Appendix A

THE SUPREME COURT OF WASHINGTON

SUSAN CHEN, et al *Petitioners* *vs.* DARREN MIGITA et al. *Respondents*	No. 98866-8 ORDER court of Appeals No. 79685-2-I

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, González, Yu, and Whitener (Justice Johnson sat for Justice Madsen), considered at its January 5, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 6th day of January, 2021.

For the Court

/s/ *Stephen, J*

CHIEF JUSTICE

Appendix B

THE SUPREME COURT OF WASHINGTON

SUSAN CHEN, et al *Plaintiffs,* *vs.* DARREN MIGITA et al. *Defendants*	No. 98866-8 ORDER court of Appeals No. 79685-2-I

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu and Whitener, considered this matter at its April 27, 2021, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion modify Commissioner's ruling is denied.

DATED at Olympia, Washington, this 28th day of April, 2021.

For the Court

/s/ González, J

CHIEF JUSTICE

Appendix C

IN THE COURT OF APPEALS OF THE STAET OF WASHINGTON

SUSAN CHEN et al *Petitioners* v. DARREN MIGITA et al. *Respondents*	No. 79685-2I DIVISION ONE UNPUBLISHED OPINION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 reversed and remand for reinstatement of the order granting summary judgment dismissing the claims against the defendant physicians. We otherwise affirm.

FACTS

Susan Chen and Naixing Lian are the parents of the 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

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

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 physicians 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 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 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.

---

[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

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 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

---

[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.

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.

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."

---

[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.

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 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]

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,

---

[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 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.

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 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]

---

[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

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 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

---

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.).

[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).

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 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]

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."

---

[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 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.

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 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:

Leach, J Dwyer, J Verellen, J

Appendix D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN CHEN, *et al* *Plaintiffs,* vs. DARREN MIGITA *et al.* *Defendants*	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:

/s/ unidentified signature
Judge

Appendix E

The Court of Appeals
Of the
State of Washington

Richard D Johnson
Court administrator/clerk

DIVISION I
One Union Square
600 University Street
Seattle WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

February 14, 2018

David M Norman
Bennett Bigelow & Leedom, P.S.
601 Union St Ste 1500
Seattle, WA 98101-1363
dnorman@bbllaw.com

Bruce W Megard, JR
Bennett Bigelow & Leedom PS
601 Union St Ste 1500
Seattle, WA 98101-1363
bmegard@bbllaw.com

Susan (gal) Chen
P.O. Box 134
Redmond, WA 98073

Michelle Suzanne Taft
Johnson, Graffe, Keay, Moniz & wick
925 4h Ave Ste 230
Seattle, WA 98104-1145
michelle@jgkmw. Com

CASE #:77522-7-1
Chen v. Darren Migita et al.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on February 14,2018, regarding appellant's GR 33 request for accommodation:

"On February 8, 2018 Appellant Susan Chen filed a Request for Accommodation under GR33, requesting the appointment of counsel as an accommodation. This ruling serves as the written decision regarding the request for accommodation. lt appears that appointing counsel in this case risks fundamentally changing the nature of appellate court services (see GR33(c)(2)(D)). Therefore, the request for appointment of counsel as an accommodation is denied.

Sincerely,
/s/ Richard Johnson

Richard D. Johnson
Court administrator/Clerk

Appendix F

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

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;

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 Plaintiff's Motion for Reconsideration.

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 of April, 2017.

/s/ Hollis Hill

The Honorable Hollis R. Hill

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

BY: *BRUCE MEGARD*

Bruce W. Megard, Jr., WSBA #27560

Attorney for Defendants Darren Migita, M.D., Ian Kodish, M.D., and James Metz, M.D.

Appendix F

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

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:

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

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's 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's 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 Nxing Lian;

13. Plaintiff's Motion for continuance

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.

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.

/s/ Hollis Hill

Honorable Hollis R. Hill

Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

BY: *BRUCE MEGARD*

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 Taft

Rando B. Wick, WSBA #20101

Attorney for Defendant Seattle Children's Hospital

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 ORDER CLARIFYING ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION TO VACATE ORDERS ON MARCH 3 AND APRIL10, 2017

On January 28, 2019, this Court entered an order indicating its intent to grant plaintiffs' motion for 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 ("January 28, 2019 Order") as to defendants Darren Migita, Ian Kodish and James Metz (collectively "Defendants"). The January 28, 2019 Order ended by indicating that it was not and could not be a final order without the permission of the Court of Appeals: "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. This Court must receive the 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 (c)."

To date, none of the parties have informed this Court that the Court of Appeals has permitted this Court to enter a formal order vacating the March 3 and April 10, 2017orders pursuant to CR 60 (b) as to Defendants only. This Court did not intend and does not believe that its January 28, 2019 Order has any legal effect without that permission and without being entered as a final order. *See e.g., State ex rel. Shafer v. Bloomer,* 94 Wn. App. 246, 250, 973 P.2d 1062, 1064 (1999) ("The State should have moved this court for permission to enter the trial court's dismissal prior to formal entry of the order to dismiss Mr. Bloomer's contempt action. As such, the order of dismissal is vacated.")

This Court provides this clarification because it learned today upon receipt of the attached ruling that Defendants have appealed the January 28, 2019 Order despite it not being a formal one. Whether the Court of Appeals believes the January 28, 2019 Order is currently subject to appeal is, of course, up to that court to decide. But the parties could eliminate that issue by seeking the permission expressly contemplated by the January 28, 2019 Order – if the Court of Appeals declines to grant it, this Court will not and cannot enter the January 28, 2019 Order as a final order. If the Court of Appeals grants that permission, this Court will enter the January 28, 2019 Order as a final order.

DONE this 29th day of March, 2019.

E-signature on following page

JUDGE KEN SCHUBERT

King County Superior Court

Judicial Electronic Signature Page

Case Number: 16-2-26013-6

Case Title: CHEN ET AL V. MIGITA ET AL

Document Title: ORDER CLARIFYING ORDER

Signed by: Ken Schubert

Date: 3/29/2019 3:31:07 PM

/s/ Ken Schubert

Judge/Commissioner: Ken Schubert

This document is signed in accordance with the provision in GR 30.

Certificate Hash:20DA9CAD30E9A356B2B0

90778A254A4188865BEC

Certificate effective date: 11/13/2018 11:21:11 AM

Certificate expiry date: 11/13/23 11:21:11 AM

Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN='Ken Schubert: EPj/VAvS5hGqrSf3AFk6yQ=="

Appendix G

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 ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION

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 dismiss 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

---

[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.

Appendix G

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

/s/ Ken Schubert
Judge/Commissioner:

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 20DA9CAD30E9A356B2B0907 78A254A4188865BEC
Certificate effective date: 11/13/2018 11:21:11 AM
Certificate expiry date: 11/13/2023 11:21:11 AM
Certificate Issued by: C=US,

E=kcscefiling@kingcounty.gov,
OU=KCDJA, O=KCDJA,
CN="Ken Schubert: EPj/VAvS5hGqrSf3AFk6

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 ORDER ON PLAINTIFFS' MOTION TO RECUSE SMITH GOODFRIEND, P.S. AND ORDERING SMITH GOODFRIEND, P.S.

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

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

Plaintiffs' motion does present a related issue that is appropriate for this Court to decide: may

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

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

DATED this 12th day of December, 2018.

E-signature on following page

_____

Chief Civil Judge Ken Schubert

King County Superior Court
Judicial Electronic Signature Page

Case Number:
Case Title:
Document Title:
Signed by:
Date:
Judge/Commissioner:

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 20DA9CAD30E9A356B2B090778
A254A4188865BEC
Certificate effective date: 11/13/2018 11:21:11 AM
Certificate expiry date: 11/13/2023 11:21:11 AM
Certificate Issued by: C=US,

E=kcscefiling@kingcounty.gov,
OU=KCDJA, O=KCDJA,
CN="Ken Schubert:
EPj/VAvS5hGqrSf3AFk6yQ=="

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, et al *Plaintiffs,* vs. DARREN MIGITA et al. *Defendants*	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 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. L., 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.[11]

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

[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.

of elevated Blood Urea Nitrogen (BLTN).[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

---

[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.

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 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 I, 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. L's hospitalization at Seattle Children's Hospital, and during the 72-hour hearing on October 30, 2013, Dr. Kodish made a "misdiagnosis" of J. L, 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 Naixng Lian, and they allege

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

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. L", 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. 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 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

---

[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 Pad 671 (2003) (summary judgment motion is not a CR 12 motion and bringing summary judgment was not a waiver of CR 12(b) defenses).

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 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 FNont*

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 courts.[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,

---

[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).

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 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.

---

[6] Although a defendant technically appears by filing a motion or an answer cha]lenging 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. Assn v. State*, 110 Wn.2d 752, 765-66, 757 P.2d 933 (1988) (defendant does not waive a jurisdictional defense by moving for dismissal)

[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).

"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 "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.*

---

[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).

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, requirements set forth by statute." *Powell v. Sphere Drake Ins. PLC,* 97 Wn. App. 890, 899, 988 P.2d 12 (1999).

"[s]ervice of process is sufficient only if it satisfies the minimum requirements of due process and therequirements 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. *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).

---

[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); *Meaclowdale Neighborhood Committee v. City of Edmovrds*, 27 Wash. App. 261, 616 P.2d 1257 (1980) (mayor had actual knowledge); *Veradale valley Citizens' Plannzng Committee v. Board of County Com'rs of Spokane County,* 22 Wash. App. 229, 588 P.2d 750 (1978).

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 Olympza*, 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

---

[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.

to meet these jurisdictional requirements. Migita Dec. 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 Buns 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 a statute of limitations defense and potential dismissal of his or her claim. [11]

---

[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).

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 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. Deckle*, 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 athree-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 P2d 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 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.

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**

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

omission." Tegland, 15 Wash. Prac., Civ. Pro. § 51:4 (2d ed. 2016) (emphasis added). See also *GNiffith 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 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.

---

[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. ofPharm,* 146 Wn. App. 929, 193 P.3d 1093 (2008) (same).

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 BeaNd 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. 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 ding 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 we11. [14] Plaintiffs'

---

[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 I1 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 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

Complaints against the defendant physicians should be 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 lawsuits) 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

---

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).

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 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

---

[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).

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 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 HeaNt Medical Center,*

---

[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).

[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 1 l71 (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).

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

---

[18] See, e.g., Shellenbarger v. Brigman, 101 Wn. Ap. 339, 348-49, 3 P.3d 21 1 (2000); Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973) (citations omitted).

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 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, Dept 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, Dept 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 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.

DATED this 2"d day of February, 2016.

BENNETT BIGELOW & LEEDOM, P.S.
By /s/ Bruce Megard

Bruce W. Megard, Jr., WSBA #2 560
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).

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

SUSAN CHEN, et al *Plaintiffs,* vs. DARREN MIGITA et al. *Defendants*	NO. 16-2-26013-6 SEA DECLARATION OF DARREN MIGITA IN SUPPORT OF DEFENDANTS DARREN MIGITA, M.D., IAN KODISH M.D., AND JAMES METZ, M.D.'S MOTION FOR SUMMARY JUDGMENT

I, Darren Migita, M.D. declare as follows;

1. I am over eighteen age old 18 years, I am competent to testify, and I have personal knowledge of the matters stated herein.

2. I am Board-Certified in Pediatrics, and practice as a pediatric hospitalist at Seattle Children's Hospital in Seattle, Washington. Yarn not an employee of Seattle Children's Hospital. I have not authorized Seattle Children's Hospital to accept legal service on my behalf.

3. I have not been personally served with a copy of the Summons or Complaint filed against me in the above-captioned matter and have not had the Summons or Complaint served at my residence.

4. With regard to my interactions with CPS and the related investigation regarding the minor children J. L. and L. L., I had no reason to believe that the allegations of abuse or neglect were untrue. I did not intend to cause the separation of the children from their parents. I reported the allegatiions anti participated in the investigation out of the concerns for the health and welfare of the children. I reported the allegations and participated in the investigation because I believed I was required by law to do so.

I declare under penalty of perjury under the lames a~ the state of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington this 1st of February, 2017.

/s/ Darren Migita
Darren Migita, M.D.

**SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

SUSAN CHEN, et al *Plaintiffs,* vs. DARREN MIGITA et al. *Defendants*	NO. 16-2-26013-6 SEA DECLARATION OF IAN KODISH IN SUPPORT OF DEFENDANTS DARREN MIGITA, M.D., IAN KODISH M.D., AND JAMES METZ, M.D.'S MOTION FOR SUMMARY JUDGMENT

I, Ian Kodish, M.D. declare as follows;

1. I am over eighteen age old 18 years, I am competent to testify, and I have personal knowledge of the matters stated herein.

2. I am Board-Certified in Pediatrics, and practice as a pediatric hospitalist at Seattle Children's Hospital in Seattle, Washington. Yarn not an employee of Seattle Children's Hospital. I have not authorized Seattle Children's Hospital to accept legal service on my behalf.

3. I have not been personally served with a copy of the Summons or Complaint filed against me in the above-captioned matter and have not had the Summons or Complaint served at my residence.

4. With regard to my interactions with CPS and the related investigation regarding the minor children J. L. and L. L., I had no reason to believe that the allegations of abuse or neglect were untrue. I did not intend to cause the separation of the children from their parents. I reported the allegatiions anti participated in the investigation out of the concerns for the health and welfare of the children. I reported the allegations and participated in the investigation because I believed I was required by law to do so.

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

EXECUTED in Seattle, Washington this 1st of February, 2017.

/s/ Ian Kodish
Ian Kodish, M.D

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

I, James Metz, M.D. declare as follows;

1. I am over eighteen age old 18 years, I am competent to testify, and I have personal knowledge of the matters stated herein.

2. I am Board-Certified in Pediatrics, and practice as a pediatric hospitalist at Seattle Children's Hospital in Seattle, Washington. Yarn not an employee of Seattle Children's Hospital. I have not authorized Seattle Children's Hospital to accept legal service on my behalf.

3. I have not been personally served with a copy of the Summons or Complaint filed against me in the above-captioned matter and have not had the Summons or Complaint served at my residence.

4. With regard to my interactions with CPS and the related investigation regarding the minor children J. L. and L. L., I had no reason to believe that the allegations of abuse or neglect were untrue. I did not intend to cause the separation of the children from their parents. I reported the allegatiions anti participated in the investigation out of the concerns for the health and welfare of the children. I reported the allegations and participated in the investigation because I believed I was required by law to do so.

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

EXECUTED in Christchurch, New Zealand this 2nd of February, 20I7.

/s/ James Metz
James Metz, M.D

Appendix J

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SUSAN CHEN, et al *Plaintiffs,* vs. DARREN MIGITA et al. *Defendants*	NO. 16-2-26013-6 SEA PLAINTIFFS' MOTION FORRECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

Comes now, the Plaintiff, Susan Chen, and moves this court to reconsider and clarify a portion of its Order of 3/3/17, granting summary judgment to Defendants Migita, Kodish, Metz, and Seattle Children's Hospital. This motion deals solely as to prejudice regarding re-filing of the minor Plaintiffs' claims at some future date.

MOTION

On behalf of all Plaintiffs, Plaintiff Susan Chen moves this court to re-consider its written Order of 3/3/17, and include language to clarify that the dismissal of Defendants Migita, Kodish, Metz and Seattle Children's Hospital is WITHOUT PREDJUDICE, as to the minor Plaintiffs Leo Lian and Jason Lian ONLY.

BASIS

Pro-se Plaintiffs filed multiple claims against multiple defendants for medical

malpractice. Claims were filed on behalf of two minor children, Leo Lian and Jason Lian. In its oral ruling, this court found that Defendants Migita, Kodish, and Metz were improperly served, that there was no affidavit presented supporting breach or causation, and that there was no appointment of a Guardian ad Litem to prosecute the minors' claims. Defendants Migita, Kodish, Metz and Seattle Children's Hospital were dismissed as defendants. The Order is silent as to whether this dismissal was with or without prejudice.

As to the minors' claims only, the dismissal should be without prejudice for re-filing, as they are still in their minority, and the statute of limitations is tolled until they reach majority. RCW 4.16.190. *Schroeder v. Weighall et al.* 179 Wn.2d 566; 316 P.3d 482; 2014 Wash., holding RCW 4.16.190 (2), which excluded medical malpractice claims from tolling unconstitutional.

Alternatively, due to failure to appoint a GAL to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of the minors for judicial consideration, and therefore no action to dismiss.

DATED this 10th day of March, 2017.

/s/ Susan Chen

Susan Chen, Pro Se Plaintiff

P.O. Box 134 Redmond, WA 98073

Appendix J

The Honorable Hollis R. Hill

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SUSAN CHEN, et al *Plaintiffs,* *vs.* DARREN MIGITA et al. *Defendants*	CASE NO. 16-2-26013-6 SEA PLAINTIFFS' REPLY ON MOTION FOR RECONSIDERATION

In these proceedings, Susan Chen and Naxang Lian filed suit as parents and natural guardians of their children, J.L. and L.L., against three doctors who were practicing at Seattle Children's 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. J. L.

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, J.L. 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 J. L. 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 J.L.'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 J.L., and the arrest of his mother.

In foster care, J.L. 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. J.L. 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. J.L. 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

[1] J.L. 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.

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.

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. (J.L. is now almost 7; L.L. 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

[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.

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);

- "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 J.L.'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 J.L.'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, J.L.'s two main treating physicians, and Brooke Greiner, J.L.'s occupational therapist, who provided a report.[3]

For eight months, J.L.'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:

> J.L. 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 J.L. is autistic.

Ex. 1. In addition to his testimony, Dr. Green, a former emergency room physician who

---

[3] Other experts in the underlying cases who are expected to testify in these proceedings include Dr. Chan, psychologist/autism specialist; Dr. Chung, J.L.'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 J.L.'s continuing GI problems during foster care.

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.

Ex. 2.[4] After reviewing all medical records and CPS files, J.L.'s court-ordered pediatrician, Dr. Julia Bledsoe from the University of Washington, confirmed that J.L. has severe autism and GI issues, and strongly supported J.L. 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 J.L. , and she acted appropriately given she did get J.L. 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.

---

[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.

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 J.L.'s medical history and rejecting the diagnoses and successful treatment plans of

---

[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 J.L. in to SCH ER on 10/20, and they did release J.L. to go home" (emphasis added), the Department may be amenable to dismissing the case if the parents agree to provide proper care for J.L. (which we had always done).

the treating doctors and therapists who were monitoring his progress carefully, causing great harm to J.L. 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 J.L. 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 J.L. – have suffered and will continue to suffer in the decades to come.

Respectfully submitted,

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

Date: March 24, 2017.

Appendix K

NO.79685-2

COURT OF APPEALS FOR DIVISION 1

STATE OF WASHINGTON

SUSAN CHEN et al

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

Susan Chen *pro se* appellant

PO BOX 134, Redmond, WA 98073
(323)-902-7038
tannannan@gmail.com

ORAL ARGUMENT REQUESTED

Appendix K

TABLE OF CONTENTS

Appendix K

Appendix K

TABLE OF AUTHORITIES

Washington Court Cases

Federal Cases

Other authorities

Statutes

Court Rules

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 provides 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.

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 as 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.

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 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 decision 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.l.'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. Twyla 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 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 cut off 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 entered 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, without 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

---

[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

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 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 and reversed the summary judgment order to provide that the dismissals were without prejudice.

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 disregard such authority and apply several irrelevant sentences from 11th Circuit. Br. 28. This Court should disregard this effort to circumvent Washington law.[2]

---

[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").

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 Physicians 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 the 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 the 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 the 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

---

[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.

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 *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 Chen is proper is still in dispute, even this argument is accepted, it *only* applies to Ms. Chen, the adult plaintiff, 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.

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 erred in not vacating 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

Appendix L

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN CHEN, *et al* *Appellants,* vs. DARREN MIGITA *et al.* *Respondents*	No. 79685-2-I DIVISION ONE 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...".).

Johns 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* appellant
PO BOX 134, Redmond, WA 98073

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUSAN CHEN, *et al* *Appellants,* vs. DARREN MIGITA *et al.* *Respondents*	No. 79685-2-I DIVISION ONE 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 *not* 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 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