No. 321983

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

CHARLIE Y. CHENG,
Plaintiff/Appellant,

vs.

SPOKANE EYE CLINIC,
JASON H. JONES, M.D.,
ROBERT S. WIRTHLIN, M.D.,
Defendants/Respondents.

APPELLANT's REPLY BRIEF

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Dated: **9/4/2014**

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AUTHORITIES

REGULATION

I. SUMMARY OF RESPONDENTS' TWO SEPERATE REPLIES

Appellant, Charlie Y. Cheng ("**CHENG**") received two separated replies regarding Appellate Court case **No. 321983**[1]: (1) Respondent Jason H. Jones, M.D. and Spokane Eye Clinic's reply (hereafter called "**DR. JONES**"), and (2) Respondent Robert S. Wirthlin's reply (hereafter called "**DR. WIRTHLIN**"). Neither of them had disputed Appellant's evidence for review[2], nor had objected to following issues for review being presented in Appellant Opening Brief, such as:

Issue No 1: Under the requirement of CR 56(c), should the trial court require the Respondents to show the absent of disputed facts? Was the Court erred in granting the summary judgment by ignoring the existing genuine issues of material fact (e.g., Appellant's painful eye and the eyeball had been removed was the result of Dr. Jones' 8/5/10 Vitreous Tap operation)?

Issue No. 2: Dr. Jones knew that Vitrectomy and antibiotic treatment is a "*recommended*" procedure to treat Appellant's "*bacterial edopthalmitis*", but he knowingly never performed an adequate Vitrectomy, and stopped the necessary antibiotic treatment. Were these acts the evidence of "*deliberate indifferent to Appellant's serious medical need*"?

Issue No. 3: Appellant's allegation was: " *Respondents Jones is liable for breath a duty to obtain informed consent before his 8/5/10 vitreous tap ("Vit.Tap") surgery inside of the Plaintiff's eyeball. ... Without*

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[1] Appellant's reply to Respondents Spokane Eye Clinic ("SEC") and Dr. Jones' Brief, please *see* **Part III,** pp. 13-18 of this Reply; Appellant's reply to Respondent Dr. Wirthlin's Brief, *see* **Part II.** pp. 3-12.

[2] Generally, judicial review is of the ***entire record***. See Norway Hill Preserv. & Protec. Assn. v. King Cy. Coun, 87 Wn.2d 267, 522 P.2d 674 (1976); Lewis v. Dep't of Licensing, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006) ("The substantial evidence standard is deferential and requires the appellate court to view ***all evidence*** and inference ..."). Appellant's substantial evidence have not been denied by the Respondents in their briefs, thus they are subjected to judicial review.

*this **negligence** of his, the Plaintiff would not have been injured by the harmful effects of "Vit.Tap" ...)* (emphasis added); Should the trial court's ruling focus on the Appellant's "***negligence***" issue, or a non-existing "***medical malpractice***" issue?

Issue No. 4: On **6/19/2013**, the Respondents have already accepted the certified-mail service by demanding the Appellant to file the Summons and Complaint. Was the trial court abused its discretion in omitting this service but relied on irrelevant facts?

Besides, the Respondents do not dispute the material facts being presented on pages 10-23 of Brief of Appellant such as: (**1**) "the trial court erred in granting the summary judgment motions without asking respondents to show the absence of material issues of fact; the court erred in ignoring the existing genuine issue of material facts"[3]; (2) "the trial court erred to dismiss appellant's " *'eighth amendment violation'* " claim by ignoring the evidence of deliberate indifferent to appellant's serious medical need";[4] (3) "the trial court erred in changing appellant's *'negligence'* issue to a **non-existing** 'medical malpractice' issue; then made its ruling upon the **irrelevant** *'malpractice'* issue"[5]; and (4) "when making 'service process' rul-ing, the trial court abused its discretion in making ruling upon un-tenable grounds; and it was erred in omitting the first service on **6/12/2013**; and it was erred in relying upon irrelevant statute."[6]

Appellant Dr. Wirthlin does not object to Appellant's accusation, such as: "***Dr. Wirthlin covered up Dr. Jones' 8/5/2010 defective surgery by ordering to remove the entire painful eyeball.***"

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[3] *See* Appellant's Opening Brief, pp. 10-16.
[4] *See* Appellant's Opening Brief, pp. 16-19.
[5] See Appellant's Opening Brief, pp. 19-20.
[6] See Appellant's Opening Brief, pp. 21-23.

II. RESPONSE TO DR. WIRTHLIN' REPLY

A. REPLY TO RESPONDENT'S EIGHT (8) ISSUES FOR CROSS REVIEW

1. Dr. Wirthlin changed Appellant's "Negligence" action to a non-existent "medical malpractice" claim.

Respondent Dr. Wirthlin's issue **#1** for review is asking this Court to determine whether the trial court properly dismissed Appellant's Amended Complaint, because of "*Appellant's failure to produce expert testimony in support of Appellant's medical malpractice claim.*" This is a baseless request because the Amended Complaint (CP 78-167) was not based on the said "*medical malpractice claim*"; but it was a "*negligence*" (*see* Appellant Opening Brief. pp. 19-20) and "deliberate indifference" action. *Id.* at 12 (*see* its subsection 2).

2. There is no medical export needed for Appellant's action based upon "negligence" and "deliberate indifference".

Respondent's issue **#2** for review – need an expert "to establish material facts relative to treatment ... to the proposed treatment" -- should be dismissed, because it is irrelevant to Appellant's issues for review.

3. The proximate cause (Dr. Jones' surgery caused painful eye) for the injury (the painful eyeball was unnecessary removed) has not been denied by the Respondent.

The Respondent's issue **#3** for review is asking this Court to determine whether need an "expert testimony that Respondent's actions

were a proximate cause of Appellant's injuries." There is no basis for this Court to review this issue, because the fact of proximate cause has been well established on page 11 of Brief of Appellant, but the Respondent does not object to the evidence on the record – i.e., there is no disputation over the alleged proximate cause for injury.

4. Respondent's issue #4 is irrelevant issue for review.

The Respondent's issue **#4** for review asks this Court to determine: "*Whether the trial court properly determined that the performance of a vicrectomy and post-surgical treatment was beyond the common understanding or experience of a layperson,*" This is irrelevant to Appellant's four issues for review. Thus, it is no basis for this Court to consider.

5. "*Res ipsa loquitor*" is not Appellant's issue for review.

The Respondent's issue **#5** asks this Court to determine: "*Whether the trial court properly determined that the doctrine of Res Ipsa Loquitor did not apply in the present case, ...*" is not subjected to review because in Appellant's Opening Brief, the Appellant did not ask this Court to review the trial court's "res ipsa loquitor" ruling.

6. Appellant does not ask to review the "*fraud*" issue.

The Respondent's issue **#6** asks this Court to determine: "Whether the trial court granted Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's claim for ***Fraud*** ..." It should be denied, because the "*fraud*" issue is irrelevant to Appellant's four issues for review.

7. Respondent's issue #7 altered the nature of Appellant's Eighth Amendment issue for review.

Regarding the trial court's abuse its discretion over Appellant's Eight Amendment claim, the Brief of Appellant stated on page 18, as:

> "The trial court abused its discretion in concluding that CHENG 'fails to provide evidence ... deliberate in difference' **by IGNORING the deliberate indifference evidence on the record**."
> (emphasis added)

Here, the phrase of "*ignoring the deliberate indifference evidence on the record is the key*" is the key issue for review, but it was omitted by the Respondent nor had responded. The respondent' issue **#7** does not object to the fact that the trial court was erroneous in "*ignoring the deliberate indifference evidence on the record*" as the trail judge making the ruling. However, the appellant asked to review following irrelevant issue:

> "Whether the trial court abused its discretion by granting Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's Eight Amendment claim due to Appellant's failure to produce evidence beyond mere allegations that Respondent's acts or omissions were performed with deliberate indifference while acting under the authority of state law."

The Respondent's new issue for review (supra) should be denied, because it is nonresponsive to Appellant's original issues for review.

8. "*Injunctive relief*" is not Appellant's issue for review.

Respondent's issue **#8** for review is asking this Court to determine whether the trial court properly denied "*Appellant's claims for injunctive*

relief and punitive damages." This is not Appellant's issue for review, so the Respondent's request for cross review should be denied.

B. REPLY TO RESPONDENT'S SIX ARGUMENTS

1. Respondent's Argument #1 Is Based Upon A Non-Existent Fact: "*The Trial Court Granted Respondent's Motion For Summary Judgment On The Issue Of* Medical Negligence"

The subtitle of Respondent's argument **#1** reads in portion: "The trial court Properly Granted Respondent's Motion for Summary Judgment on the issue of **medical negligence** ..." (Emphasis added.) This is a mis-represented facts, because on the record the trial court did not grant a Respondent's motion "*on the issue of medical negligence.*"[7] (The trial court's rulings were based upon not-existing "*medical malpractice*" issue.[8])

Under this special circumstances that the Respondent's Argument **#1** does not tell thtruth, and he asks this Court to review a non-existent fact (trial court made a ruling "on the issue of medical negligence") So, there is

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[7] Regarding the summary judgment motion, the trial court has made two rulings: (1) The 11/22/2013 letter ruling (CP 239-243), and (2) "Order Granting Defendant Wirthlin, MD's Motion For Dismissal Claims" (CP 276-277). Neither the trial court's ruling was focus on the issue of "***medical negligence***", as the Respondent asserted. The trial court's ruling was based upon the issue of "***medical malpractice***", which is not an issue in Appellant's Amended Complaint (CP 78-167). *See* page 1 of the 11/22/2013 ruling (CP 239), the trial judge's ruling was subtitled as: "1. Lack of expert testimony to support the claims for ***medical malpractice*** and informed consent." (Emphasis added.) On page 2 of the 11/22/2013 ruling (CP 240), the trial judge stated, "**Medical malpractice** claims require a showing that: (1) the healthcare provider failed to exercise the requisite standard of care, and (2) such failure was a proximate cause of the plaintiffs injuries. Expert testimony is typically required to establish the standard of care ..."

[8] See Appellant's Opening Brief, pp. 19-20.

no basis for this Court to consider the non-responsive Argument **#1** due to the Respondent does not meet the requirement set forth in **RAP 10.1** and **RAP 10.3.**

2. Respondent's Argument #2 (Need Export Testimony To Prove Lack Of Informed Consent) Is Irrelevant To Appellant's Issues And Arguments.

Respondent's Argument **#2**, at pp. 8-9 of Respondent's Response, was: "*Appellant failed to Produce Necessary Expert Testimony to Substantiate Material Facts regarding the lack of informed consent sufficient to survive Respondent's motion to summary judgment.*" This is nonresponsive argument and irrelevant to the Appellant's four (4) issues pertaining to assignment of error (*see* Appellant's Brief, pp. 2-3) and four (4) arguments on pages 9-23 of Appellant's Opening Brief.

By law, the Respondent's response or argument should "in reply to the response the appellate or petitioner has made." **RAP 10.1(c)**; "Should confirm to the section and answer the brief of appellant." **RAP 10.3(b)**. The Respondent's Argument **#1** does not reply nor answer to the Appellant's issues and arguments. Thus, his entire Argument **#1** on pp. 8-9 should not be considered by this Court.

3. Respondent's Argument #3 (Need "Expert Testimony" To Prove "Dr. Wirthlin's Actions Were The Proximate Cause") Is Irrelevant To Appellant's Issues And Argument.

In seeking appellate court's review of Respondent Dr. Wirthlin's adverse argument against the Appellant, Dr. Wirthlin's response must response or relate to the Appellant's issues or argument. **RAP10.1(c);** also see **RAP 10.3(b).** If not, it should be denied.

The Respondent assertion in his Argument **# 3** --"*Appellant failed to present necessary expert testimony sufficient to establish that respondent Dr. Robert Wirthlin's actions were the proximate cause of plaintiff's alleged injuries*" -- is not among the Appellant's four issues for review (*see* Appellant's Brief, pp. 2-3) and the Appellant's four arguments (*Id*, pp. 9-23). In another words, Respondent's Augument **#3** ("expert" issue) is nothing related to the Appellant's issues for review. Thus there is no basis for this court to waste its valuable judicial resource to consider the Respondent's irrelevant assertions in his Argument **#3**.

4. Respondent's Argument #4 Erred In Arguing An Irrelevant "Punitive Damages" Issue.

Respondent's Argument **#4** reads: "Summary Judgment Was Apropriate To Dismiss Appellant's Claims For Punitive Damages." But, it is not responsive to Appellant's issues for review nor related to Appellant's Argument raised in the Appellant's Opening Brief.

By law, the Respondent's response or argument should "in reply to the response the appellate or petitioner has made." **RAP 10.1(c)**; "Should confirm to the section and answer the brief of appellant." **RAP 10.3(b)**.

The Respondent's Argument **#4** does not reply nor answer to the Appellant's issues and arguments. In applying **RAP 10.1(c)** and **10.3(b)**, the Respondent's entire Argument **#4** on page 12, should not be considered by this Court due to it is unresponsive and irrelevant.

5. Respondent's Argument #5 Erred In Omitting The Evidence Regarding "*Deliberate Indifference.*"

Appellant pointed out the trial court's error, as: "*The trial Court erred to dismiss Appellant's 'Eighth Amendment violation' claim by* ***ignoring the evidence*** *of deliberate indifferent to Appellant's serious medical need.*" (See Appellant's Opening Brief, pp. 16-19, emphasis added.) In another words, the trial judge's "***ignoring***" the existing evidence of deliberate indifferent is Her Honor's material error as she making the Eighth Amendment claim.

The evidence of Dr. Wirthlin's deliberate indifferent to Appellant's serious medical needs has been established on page 6 of Amended Complaint (**CP 78-167**, at **83**), as:

> 7.4 Defendant Dr.. Wirthlin promoted himself, "specializing in disease of vitreous." Exhibits J & H. (*i.g.*, CP 127, 118) He has a duty to treat Plaintiff's "endophthalmitis", a disease was confirmed by him on 8/18/10 follow-up exam. Exhibit K (CP 128-129).
>
> 7.5 He found that there had been a "*large plaque*" inside Plaintiff's vitreous after Dr. Jones's 8/5/10 surgery. As a vitreous specialist, Dr. Wirthlin has a duty to remove this "*large plaque*" because it was Plaintiff's "serious medical needs".

In Respondent's Brief, Respondent Dr. Wirthlin admitted above-mentioned fact and allegation by keeping silent and "failure to deny". **CR 8(d)**[9],

Upon the medical record, the Amended Complaint (**CP 78-167**) has presented the following facts regarding Dr. Wirthlin's deliberate indifference to Appellant's serious medical need (to restore the left vision), as: (1) Dr. Wirthlin found that the Appellant's left vision was blocked by a "***large plaque***" left over after Dr. Jones' 8/5/2010 surgery (*see* **CP 90,** subsection **21.1.2**), but he did not remove the "***large plaque***" to restore Appellant's vision; (2) He diagnosed that the Appellant's left eye was suffering from "*endophthalmitis*" (*Id.*, *see* its sub-section **21.1.3**), a bacterial infection which was required be treated with "vitrectomy" and "instruction of antibiotic treatment",[10] but he did not perform the requested "vitrectomy" nor had proscribed the required antibiotic treatment to treat the Appellant's bacterial "*endophthalmitis*;" (3) He knew that the Appellant's post-surgery painful eye was controllable by pain medications (*see* **CP 90,** subsection **21.1.1**) and "*the Plaintiff's pain was caused by gtts*" (*Id.* sub-section **20.2**), but he rather to have Dr. Ranson to remove the Appellant's entire painful

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[9] CR 8 provides: "(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." CR 8(d).

[10] To treat the bacterial endophthalmis, Respondent Dr. Jones, the eye doctor, provides the standard of care as: "With a preoperative diagnosis of bacterial endopthalmitis or other similar infectious process; the recommended approach to attempt to salvage or restore vision is removal of the vitreous fluid in the affected eye through a vitrectomy, ... and the institution of antibiotic treatment to address the cause of the inflammatory process." (*see* **CP 121,** paragraph 5).

left eyeball (*enucleation*); and (4) Dr. Wirthlin's *enucleation* decision was made after he knew that painful eye was the result of Dr. Jones' 8/5/2010 surgery, and after he discovered the secret that Dr. Jones' surgery have left a "***large plaque***" inside of the Appellant's left eyeball.

The Respondent's Argument **#5** does not object to above-mentioned facts supported by the evidence on the record, but ignored the undeniable evidence – then made a baseless conclusion on page 15 of his Brief: "In the absence of such evidence, summary on Cheng's Eight Amendment claim was appropriate." Under this circumstance that the Respondent's Argument **#5** was made by ignoring the existent evidence of deliberate indifference to Appellant's serious medical need, Thus, the Appellant's Eighth Amendment issue – "*the trial court erred to dismiss Appellant's 'Eighth Amendment Violation' claim by ignoring the evidence of deliberate indifferent to Appellant's serious medical need*" (*see* page **16** of Brief of Appellant) -- is entitled be sustained.

C. ARGUMENT

1. Standard Review

An appellate court reviews issues of law de novo. Washam v. Democratic Central Comm., 69 Wn. App. 453 at 459, 849 P. 2d 1229 (1993). A11 issues raised in Brief of Appellant are pure issues of law – they are subjected to review.

2. The Appellate Court lacks of authority to Review the Respondent's eight irrelevant issues for cross review.

According to **RAP 5.1**, "*A party seeking cross review must file a notice of appeal … within the time allowed by rule 5.2(f).*" Instant case, Respondent asks for cross review of his eight (8) issues but failed to file a timely Notice of Appeal required by the law. Hence, his all 8 issues for cross review, stated on pp. 1-2 of Respondent's Brief, should be denied because the Respondent failed to give this Court an authority to review his eight new issues.

3. Respondent's Irrelevent Issue should be precluded from review.

Pursuant to **RAP 10.1**, the Respondent's Reply Brief should "in reply to the response the appellate or petitioner has made." **RAP 10.1(c)**; *See* also **RAP 10.3(b)** ("The brief of respondent should confirm to the section and answer the brief of appellant or petitioner"). The Respondent's eight issues for cross review not only failed to file a Notice of Appeal (supra) also they are irrelevant to Appellant's issues. As a result – the Respondent does not meet the requirement set forth in **RAP 10.1** and **RAP 10.3** -- the Respondent's issues for cross review should be denied.

III. RESPONSE TO DR. JONES' REPLY

A. RESPONDENTS OMITTED MATIAL FACTS FOR REVIEW IN THEIR 'CONTERSTTEMENT OF THE FACT' SECTION.

Response Brief of Spokane Eye Clinic and Dr. Jones, does not object to, but omitted the following Appellant's material facts for review:

- After Dr. Jones' Vitreous Tap ("Vit.Tap") operation, the Appellant's left eye lost its ability to response to the "***blue & yellow color with using a pen light.***" **CP 86** (*see* section 17.1).
- Dr. Jones knew that the Vit.Tap he performed was "a recognized risk of the procure." ***Id.*** (*see* section 16.4); "*but he did not provide a consent form for 'Vit.Tap', not had mentioned this term to the Plaintiff.*" ***Id.*** (*see* section 16.3); and, "*he did not inform the Plaintiff the harmful result of Vit.Tap.*" ***Id.*** (*see* section 16.4).
- Dr. Jones' Vit.Tap operation caused Appellant's "*vitreitis*," "*retinitis*," "*retinal detachment*," etc. **CP 87** (*see* sections 17.2 – 17).
- Dr. Jones knew that to perform an adequate *Vitrectomy* was serious medical need to treating Appellant's bacterial *endophthalmitis*. **CP 84** (*see* sections 10.2); **CP 85** (*see* section 11.1). But, he failed to do so. **CP 86** (*see* section 15).
- Dr. Jones knew that "*the institution of antibiotic treatment*" was "*the recommended approach to attempt to salvage or to restore vision.*"

CP 121 (*see* section 5) , but he stopped the necessary antibiotic treatment after Appellant complained of Dr. Jones' defective 8/5/2010 surgery.

B. RESPONSE TO RESPONDENT'S 'ARGUMENT

1. RESPONDENT'S ARGUMENT ## 1-4: Respondent's "Service Process" issue erred in arguing the irrelevant August 2013 service.

Respondent's Argument **## 1-4** are regarding the dispute "*Service Process*" issue[11]. Pursuant to **RAP 10.1(c)** and **RAP 10.3(b)**. The Respondent's argument should have responded to the Appellant two issues regarding the "service" – i.e., the trial court "*was erred in omitting the first service on 6/12/2013, and it was erred in relying upon irrelevant statute.*" – they, however, do not object to Appellant's assertions (1) that the trial court "was erred in *omitting* the first service on 6/12/2013", (2) that the trial court "was erred in relying upon *irrelevant statute*".

The Respondent and the trial court erroneously claimed that "Cheng failed to properly serve Dr. Jones before September 26, 2013." Because the **9/26/2013** service is irrelevant to the first service dated **6/13/2013** which delivered to the Respondents the Appellant's initial Complaint dated **6/12/2013** (**CP 173-93**), which one the Respondents has admitted the service and paid **$250** for a 12-person jury fee on **7/30/2013** (*see* **CP 349-**

[11] The Appellant's assertion is: "Whent making servie process' ruling, the trial court abused its discretion in making ruling upon untentable grounds; and it was erred in omitting the rfirest service on 67/12/2013, and it was erred in relying upon irrelevant statute." Appellant's Brief, pp. **21-22**.

350); but they wrongfully relied on another irrelevant issue – regarding when and how the Amended Complaint dated **7/3/2013** (*see* **CP 78-167**) was served by the Spokane County Sheriff -- which is not responsive to the Appellant's issue which is related to the service process of initial Complaint dated **6/12/2013.** Thus, the Respondent's Arguments **#1** to **#4**, on pp. 7-13, of the Respondent's Brief, are nonresponsive and have no merit.

2. Argument #5 (Whether The Defendants Have Waived The Affirmative Defenses) Is Irrelevant To Appellant's Issue For Review And Argument.

The title of Defendant's Argument **#5** reads: "Dr. Jones and SEC did not waive the affirmative defense of insufficiency of process/service of process." However, this not an issue and argument responsive to Appellant's issues and arguments, because the Appellant does not have such issue for review. Thus, the non-responsive Argument **#5** should not be considered by this Court, pursuant to the rule set forth in **RAP 10.1(c)** ("in reply to the response the appellate or petitioner has made") and **RAP 10.3(b)** ("Should confirm to the section and answer the brief of appellant").

3. Argument #6 (The Issue Of Fraud) Is Irrelevant To Appellant's Issue For Review And Argument.

The title of Defendant's Argument **#6** reads: "Dr. Jones and SEC did not engage in fraud or fraudulent concealment within the meaning of RCW 4.16.350(3)." However, it is not the Appellant's issues for review or argument. Thus, the non-responsive Argument **#6**

should not be considered by this Court, pursuant to the rule set forth in **RAP 10.1(c)** ("in reply to the response the appellate or petitioner has made") and **RAP 10.3(b)** ("Should confirm to the section and answer the brief of appellant").

4. Argument #7 (Regarding "Standard Of Care Claim") Is Non-Responsive To Appellant's Issues For Review And Appellant's Argument.

The title of Respondents' Argument **#7** reads: "Notwithstanding the above, the trial court properly dismissed Cheng's ***standard of care claim*** for lack of supporting expert testimony." In another word, the Respondent's issue was related to "*Cheng's standard of care claim.*" However, the Respondent's assertion ("***standard of care claim***") is not Appellant's issues for review due to there has been no such issue existing nor Appellant had argued this issue. Furthermore, the trial court had not "dismissed Cheng's standard of care claim" (i.e., Respondents misstated).

Thus, the non-responsive Argument **#7**, which is based upon a non-existent fact, should not be considered by this Court. **RAP 10.1(c)** ("in reply to the response the appellate o r petitioner has made") and **RAP 10.3(b)** ("Should confirm to the section and answer the brief of appellant").

5. Argument #8 (informed consent claim) is nonresponsive to Appellant's issues.

The Respondents' Argument **#8** was arguing, as its title suggested: "*Summary Judgment was proper on Cheng's informed consent claim.*" It is

nonresponsive to Appellant's issues and argument, because the Brief of Appellant does not ask this court to review whether the trial court's "*summary judgment was proper on Cheng's informed consent claim.*" Under this circumstances that the Respondent's argument was nothing related the Appellant's issues (i.e., nonresponsive). Thus, its Argument **#8** should not be considered by this Court for the review. **RAP 10.1(c)** ("in reply to the response the appellate or petitioner has made") and **RAP 10.3(b)** ("Should confirm to the section and answer the brief of appellant").

6. Argument #9 (Eighth Amendment Claim) Conclusion ("Cheng Failed To Respond ... With Evidence") Was Not Supported By The Record.

The Appellant's second issue for review, at pp. 16-19 of the Appellant's Brief is: "The trial court erred to dismiss Appellant's 'Eight Amendment Violation' claim by **ignoring** the evidence of deliberate indifferent to Appellant's serious medical need" (i.e., the trial court's omitting Appellant's substantial evidence was erroneous). To support the assertion, Appellant presented the following substantial evidence upon the record, such as: (1) Respondent Dr. Jones knew that "instruction of antibiotic" was "the recommended approach to attempt to salvage or retore vision" (see Appellant's Brief, page 17, n.47); (2) Dr. Jones stopped the

necessary antibiotic treatment after the Appellant's complaint against his defective 8/5/2010 eye surgery,[12] etc.

Had the Appellant presented false facts, Respondent would have had legitimate reasons to oppose them. But the Respondent ignored these undeniable evidence, then asks this Court to dismiss the Appellant's Eighth Amendment issue upon their baseless assertion: "Cheng failed to respond ... with evidence that Dr. Jones had actual knowledge of a serious medical need that posed an excessive risk to Cheng's health ...". (*See* Brief of Respondent Dr. Jones, page 21.) In another words, the Respondent's Argument **#9** is not supported by the evidence. Thus, the unresponsive Argument **#9** should be dismissed. **RAP 10.1(c); RAP 10.3(b)** ("Should confirm to the section and answer the brief of appellant"); and, the Appellant's second issue for review – "The trial court erred to dismiss Appellant's 'Eight amendment Violation' claim by ignoring the evidence of deliberate indifferent [sic] to Appellant's serious medical need." – should be sustained.

IV. CONCLUSIONS

The Respondents' two Reply Briefs are not responsive to Appellant's issues for review. And, their arguments do not support the trial courts

[12] See Amendment Complaint (**CP 78-167**), at **93**, subsection 25 ("Dr. Jones' Retaliation).

12/20/2013 "ORDER GRANTING SUMMARY JUDGEMENT OF DISMISAL TO DEFENDANTS SPOKANE EYE CLINIC AND JONES, MD" and "ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL TO DEFENDANT WIRTHLIN MD'S MOTION FOR DISMISSAL OF ALL CLAIMS". Accordingly, the trial court's Summary Judgment Orders must be reversed, and allow the undisputed facts be tried by a jury.

Respectfully submitted on September **4**, 2014.

9-4-2014

By: **Charlie Y. Cheng**
Appellant pro se

CERTIFICATE OF SERVICE

I, Charlie Y. Cheng, certify that on **9/5/2014**, I deposited the copy of this brief to defendants' attorneys: (1) **James B. King** (818 W. Riverside Ave, Ste 250, Spokane, WA 99201-0994) via first-class certified mail #7012 2920 0001 9447 1610, and (2) **Dan W. Keefe** (221 N Wall St. Ste 210, Spokane, WA 99201-0824) via first-class certified mail #7012 2920 0001 9447 1627).

Under penalty of perjury of the laws of the State of Washington, I certify that the forgoing is true and correct.

On this **5th** day of September, 2014.

9-5-2014

By: **Charlie Y. Cheng**
370 Field Place NE, Renton, WA 98059

ORIGINAL