NO. 98866-8

IN THE SUPREME COURT
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;

Petitioners,

v.

DARREN MIGITA, M.D.; IAN KODISH, M.D.; JAMES METZ, M.D.; SEATTLE CHILDREN'S HOSPITAL

Respondents.

RESPONDENT SEATTLE CHILDREN'S HOSPITAL'S ANSWER TO PETITION FOR REVIEW

Rando B. Wick, WSBA #20101
Michelle S. Taft, WSBA #46943
JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
925 Fourth Avenue, Ste. 2300
Seattle, WA 98104
Phone: 206-223-4770
Fax: 206-386-7344
Email: wickr@jgkmw.com
Email: taftm@jgkmw.com
Attorneys for Respondent
Seattle Children's Hospital

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Petitioners Susan Chen and Naixiang Lian, individually and as parents and natural guardians of L.L. and J.L. (collectively "Petitioners")' seek discretionary review of the Court of Appeals' decision to affirm the trial court's denial of their CR 60 Motion as it pertained to Respondent SCH. An appeal from a denial of a CR 60(b) motion is limited to the denial of the motion, not the impropriety of the underlying judgment or order. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450–51, 618 P.2d 533 (1980). Petitioners have failed to demonstrate a legitimate basis for discretionary review of the Court of Appeals' decision as it pertained to Respondent SCH under RAP 13.4(b). The Court of Appeals' unpublished opinion follows well-established Washington law and does not warrant discretionary review for any other reason. Petitioners request for discretionary review should therefore be denied.

II. RESTATEMENT OF THE CASE

Petitioners' claims arose out of the medical care provided to their three-year-old son, J.L. by Respondent SCH and its physicians Darren Migita, MD; Ian Kodish, MD; and James Metz, MD (collectively "the Physicians") in October 2016. (CP 185, 202, 215)[1] Petitioners alleged

[1] SCH joins and incorporates the Restatement of the Case set forth in the Respondent Physicians' Answer to Petition for Review, including the Respondent Physicians'

medical negligence and false reporting claims against the Respondent Physicians and vicarious liability claims against Respondent SCH. (*Id.*)

A. Factual History

Petitioners are the parents and legal guardians of two minor children, J.L. and L.L. J.L. came to the attention of the Suspected Child Abuse and Neglect (SCAN) team at Respondent SCH in October 2013, when he was three years old. On October 20, 2013, J.L. presented to the SCH Emergency Department ("ED") with irritability, a distended abdomen, lethargy, and abnormal laboratory results. (CP 318-320; 420-425) His physicians recommended additional medical workup, but Petitioner Chen refused. J.L. was discharged home with instructions to follow up immediately with J.L.'s primary care provider ("PCP"). (*Id.*).

On October 23, 2013, Petitioner Chen, took J.L. to his PCP, Dr. Kate Halamay, who reported Petitioner Chen to CPS due to her concerns. (CP at 426). A CPS worker convinced Petitioner Chen to take J.L. to Respondent SCH, where he was admitted, placed into protective custody, and evaluated by the Respondent Physicians. (CP 420-36) Due J.L.'s failure to thrive, his medical and psychiatric diagnoses, the concerns of his providers, Petitioner Chen's refusal to follow medical advice, and Petitioner Chen's decision to withhold nutrients from J.L., CPS chose to

---

explanation of the care at issue and the procedural history of this case, pursuant to RAP 10.1(g)(2).

place J.L. and his brother, L.L. into foster care as it investigated Petitioner Chen. (CP 206; 218; 411; 420-36) Petitioner Chen was arrested and charged with child abuse. The dependency proceeding and criminal charges were ultimately dismissed. (CP 263-264). Judge Hollis Hill, who initially presided over the civil case that is the basis of this appeal, presided over and ultimately dismissed the dependency proceeding. (*Id.*; CP 515).

B. Relevant Procedural History

i. **The trial court dismissed SCH on the merits on March 3, 2017.**

Petitioners filed their Complaints against Respondent SCH and each of the individual Respondent Physicians in October 2016, serving Respondent SCH on December 12, 2016. (CP 54-55) On February 2, 2017, the Respondent Physicians filed and served a CR 56 Motion for Summary Judgment, seeking dismissal of all claims against them on four legal grounds: (1) lack of personal jurisdiction; (2) the statute of limitations; (3) lack of expert testimony supporting a medical malpractice claim; and (4) immunity under RCW 26.44.060. (CP 288-310) Respondent SCH joined the CR 56 Motion, seeking dismissal of Petitioners' vicarious liability claims against it. (CP 409-415; 671-672)

Respondent SCH recognized that one of the three Complaints had been signed and properly served on it. (CP 409-410). Respondent SCH requested dismissal of Petitioners' vicarious liability claims against it because the underlying claims against its Physicians warranted dismissal on substantive grounds: (1) for lack of expert support on the standard of care and causation and (2) for immunity under RCW 26.44.060. (CP 409-410)

At the March 3, 2017 summary judgment hearing, the trial court concluded that the grounds for dismissal were pure issues of law, denied Petitioners' request for a continuance, and granted the CR 56 Motion, dismissing Respondents. (CP 551-552; 630-632) The trial court also denied Petitioners' subsequent Motion for Reconsideration on April 10, 2017. (CP 659-660)

Petitioners appealed the trial court's March 3 and April 7, 2017 Orders twice (No. 76824-7 and No. 77522-7). Both of these appeals were dismissed. Petitioners moved for discretionary review of the Court of Appeals' decision to dismiss Appeal No. 77522-7. This Court denied Petitioners' Motion on November 6, 2019. (*See Order* on No. 97015-7).

ii. The trial court denied Petitioners' CR 60 Motion to Vacate the summary judgment orders as they pertained to Respondent SCH.

While Petitioners were in the process of appealing the trial court's March 3 and April 7, 2017 Order dismissing Respondents on summary judgment and denying reconsideration, they also filed a CR 60 Motion to Vacate those same Orders on March 2, 2018, amending their Motion on September 6, 2018. (CP 8-16; 104-118) The hearing took place on December 14, 2018. (RP 1) Petitioners appeared *pro se*, and J.L. was represented by attorney Jason Anderson. (RP 2).

At the CR 60 hearing, the trial court recognized that Respondent SCH had joined the Respondent Physicians' Motion for Summary Judgment on substantive grounds. (RP 12) The trial court held that the vicarious liability claims against Respondent SCH had been properly dismissed on summary judgment on those substantive grounds. (RP 20) The trial court also recognized that CR 60 is not a substitute for an appeal. (RP 17). The trial court denied Petitioners' Motion to Vacate as it pertained to all Respondents. (RP 66-72; CP 1570-1571).

Petitioners moved for reconsideration, which the trial court granted as to the Respondent Physicians on January 28, 2019. (CP 1575-1577) However, the trial court upheld its decision to deny Petitioners' CR 60 Motion as it pertained to Respondent SCH, explaining:

> 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.

(CP 1577)

iii. The Court of Appeals affirmed the trial court's orders denying Petitioners' CR 60 Motion and denying reconsideration pertaining to Respondent SCH.

The Respondent Physicians appealed the trial court's January 28, 2019 Order as it pertained to the decision to re-instate Petitioners' claims against them under CR 60. Petitioners cross-appealed the trial court's decision to deny their CR 60 Motion as it pertained to Respondent SCH. The Court of Appeals reversed and remanded the trial court's decision as it pertained to the Respondent Physicians. Its unpublished opinion explained that the trial court, "attempted to correct legal error by vacating the [summary judgment] 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…" *Chen v. Migita, et. al.*, 13 Wn. App. 2d 1108 at *7 (June 22, 2020).

The Court of Appeals then affirmed the trial court's decision as it pertained to Respondent SCH. *Id.* In so affirming, the Court of Appeals recognized that, like now, many of Petitioners' "arguments do not address the standards to vacate under CR 60, but merely challenge the underlying order granting summary judgment dismissal." *Id.* The Court of Appeals

held that the record did not support Petitioners' CR 60 Motion as it applied to Respondent SCH. It recognized that Petitioners were not entitled to vacate the summary judgment dismissal under CR 60(b)(3) because Petitioners failed to exercise due diligence by making a request to SCH for medical records through discovery or otherwise. *Id.* The Court of Appeals also recognized that the record did not support vacating summary judgment where the trial judge also presided over the dismissed dependency case because Petitioners did not file an affidavit of prejudice or a motion to recuse and there was nothing in the record to indicate that the trial judge's impartiality might be questioned. *Id.* at *8. Finally, the Court of Appeals recognized that summary judgment was not void under CR 60(b)(6) where the trial court did not appoint a guardian *ad litem* for J.L. and L.L. because parents may initiate lawsuits on behalf of their minor children. *Id.* at 8, *citing Taylor v. Enumclaw Sch. Dist. No. 216,* 132 Wn. App. 688, 694, 133 P.3d 492 (2006). This unpublished opinion is the basis of Petitioners' request for discretionary review. However, Petitioners have not articulated a legitimate basis for review of the Court of Appeals' decision as it relates to Respondent SCH under RAP 13.4(b).

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals' decision affirming the trial court's CR 60 order as it pertains to SCH follows well-established law and does not

conflict with any decisions of this Court. Petitioners have failed to identify any legitimate bases that would otherwise entitle them to discretionary review under RAP 13.4(b).

A. Petitioners have failed to meet the requirements of RAP 13.4(b).

A petition for review will only be accepted by the Supreme Court in specific instances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Nowhere in their brief do Petitioners set forth legitimate legal bases that would permit discretionary review under RAP 13.4(b). They do not articulate how the Court of Appeals opinion on their CR 60 Motion is inconsistent with prior case law, raises legitimate constitutional concerns or is otherwise an issue of substantial public interest.

Regarding the reasons that discretionary review should be denied related to the issue of a guardian *ad litem* and Petitioners' allegation that Judge Hill should have recused herself, Respondent SCH respectfully joins and adopts by reference herein the legal arguments set forth in the

Respondent Physicians' Answer to Petition for Review. RAP 10.1(g)(2). As explained by the Respondent Physicians, the Court of Appeals' appropriately found that vacating dismissal was not warranted where (1) this case was brought by the minors' parents and legal guardians and (2) the record demonstrated no legitimate reason requiring Judge Hill to recuse herself.

B. The Court should also deny discretionary review as it pertains specifically to Respondent SCH because the Court of Appeals correctly followed established Washington law.

CR 60(a) empowers the Court to correct clerical or inadvertent mistakes in judgments, orders, or other parts of the record, whereas the substantive grounds for vacation are articulated under CR 60(b)(1)-(11). CR 60. *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 843, 365 P.3d 223 (2015) (recognizing that CR 60(b) does not authorize vacating an order or judgment where the trial court committing an error of law because "[e]rrors of law may not be corrected by a CR 60 motion; rather, they must be raised on appeal.") The Court's review of a decision granting or denying a CR 60 motion is limited to the trial court's decision on the CR 60 motion itself, not the underlying order the party seeks to vacate. *Persinger v. Persinger*, 188 Wn. App. 606, 608-9, 355 P.3d 291 (2015).

> An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment. The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion.

Bjurstrom, 27 Wn. App. at 450–51; *see also Young v. Thomas*, 193 Wn. App. 427, 435, 378 P.3d 183, 187 (2016) (recognizing that because a CR 60(b) motion is addressed to the trial court's sound discretion, appellate courts do not address arguments not made before the trial court). The Court of Appeals appropriately recognized that Petitioners were not entitled to use CR 60 as a substitute for an appeal of the dismissal of their claims against SCH.

Similarly, the Court of Appeals appropriately recognized that review of a CR 60 motion follows an abuse of discretion standard. *See also Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003); *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (Recognizing that the trial court cannot attempt to correct a judicial error under CR 60(a) and holding that a decision under CR 60(a) is held to an abuse of discretion standard). "A court abuses its discretion when its decision is based on untenable grounds or reasoning." *Barr*, 119 Wn. App. at 46. The Court of Appeals appropriately found that

the trial court did not abuse its discretion in deciding Petitioners' CR 60 motion as it related to Respondent SCH.

Regarding issues specific to Respondent SCH, the Court of Appeals recognized that Respondent SCH, who had been properly served, was dismissed on the merits. Petitioners' claims against SCH were for vicarious liability only. Their failure to establish underlying *prima facie* claims of medical negligence and false reporting against the Physicians also necessitated dismissal of their vicarious liability claims against SCH. The Court of Appeals appropriately recognized that there was nothing ambiguous about the dismissal of SCH on the merits that would have warranted vacating the summary judgment order under CR 60.

The Court of Appeals also appropriately recognized that under Washington law, including *Wagner Dev., Inc. v. Fid. & Deposit Co. of M.D.*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999), judgment may be vacated under CR 60(b)(3) based on new evidence that could not have been discovered by exercising due diligence in time to move for a new trial/reconsideration. *Chen*, 13 Wn. App. 2d 1108 at *7. However, it would have been inappropriate to vacate summary judgment dismissal of Respondent SCH based upon medical records obtained in Petitioners' federal case eighteen months after Respondents were dismissed in the present case. *Id.* Petitioners did not establish that they had exercised due

diligence to obtain those same records in the present case, which is required under CR 60(b)(3). Specifically, "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." *Id.* at *7.

In Washington, a mere allegation of diligence is not sufficient; the moving party must state facts explaining why the evidence was not initially available. *Peoples v. City of Puyallup*, 142 Wn. 247, 248, 252 P. 685 (1927). Evidence is not "newly discovered" if it was known, under the circumstances must have been known, or by the exercise of reasonable diligence should have been known by the moving party at any time prior to the submission of the case. *In re Estate of Rynning*, 1 Wn. App. 565, 572, 462 P.2d 952 (1969). "[P]ro se litigants are bound by the same rules of procedure and substantive law as attorneys." *Westberg v. All-Purpose Structures Inc*., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997), *as amended* (June 13, 1997). Moreover, the court will not grant relief under CR 60 if newly discovered evidence is not material. *Hinton v. Carmody*, 186 Wn. 242, 255, 60 P.2d 1108 (1936).

J.L.'s medical records were immaterial to the underlying decision on summary judgment, which was granted based on a lack of medical expert testimony and immunity arising from the Respondents' good faith

participation in the CPS protective hold. But even if the records had been material, Petitioners' failure to establish due diligence in the present case meant that they did not meet the requirements of CR 60(b)(3). The Court of Appeals appropriately followed Washington law in concluding that Petitioners' CR 60 Motion was properly denied as it pertained to Respondent SCH.

IV. CONCLUSION

Petitioners appeal of the trial court's decision to deny their CR 60 motion as it relates to Respondent SCH cannot substitute for an appeal of the underlying summary judgment dismissal. The trial court and Court of Appeals appropriately recognized that Petitioners were not entitled to vacate the dismissal of Respondent SCH under CR 60. Petitioners have failed to demonstrate any legitimate basis for discretionary review under RAP 13.4(b). Their Petition should therefore be denied.

DATED this 29th day of October, 2020, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK,

LLP

s/Michelle S. Taft

Rando B. Wick, WSBA #20101
Michelle S. Taft, WSBA #46943
Attorneys for Defendant
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770
wickr@jgkmw.com
michelle@jgkmw.com

V. CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the date signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, Respondent Seattle Children's Hospital's Answer to Petition for Review, by the method indicated below and addressed to the following:

Susan Chen Post Office Box 134 Redmond, Washington 98073-0134 tannannan@gmail.com *Pro Se Plaintiffs*	☐ U.S. Mail ☑ E-mail/E-Service ☐ Messenger ☑ Mandatory E-Service
Naixiang Lian P. O. Box 134 Redmond, WA 98073-0134 liannaixiang@gmail.com; liannx2000@gmail.com *Pro Se Plaintiffs*	☑ U.S. Mail ☑ E-mail/E-Service ☐ Messenger ☑ Mandatory E-Service
Bruce W. Megard, Jr. David Norman Bennett Bigelow & Leedom, PS 601 Union Street, Suite 1500 Seattle, Washington 98101 bmegard@bbllaw.com; dnorman@bbllaw.com *Attorney for Defendants Migita, Kodish, and Metz*	☐ U.S. Mail ☑ E-mail/E-Service ☐ Messenger ☑ Mandatory E-Service
Smith Goodfriend, P.S Howard M. Goodfriend Valerie A. Villacin 1619 8th Ave N Seattle, WA 98109 howard@washingtonappeals.com; valerie@washingtonappeals.com	☐ U.S. Mail ☑ E-mail/E-Service ☐ Messenger ☑ Mandatory E-Service

Signed this 29th day of October, 2020 at Seattle, Washington.

/s/Erica Hupf
Erica Hupf
Legal Assistant to Rando B. Wick

JOHNSON, GRAFFE, KEAY, MONIZ & WICK

October 29, 2020 - 3:48 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98866-8
Appellate Court Case Title:	Susan Chen et al. v. Darren Migita, MD et al.

The following documents have been uploaded:

- 988668_Answer_Reply_20201029154719SC389728_4094.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was SCH Answer to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- Rando@jgkmw.com
- andrienne@washingtonappeals.com
- bmegard@bbllaw.com
- dnorman@bbllaw.com
- howard@washingtonappeals.com
- hupfe@jgkmw.com
- liannaixiang@gmail.com
- liannx2000@gmail.com
- tannannan@gmail.com
- valerie@washingtonappeals.com
- wickr@jgkmw.com

Comments:

Sender Name: Michelle Taft - Email: michelle@jgkmw.com
Address:
925 4TH AVE STE 2300
SEATTLE, WA, 98104-1145
Phone: 206-223-4770

Note: The Filing Id is 20201029154719SC389728