behalf on appeal. [1]
- SCH Physicians' untimely motion to dismiss a cross-appeal should be denied because Cross-Appellants' Notice of cross-appeal [2] was filed and granted over ten months ago.
- SCH Physicians' responses to cross-appeals at the overlength pages (*Reply*, 26-37) should be stricken pursuant to RAP 10.4 (b).

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[1] *See,* Appendix A. Trial court states in its order that it appoints Mr. Jason Anderson "for the limited purpose" of *only* assisting with motion to vacate, *not* for appeal.

Eleven months ago, Cross-Appellants filed Notice of Cross-Appeal challenging trial court's four orders which was granted by this Court. SCH and SCH physicians did not dispute. Now *for the first time in their reply brief*, SCH Physicians improperly asked this Court to dismiss Cross-Appeal[2] which was filed and granted over ten months ago[3], seemingly to suggest that RAP 2.2 (a)(10) does not apply to the current case. SCH physicians' now position in their *over-length* Reply about application of RAP 2.2 (a)(10) is inconsistent with their previous arguments. RAP 2.2 (a)(10) states "[a]n order ***granting or denying*** a motion to vacate a judgment". If Appellant SCH physicians' reasoning is accepted that RAP 2.2 (a)(10) is inapplicable here, SCH Physicians' appeal should be dismissed.

For the first time, SCH Physicians argued minor J.L. has abandoned his appeal but *no* counsel was ever authorized to act on J.L.'s behalf on appeal. *See,* Appendix A (trial court order explicitly states that Mr. Anderson was appointed to represent J.L. for the "limited purpose" of *only* assisting with motion to vacate, *not* for appeal).

In their opening brief, SCH Physicians abandoned the proper reviewing standard of Judge Schubert's order on motion to vacate should be considered as a waiver. SCH Physicians' most cited authority is ***Marriage of Tang***, 57 Wn. App. 648, 789, P.2d 118 (1990) ("The decision to vacate a judgment under CR 60 (b) will not be overturned on appeal unless it plainly appears that the trial court has abused its discretion."). [4]

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[2] *See,* Appendix B. Cross-Appellants' Notice of Appeal filed on March 28, 2019 challenging *four* trial court orders was granted by this Court as uncontested.

[3] Respondent Seattle Children's Hospital ("SCH") joined in this argument but provided no authorities to show why it can challenge this Court's 10-month-ago decision granting cross-appeal.

[4] Seattle Children's Hospital asked this Court to uphold Judge Schubert's order because "the trial court exercised sound judgement".

Judge Schubert did not abuse his discretion when vacating summary judgment as to SCH Physicians who did not (and had failed to) make any such arguments. This Court should affirm Judge Schubert's order granting vacation as to SCH Physicians. and reverse denying vacation as to SCH.

II. REPLY TO RESTATEMENT OF THE CASE

A. Both Criminal and Dependency Court adjudicated five years ago that SCH Physicians' misstatements were "contrary to" J.L.'s medical records

SCH physicians' motion challenging the trial court's personal jurisdiction, framed as summary judgment), was brought prior to discovery. All allegations in plaintiffs' complaints are thus required to treat as established. ***State v. LG Elecs., Inc.,*** 185 Wn. App. 394, 341 P.3d 346 (2015). Appellant/Defendant James Metz's SCAN report had been determined to be "contrary to" J.L.'s medical records by both offices of Attorney General and King County prosecutors, and further adjudicated to be false by both Criminal and Dependency courts over five years ago. In asking this Court to rely on Metz's report, SCH Physicians improperly advised this Court to disregard two other courts' prior findings that were entered over five years ago.

The ***LG*** Court had explicitly rejected such arguments by announcing that "[t]he [defendants]/companies' position, which is at variance with our prior decisions, is untenable" and for motion for summary judgment brought prior to discovery, the allegations in the complaints should "be treated as verities". This Court specifies,

> Even where the trial court has considered matters outside the pleadings on a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established." ***Freestone***, 155 Wn. App. at 654; accord ***State v. AU Optronics Corp.***. 180 Wn. App. 903, 912, 328 P.3d 919 (2014); ***FutureSelect***. 175 Wn. App. at 885-86; ***SeaHAVN. Ltd. v. Glitnir Bank***. 154 Wn. App. 550, 563, 226 P.3d 141 (2010);

Shaffer v. McFadden. 125 Wn. App. 364, 370, 104 P.3d 742 (2005***); CTVC of Haw. Co. v. Shinawatra,*** 82 Wn. App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996); ***Hewitt v. Hewitt.*** 78 Wn. App. 447, 451-52, 896 P.2d 1312 (1995); ***In re Marriage of Yocum.*** 73 Wn. App. 699, 703, 870 P.2d 1033 (1994); ***Harbison v. Garden Valley Outfitters. Inc..*** 69 Wn. App. 590, 595, 849 P.2d 669 (1993); ***MBM Fisheries. Inc. v. Bollinger Mach. Shop &Shipyard. Inc..*** 60 Wn. App. 414, 418, 804 P.2d 627 (1991): *see also* ***Raymond v. Robinson***, 104 Wn. App. 627, 633, 15 P.3d 697 (2001) (Division Two); ***Precision Lab. Plastics. Inc. v. Micro Test. Inc..*** 96 Wn. App. 721, 725, 981 P.2d 454 (1999) (Division Two); ***Byron Nelson Co. v. Orchard Mgmt. Corp.***. 95 Wn. App. 462, 467, 975 P.2d 555 (1999) (Division Three). Our Supreme Court has recognized this approach and adopted the same. *See* ***FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings. Inc..*** 180 Wn.2d 954, 963-64, 331 P.3d 29 (2014) (standard applies when full discovery has not been conducted); ***Lewis v. Bours***, 119 Wn.2d 667, 670, 835 P.2d 221 (1992).

Given the fact that defendant physicians' motion for summary judgment was brought prior to discovery. All allegations are required to be treated as established. SCH Physicians had so far failed to provide any evidence to contest Cross-Appellants' allegations.

B. The Record should be reviewed as a whole

When moving motion to vacate, Cross-Appellants submitted J.L.'s 600 pages' medical records from Seattle Children's Hospital. Neither SCH nor SCH Physicians disputed the authenticity of these records, and these documents had been properly presented before the trial court for the purpose of motion to vacate as well as records for appeal and had been perfectioned by Cross-Appellants/Respondents. ***Streater v. White***, 26 Wn.App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980) (holding that the court should review "the record as a whole"). Also, ***Stiles v. Kearney***, 168 Wn. App. 250, 259, 277 P.3d 9 (2012) (The appellant must also provide a record sufficient to review the issues raised on appeal. The failure to do so precludes appellate review).

It is Appellant's responsibility to providing a sufficient record on appeal but SCH Physicians failed to perfection a complete record when they challenged Judge Schubert's finding when

ruling motion to vacate that Judge Hill's order is ambiguous and "creates a question of regularity of proceedings." Therefore, the appellate court is required to review the evidence "in light most favorable to the prevailing party," and deference is given to the trial court's determination. ***Weyerhaeuser v. Tacoma- Pierce Country Health Dept.***, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

III. REPLY ARGUMENTS IN SUPPORT OF CROSS-APPEAL

As they have throughout this litigation, Appellant Seattle Children's Hospital ("SCH") Physicians and Respondent SCH continue their above-the-law position on advising the Court to adopt multiple new rules in Washington courts. For example, SCH physicians ask this Court to announce a series of new rules. For example,

(1) *that RAP 2.2 (a)(10) automatically grants Appellants rights to appeal on any motion to vacate.*

This assertion does not make sense. If this assertion is accepted, an appeal right could be simply and easily obtained by filing a motion to vacate on any trial court's decisions. This reasoning does not make sense and contradicts with Appellant SCH physicians' previous position and Washington precedents that interlocutory decisions are not appealable.

(2) that a court lacking jurisdiction could rule the case on the merits.

This assertion is without merits. If this assertion is accepted, Administrative Court could rule civil or any other matters as long as it chooses to do so. Or Criminal matters could be decided in Civil court even if it does not have such jurisdiction. *See,* ***Frank v. Dep't of Licensing***, 94 Wn. App. 299 (1999) (holding judgement void when entered by a court lacking jurisdiction of the parties or the subject matter).

(3) *that minors' claims be disposed before guardian ad litem was appointed.*

This assertion is flawed. It ignores the children's best interest required by statute and precedents. *e.g.*, ***Newell v. Ayers***, 23 Wn. App. 767, 598 P .2d 3 (1979) ("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"); ***Dependency of A.G.***, 93 Wn. App. 268, 968 P .2d 424 (1998) ("the [guardian ad litem] statute is mandatory, and the children's interests are paramount. We cannot condone ignoring the statutory provision specifically designed to protect them"); ***In re Dependency of O. J.,*** 88 Wn. App. 690, 947 P .2d 252 (1997) (the trial court's failure to appoint GAL after being drawn to its attention is "reversible error"). *Also*, RCW 4.08.50.

(4) *that the court does not need to comply with court rules. e.g., CR 56 (requiring 28 days' notice provided for motion for summary judgment). Also, CR 41 (b)(3) & CR 52 (a) (mandatory entry of factual findings for a dismissal on merits). Code of Judicial Conduct ("CJC") Rule 2.11 (A)(6)(d) ("shall" is used to impose mandatory disqualification when a judge "previously presided as a judge over the matter in the matter").*

Here, less than 28 days' notice was provided. No factual findings were entered. The judge did not recuse when mandatorily required by CJC.

A. SCH Physicians' position about applicability of RAP 2.2 (a)(10) is inconsistent

SCH Physicians have been suggesting that RAP 2.2 (a)(10) *automatically* grants rights to appeal for *all* motion to vacate. If this interpretation is accepted, *any* litigants can challenge *any* trial court's (interlocutory) decisions *after* filing a motion to vacate.

RAP 2.2 (a) (10) refers "[a]n order granting or denying a motion to vacate a judgment." SCH Physicians have been arguing that RAP 2.2 (a)(10) applies the current case but now suggest that RAP 2.2 (a)(10) does not apply for the current case and cross-appeal. If this reasoning is accepted, SCH Physicians' appeal should also be dismissed.

B. SCH Physicians' failure to designate the proper standard of review on Judge Schubert's Order on motion to vacate is a waiver

It is the responsibility of the moving party to raise all of the issues for consideration by the Court in its *initial* filing. As agreed by Cross-Respondent SCH, Review standard for order on motion to vacate is the abuse of discretion.

SCH Physicians' failure to designate the proper reviewing standard on Judge Schubert's order motion to vacate in their opening brief is a waiver. *See*, ***Sacco v. Sacco***, 114 Wn. 2d 1, 5, 784 P.2d 1266, 1268 (1990) (denying plaintiff's request for attorney's fees in her reply brief because the issue was not raised in her opening appellate brief). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (holding that an issue raised for the first time in a party's reply brief on appeal could not be considered by the court.).

C. SCH Physicians' innovative argument that a court lacking jurisdiction has authority to further adjudicate on merits is at odds with Washington precedents

Judge Schubert properly finds that the March 3, 2017 order containing "a question of regularity of the proceeding" (CP 888) that requires vacation and exercises his sound discretion in vacating Judge Hill's ambiguous order pursuant to Washington Supreme Court's holding in ***State v. Nw. Magnesite Co.,*** 28 Wn.2d 1, 182, P.2d 643 (1947). SCH physicians innovatively

suggested that a court without jurisdiction can rule the case on the merits. *If SCH Physicians' position is embraced, a new rule is created for the legal system that every court can rule matters even if without jurisdiction, then the whole legal system will be in disorder: Bankrupt Court can decide dependency matters; or superior court can take over supreme court's authority, etc.*

Jurisdiction is the prerequisite for a court to properly exercise its authority. ***Wampler v. Wampler,*** 25 Wn.2d 258, 170 P.2d 316 (1946) ("only the court…had power to pass on the merits – had jurisdiction, that is, to render the judgment."). A court without jurisdiction over parties or subject matters has no authority to act. *e.g.,* ***Frank v. Dep't of Licensing,*** 94 Wn. App. 299 (1999). *Also,* ***Dike v. Dike,*** 75 Wn.2d 1,7, 448 P.2d 490 (1968) (an order is void when entered by a court lacking jurisdiction).

D. Judge Schubert properly exercises his discretion in vacating an ambiguous summary judgment as to SCH Physicians

Judge Hill's March 3, 2017 Order was silent about whether the order was with or without prejudice. As conceded by Appellant SCH Physicians, the order was ambiguous and can be seen of two ways. *i.e.,* "I didn't need to clarify because it was obviously with prejudice" or "I didn't need to clarify because it was obviously without prejudice." RP 33.

SCH Physicians admitted that "we don't know whether the court ruled on the merits." RP 22. Judge Hill's statement supported that her ruling cannot be on the merits because she had never heard the merits. CP 545 (Judge Hill articulates that she does not hear the merit of the case.). Even if SCH Physicians' now assertion that Judge Hill's dismissal was on the merits (which were denied), then Judge Hill's failure to enter factual findings required by CR 41 and CR 52 still warrants a vacation. *See,* ***Little v. King,*** 160 Wn.2d 696 (2007) ("the trial court could have

reasonably concluded that the lack of findings and conclusions was as "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.").

As supported by compelling evidence on records, Judge Hill's dismissal cannot be with prejudice. SCH Physicians' innovative argument that a court lacking jurisdiction can rule on merits is to subvert the justice system. This Court should reject this argument.

E. Judge Hill erred in granting summary judgments when SCH and SCH Physicians had not met their initial burden of showing the absence of an issue of material fact

As stated *supra*, ***LG*** Court's decision and Washington's multiple precedents require that all facts were considered established when a motion was filed prior to discovery. SCH Physicians provided no evidence to contend Cross-Appellants' alleged misdiagnosis and misrepresentation where SCH and SCH Physicians' negligence are *so* clear that *Res Ipsa Loquitur* applies. If the moving party does not sustain their initial burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials. ***Preston v. Duncan,*** 56 Wn.2d 678 (1960).

SCH Physicians and SCH provided no arguments in neither their brief or reply that they had met their initial burden of proof that they are entitled to summary judgment. Indeed, they never met this burden. Given the multiple factual disputes as to whether SCH Physicians misdiagnosed J.L., or whether they acted in good faith as claimed, a grant of summary judgment is thus improper.

Judge Hill committed multiple errors in the order granting summary judgment. For example, Judge Hill did not appoint guardian ad litem for minors when this brought to her attention, nor did she find any good cause of not making this appointment. ***Newell v. Ayers***, 23 Wn. App. 767,

598 P.2d 3 (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 voided at his option"). *Also,* ***Anderson v. Dussault,*** 180 Wn.2d 1001, 321 P.3d 1206 (2014) (the Supreme court holding that minor's claim was not barred due to the absence of guardian ad litem who could receive a notice of the proceedings.); ***Dependency of A.G.,*** 93 Wn. App. 268, 968 P.2d 424 (1998) (this Court sanctioned Department of Social and Health Services and trial court for their failure "to comply with the mandate of the guardian ad litem statute").

Further, Judge Hill failed to recuse herself from the case as mandatory required by Code of Judicial Conduct ("CJC") Rule 2.11 (A)(6)(d) where "shall" was used. ***State v. Hall***, 35 Wn. App. 302, 666 P.2d 930 (1983) ("shall" possess a mandatory or imperative character").

The March 3, 2017 order was also defected for failing to comply with CR 11, CR 41, CR 52, CR 56. All these and other failures constitute reversable errors for both SCH and SCH Physicians that this Court should reverse.

IV. REPLY ARGUMENTS TO SCH AND SCH PHYSCIANS' RESPONSE

A. Motion to strike SCH Physicians' new arguments in their over-length Reply

1. SCH Physicians' 37 pages' overlength Reply should be stricken. RAP 10.4 (b)

RAP 10.4 (b) requires "Appellant's reply brief should not exceed 25 pages.". *also,* ***Nowogroski Ins., Inc. v. Rucker,*** 88 Wn.App. 350, 362, 944 P.2d 1093 (1997) (This Court "note[s] that Nowogroski's reply to the cross-appeal exceeds RAP 10.4 (b)'s 25-page limit by 8 pages. We deny Nowogroski's belated requrest for leave to file its over-length brief and strike the last eight pages."). Here, SCH Physicians' 37 pages' Reply to Respondents/Cross-Appellants' brief exceeds RAP 10.4 (b)'s 25-page limit by 12 pages. Respondents/Cross Appellants respectfully ask this Court to strike SCH Physicians' last 12 pages (*i.e.,* P. 26-37) per RAP 10.4 (b) and all new arguments in their Reply.

2. SCH Physicians' new arguments in Reply is "too late to warrant consideration"

It is the responsibility of the moving party to raise all of the issues for consideration by the Court in its initial filing. *See, **Sacco v. Sacco,*** 114 Wn. 2d 1, 5, 784 P.2d 1266, 1268 (1990) (denying plaintiff's request for attorney's fees in her reply brief because the issue was not raised in her opening appellate brief). ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). ***Fosbre v. State,*** 70 Wn.2d 578, 583, 424 P.2d 901 (1967) ("We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits") (citing ***State v. Davis***, 60 Wn.2d 233, 373 P.2d 128 (1962); ***Kent v. Whitaker,*** 58 Wn.2d 569, 364 P.2d 556 (1961)).

In their Reply, SCH Physicians improperly raised multiple new arguments *for the first time* on appeal (most of them are at the overlength pages) For example,

- *SCH Physicians' new arguments about abuse of discretion in Reply brief (SCH Physicians' Reply at 5-20) do not warrant consideration.*

  * SCH Physicians' failure to designate the proper reviewing standard on the challenged order in opening brief is a waiver. As agreed by Cross-Respondent SCH, Review standard for order on motion to vacate is the abuse of discretion. (*SCH Response*, at 8-9).

- *SCH Physicians' baseless assertion that minor J.L. abandoned the appeal.* (Reply at 2& 34).

  * SCH Physicians provided no evidence that any counsels were authorized to act on behalf of J.L. on appeal. *See,* Appendix A. (Mr. Anderson was appointed *only* "for the limited purpose" of assisting with motion to vacate at trial court.).

- *SCH Physicians' new argument about failure to appoint guardian ad litem for two minors.* (*SCH Physicians' Reply* at 31-34).

  SCH Physicians' argument is inconsistent with their previous position at the hearing for motion for summary judgment. See CP 525 (SCH Physicians stated "[minors] are considered incompetent as a matter of law.")

- *SCH Physicians' new argument that Cross-Appellants cannot challenge Judge Hill's summary judgment order. (Reply at 35-37).*

  * Cross-Appellants' Notice of Cross-Appeal was filed on March 25, 2019, explicitly appealing trial court's *four* orders, including Judge Hill's three orders. See, Appendix B.

  * Commissioner of this Court granted Cross-Appeal on April 5, 2019. Neither SCH nor SCH physicians ever challenged this decision.

  * Even if their arguments are considered, SCH physicians did not cite one single case that Cross-Appellants cannot challenge the underlying orders in an appeal from order ***granting*** summary judgment.

- *SCH Physicians' false assertion that the trial court acknowledged Respondents' expert as "incompetent".*

  * Whether Cross-Appellants' expert is qualified, it should not be decided by SCH Physicians, but within trial court's discretion. ***Miller v. Peterson***, 42 Wn. App. 822, 832, 714 P.2d 695 (1986) ("whether an expert is qualified to testify is a determination within the discretion of the trial court."). Here, SCH physicians provided no evidence on record that the trial court ever made such determination.

Without waving their rights to strike the overlength reply, Cross-Appellants will address SCH Physicians' arguments in the following sections.

B. This Court should deny SCH and SCH Physicians untimely motion to dismiss Cross-Appeal

1. SCH and SCH Physicians' motion to dismiss was brought for the first time on appeal, and over 10 months after the cross-appeal was granted by this Court

On March 25, Cross-Appellants filed notice of cross-appeals in both superior court and this Court, challenging superior court's *four* orders including three orders entered by Judge Hill. ***See,*** Notice of Cross-Appeal at Appendix B. On April 5, 2019, Commissioner of this Court granted cross-appeal. For the past ten months, neither SCH nor SCH Physicians challenged this Court's decision granting cross-appeal. Now, *for the first time* on appeal, they asked this Court to dismiss an over-eleven-months-ago cross-appeal. Further, SCH Physicians cite not even one single case to support their position that an order ***granting*** vacating judgment is precluded from review the underlying decisions. [5]

2. RAP 2.2 (a)(10) does not require Cross-Appellants to be "aggrieved party".

Washington established precedents allow only final decisions are appealable. SCH Appellants' appeal is premature because Judge Schubert's order is interlocutory and unappealable. SCH Appellants seem to argue that order on motion to vacate is always appealable, if this reasoning is accepted, then every litigant could obtain appeal right only by moving a motion to vacate.

SCH Physicians' position is inconsistent. They have been arguing that RAP 2.2 (a)(10) applies to this case but now and for the first time in their reply argued that Cross-Appellants are not "aggrieved" so their cross-appeal should be dismissed. (SCH Physicians' Reply at 20). However, they failed to recognize that RAP 2.2 (a)(10) does not require a party to be aggrieved.

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[5] SCH Physicians cited ***Bjurstrom v. Campbell,*** 27 Wn. App. 449, 450-51, 618 P .2d 533 (1980) which only address motion denying vacation.

RAP 2.2 (a)(10) refers to "an order granting or denying a motion to vacate a judgment". Therefore, if RAP 2.2 (a)(10) grants SCH Physicians appeal rights, what is the justification to dismiss cross-appellants' cross-appeal?

C. SCH and SCH Physicians' joinders are improper and their arguments contradict each other in multiple places

SCH physicians asserts that they "incorporates arguments presented by cross-respondent Seattle Children's Hospital". (SCH Physicians Reply at 22). However, SCH's many arguments do not support SCH Physicians' position. For example, SCH Physicians argued that cross-appellants are not "aggrieved" when summary judgment as to SCH Physicians were granted, SCH failed to explain how it can join in this argument when the challenged order was entered in its favor.[6] While SCH physicians sought to review Judge Schubert's order under error of law (*e.g.*, SCH Physicians BR at 1), SCH recognized reviewing standard is "subject to an abuse of discretion standard" and Judge Schubert's order is "the trial court exercised sound judgement" (SCH Response at 8). SCH sought to affirm Judge Schubert's order but SCH Physicians asked to reverse. While SCH admitted proper service and consented to trial court's jurisdiction (CP 537) but SCH Physicians consistently claimed that the trial court lacked personal jurisdiction over them due to Cross-Appellants' improper service. (CP 288, 294-298, 303).

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[6]. SCH also improperly asked joinder. (SCH Response at 5-6) but provided no explanation how cross-appellants are not "aggrieved" when their claims as to SCH was not granted by Judge Schubert.

D. Washington courts protect litigants' rights to discovery

1. Notice pleading system allows plaintiffs to discover

SCH Physicians and SCH improperly asserted that cross-appellants alleged only vicarious liability of Seattle Children's Hospital (*SCH Physicians' Reply* at 12; *SCH's Response* at 5). This argument is flawed in two ways. First, Washington is a notice pleading state. This means a simple concise statement of the claim and the relief sought is sufficient. Civil Rule 8, does not require parties to state all of the facts supporting their claims in their initial complaint. ***Bryant v. Joseph Tree, Inc.,*** 119 Wn. 2d 210, 222, 829 P. 2d 1099 (1992). ***Pacific Northwest Shooting Park Ass'n v. City of Sequim***, 158 Wn.2d 342, 352, 144 P.3d 276 (2006) (citing CR 8(a)). Further, Notice pleading contemplates that discovery will provide parties with the opportunity to learn more information about the nature of the complaint; therefore courts should be forgiving for factual errors or deficiencies in a complaint before there has been an opportunity to complete discovery. ***Bryant,*** 119 Wn. 2d at 222. Therefore, whether plaintiffs' allegations as to defendant Seattle Children's Hospital is yet to be determined pending discovery.

2. SCH's withholding medical records from plaintiffs deprived plaintiffs of a fair opportunity to access the courts

As stated in their brief, Cross-Appellants pointed out that the current situation is very similar to the willful withholds in ***Roberson v. Perez,*** 123 Wn. App. 320, 96 P.3d 420 (2004). SCH Physicians made no argument that J.L.'s 600 pages' medical record is material and may affect Judge Hill's decision. Notably, when SCH Physicians' summary judgment was granted, Appellant/defendant *Darren* Migita's treatment records were not even before Judge Hill (SCH submitted records from Dr. *Russell* Migita who was not defendant of this case but merely had the same last name). Washington Notice Pleading system allows plaintiffs to explore evidence for

their claims. ***Putman v. Wenatchee Valley Mex. Ctr., P.S.,*** 166 Wn.2d 974, 983, 216 P.3d 374 (2009). SCH's withholds deprived plaintiffs of fair tribunal and an opportunity of access to the courts. SCH's summary judgment was obtained through misrepresentation and significant withholds. Judge Schubert's failure to vacate summary judgment as to SCH is an abuse of discretion. This Court should reverse.

V. CONCLUSION

For the reasons stated, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 20th day of February 2020.

/s/ Susan Chen
Susan Chen
Pro se Appellant

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 documents 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 20th day of February, 2020.

/s/ Naixiang Lian

Naxiang Lian

Pro se cross-appellant/respondent

NAIXING LIAN

February 20, 2020 - 3:51 PM

Transmittal Information

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APP. L

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
Tel: 503-722-4270
Fax: 503-722-4450

APP. M

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

APP. N

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 readacted).

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

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SUSAN CHEN - FILING PRO SE

September 21, 2020 - 3:47 PM

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