SUPREME COURT NO. 92167-9

THE SUPREME COURT
FOR THE STATE OF WASHINGTON

CHARLIE Y. CHENG

Appellant/Plaintiff

vs.

SPOKANE EYE CLINIC,
JASON H. JONES, M.D.,
ROBERT W. WIRTHLIN, M.D.

Respondents/Defendants

RESPONDENTS JASON H. JONES, M.D., AND SPOKANE EYE CLINIC'S ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

A. General Nature of Case and Identity of Parties.

At the core, this is a medical malpractice case arising from treatment received by appellant Charlie Y. Cheng ("Cheng") from respondents Jason H. Jones, MD (Dr. Jones), and Robert S. Wirthlin, MD (Dr. Wirthlin). Dr. Jones and Dr. Wirthlin are ophthalmologists at Respondent Spokane Eye Clinic (SEC). Cheng, the plaintiff below, appeals from summary judgment in favor all defendants.

B. Pertinent Facts.

On June 28, 2013, Cheng, acting *pro se*, filed a Complaint in Spokane Superior Court naming as defendants, SEC, Dr. Jones, Dr. Wirthlin, and SEC. *CP 2* Therein, Cheng alleged:

- Cheng, at all material times, was a Department of Corrections inmate in custody at the Airway Heights Correction Center. *CP 3*

- In August of 2010, Cheng was experiencing high levels of pain. *CP 8*
- On August 5, 2010, Dr. John Smith at the Airway Heights Correctional Center infirmary sent Cheng to the Spokane Eye Clinic for evaluation, and that Dr. Smith informed Dr. Jones that Cheng's left eye was "sudden painless (sic) blindness OS at 0945 today. Had blurring, diminished sight OS since 8-4-10." *CP 4*
- At the Spokane Eye Clinic [on August 5, 2010], Dr. Jones told Cheng that his left vision was blocked by "clouded pus" and that Cheng's left vision would recover after a vitrectomy. *Id.*
- Dr. Jones [on August 5, 2010] documented that "it was not possible to do a thorough vitrectomy because of the extremely poor view."
- On August 5, 2010, Dr. Jones performed a "vitreous tap" inside of Cheng's left eyeball. *Id.*

- Dr. Jones failed to obtain Cheng's informed consent for the August 5, 2010, "vitreous tap" surgery. *CP 11*
- After Dr. Jones' August 5, 2010, vitreous tap procedure, Cheng's eye became "completely cataracted" and his retina became detached. *CP 12*
- On August 6, 2010, the day after the vitreous tap procedure, Dr. Jones documented "no view" of the left retina. *CP 7*
- On August 11, 2010, five and a half days after the vitreous tap and vitrectomy, Cheng's left eye was completely cataracted, and Dr. Jones documented this as "total cataract OS." *CP 5*
- On August 11, 2010, Cheng's left eye started having edema, and before the August 5, 2010, procedure, Cheng had no edema in his left eye. *CP 6*

- On August 11, 2010, Dr. Jones still found "no view" of the left retina. *Id.*
- On August 15, 2010, a nurse at the Airway Heights Infirmary documented Cheng's post-surgery trigeminal nerve pain. *CP 6, 7.*
- On August 18, 2010, Dr. Wirthlin found "no view" of the left retina. *Id.*
- On August 18, 2010, Dr. Wirthlin found there was a "large plaque" left over from the August 5, 2010, surgery. *Id.*
- On August 24, 2010, 21 days after the vitreous tap surgery, Dr. Nicholas Ranson [at SEC] did a pre-enucleation evaluation of Cheng on referral from Dr. Jones. *CP 9*
- Cheng's eye was removed on September 3, 2010. *CP 15*
- In September of 2010, the Harborview Medical Center lab found that Cheng's left eyeball had

been suffering from "severe suppurative . . . retinitis." *Id.*

- After Dr. Jones' [August 5] vitrectomy, there was a "large plaque" inside of Cheng's left eyeball, Dr. Jones failed to clean up the dirty vitreous, and that, as a result, Cheng's "vitreous body [was] nearly completely replaced by purulent, necrotizing inflammation." *Id.*
- Dr. Jones failed to treat his "serious retinitis" and that this constituted deliberate indifference to Chang's serious medical needs. *CP 13*
- It was "evidence of Dr. Jones' failure to care of his duty and obligation" [sic]. *Id.*
- Even though Dr. Jones was a "retina detachment" specialist, he never treated Cheng's detached retina, and this amounted to deliberate indifference to Cheng's serious medical need and was evidence

of Dr. Jones' medical malpractice or negligence. *Id.*

On July 11, 2013, Cheng filed an Amended Complaint. *CP 78* Therein, he alleged, among other things:

- On November 2, 2010, Cheng "complained to defendant Jason H. Jones about his negligence." *CP 79*
- The standard of care applicable to Dr. Jones required him to treat retinal detachment, not cause Cheng's retinal detachment, trigeminal pain and cataract. *CP 81*
- Dr. Jones' standard of care did not include failing to remove a large plaque inside of the patient's vitreous, which was left over from an unsuccessful vitrectomy. *Id.*
- Dr. Jones failed to obtain informed consent for the vitreous tap procedure and that the standard of care did not include failing to continue to treat Cheng's

endothalmitis with antibiotics, but rather removing the entire eyeball. *Id.*

- Dr. Jones' standard of care did not include removing Cheng's eyeball as retaliation after his "failure to care was confronted by the patient." *Id.*

Neither the original nor the amended Complaint were personally served on Dr. Jones. Cheng never obtained abode service on Dr. Jones or properly served SEC. *CP 169, CP 173, CP 351*

C. Pertinent Trial Court Procedure

On October 8, 2013 Dr. Jones and SEC moved for summary judgment, arguing insufficient process/service of process and resulting lack of personal jurisdiction, expiration of the statute of limitations, lack of supporting expert testimony, and insufficient evidence to support Cheng's Eighth Amendment "deliberate indifference" claim. *CP 294, CP 283*

On December 20, 2013, the court issued its order granting summary judgment in favor of Dr. Jones and SEC. *CP 273*

D. Court of Appeals Decision

On June 9, 2015, Division III of the Court of Appeals, in an unpublished opinion, affirmed summary judgment in favor of Dr. Jones, Dr. Wirthlin, and SEC. On July 30, 2015, the Court of Appeals denied Cheng's Motion for Reconsideration. This Petition for Review followed.

II. ARGUMENT AND AUTHORITIES

A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, wish the appellate court performing the same inquiry as the trial court. *Lybbert v. Grant County*, 140 Wn.2d 29, 34, 1 P.3d 1124 (2000); *Nivens v. 7-11 Hoagies Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the trial court must view all facts and reasonable inferences therefrom in favor of the non-moving

party. *Weyerhouser Company v. AETNA Casualty and Surety Company*, 123 Wn.2d 891, 897, 874 P.2d 142 (1992). A court may grant summary judgment if the pleadings, affidavits, and depositions establish there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

A defendant moving for summary judgment in a medical malpractice case has the initial burden of showing the absence of a material issue of fact, or that the plaintiff lacks competent evidence to support an essential element of his case. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001); *Fisher v. Aldi Tire, Inc.*, 78 Wn. App. 902, 906, 902 P.2d 166 (1995). If the defendant meets his initial burden by showing the plaintiff lacks evidence to support his case, the burden shifts to the plaintiff to produce evidence sufficient to establish a *prima facie* case. *Seybold, supra* at 676, *citing, Van Hook v. Anderson*, 64 Wn. App. 353, 824 P.2d 509 (1992); *Young v. Key*

Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. The trial court properly granted summary judgment in favor of Dr. Jones and Spokane Eye Clinic

1. Cheng, in his response to Dr. Jones and Spokane Eye Clinic's Motion for Summary Judgment, failed to demonstrate the existence of a material issue of fact with respect to his Eighth Amendment Claim.

A prisoner's Eighth Amendment right to be free from cruel and unusual punishment is violated if officials are deliberately indifferent to the prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Hunt v. Dental Department*, 865 F.2d 198, 200 (9th Cir. 1989). To succeed on a deliberate indifference claim, the plaintiff must demonstrate facts sufficient to prove that he has or had a serious medical need and that a particular defendant acted with deliberate indifference to that need. *See*, *Estelle*, 429 U.S. at 104-5.

A prisoner must satisfy both objective and subjective elements to establish an Eighth Amendment violation. *Farmer*

v. Brennan, 511 U.S. 825, 834-837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). To establish the subject component of a deliberate indifference claim, "an inmate must allege sufficient facts to indicate that prison officials acted with a culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 302, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). The official must have actual knowledge of an "excessive risk to inmate health and safety," possessing both the facts from which an inference of serious risk to health and safety could be drawn and then drawing that inference. *Farmer*, 511 U.S. at 837. Even gross negligence, without more, does not constitute "deliberate indifference." *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

The indifference to medical needs must also be substantial; inadequate treatment due to malpractice, or even gross negligence, does not amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnoses and treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 243 (9th Cir. 1989). In addition, as in any civil rights case, the plaintiff must establish a causal link between the defendant's conduct and the alleged injury. Without causation, there is no deprivation of a plaintiff's constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 370-371, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Estate of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999).

Courts have recognized that deliberate indifference to serious medical needs may be manifested in two ways: "It may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison officials provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988)(*citing Estelle v. Gamble*, 429 U.S. at 105, 97 S.Ct. 285). In either case, however, the indifference to the inmate's medical needs must

be purposeful and substantial; negligence, inadvertence, or differences in medical judgment or opinion do not rise to the level of constitutional violation. *Jackson v. McIntosh*, 90 F.3d 330, 331 (9th Cir., *cert denied*, 519 U.S. 1029, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996)); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Franklin v. Oregon State Welfare Division*, 662 F.2d 1337, 1344 (9th Cir. 1981).

There is no categorical requirement that the plaintiff in an Eighth Amendment case support his/her claim with expert testimony. *See*, *McCabe v. Prison Health Services*, 117 F. Supp. 2d 453, 452 (ED Pa. 1997). More specifically, where it is clear from the record that a plaintiff's medical condition is serious, or the issue is undisputed, and a defendant knowingly either refuses to treat the plaintiff or inordinately delays treatment, no expert testimony is necessary to raise a material issue of fact on the existence of a "serious medical need" or "deliberate indifference." *See, e.g.*, *Meeks v. Allison*, 290 Fed. Appx. 4 (9th Cir. 2008).

However, where the plaintiff's claim is essentially one of misdiagnosis, or inappropriate (rather than nonexistent or delayed) treatment, if the plaintiff fails to provide supporting expert testimony in opposition to a defense motion for summary judgment, the court, in granting summary judgment in favor of the defendant, may conclude no reasonable juror could find deliberate indifference. *See, e.g., Francisco v. Correctional Medical System*, 548 F. Supp. 2d 128, 131 (DC Del. 1978).

In the instant case, there was no refusal to treat, or inordinate delay in treatment. Indeed, Cheng was seen and treated by Dr. Jones at SEC on August 5, 2010, the very day of the referral from Dr. Smith, a clinician at the Airway Heights Correctional Facility. Thereafter, Cheng was seen four additional times in August (August 6, 11, 18 and 24), either by Dr. Jones or another ophthalmologist at SEC, before the enucleation on September 3, 2010. Cheng's claim, in essence, is that Dr. Jones improperly diagnosed and treated his eye condition. Such claims, however, are matters of "medical

judgment" not encompassed by the Eighth Amendment. *See*, *Fleming v. Lefevre*, 423 F. Supp. 2d 1064 (DC Cal. 2006); *Willis v. Ritter*, 2008 WL 821828 (DC Cal. 2008).

Moreover, because of the complexity of the medical issues, including diagnosis of pathology of the eye and the performance of ophthalmologic surgery, Cheng needed expert testimony to raise a material issue of fact on deliberate indifference.

Finally, while expert testimony may not always be necessary to raise a material issue of fact with respect to "serious medical need" or "deliberate indifference," it is required to establish the causal relationship between defendants' alleged deliberate indifference to a serious medical need and plaintiff's injury/damages. *See*, *e.g.*, *Gibson v. Weber*, 433 F.3d 642 (8th Cir. 2006); *Copelton v. Correctional Corp. of America*, 2010 WL 4956377 (DC Mont. 2010). In the instant case, Cheng failed to provide expert testimony that deliberate

indifference on the part of Dr. Jones and/or SEC caused his injury/damages.

Cheng correctly points out that the Court of Appeals, in holding summary judgment in favor of defendants was appropriate due to the lack of supporting expert testimony, did not directly address his Eighth Amendment claim. However, an appellate court may affirm summary judgment on any basis supported by the record, *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008), *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). On the record before the trial court, summary judgment was appropriate on Cheng's Eighth Amendment claim.

2. Notwithstanding Cheng's failure to raise a material issue of fact to avoid summary judgment on his Eighth Amendment and state law medical malpractice claims, summary judgment was appropriate based on the expiration of the statute of limitations and insufficiency of process (service of process).

Even though the Court of Appeals addressed only Cheng's failure to support his claims with expert testimony,

summary judgment was still appropriate based on expiration of the statute of limitations and insufficiency of process/service of process. On these issues Dr. Jones and SEC adopt and incorporate their briefing to the Court of Appeals.

III. CONCLUSION

Based on the foregoing argument and authorities, Respondents Jason H. Jones, M.D., and SEC respectfully submit that summary judgment in their favor was appropriate, that the Court of Appeals decision affirming summary judgment was correct, and that Cheng's Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 9 day of October, 2015.

EVANS, CRAVEN & LACKIE, P.S.

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DECARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on October 9, 2015, I arranged for service of the foregoing RESPONDENTS JASON H. JONES, M.D.,AND SPOKANE EYE CLINIC'S ANSWER TO PETITION FOR REVIEW to the Court and to the parties to this action as follows:

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DATED at Spokane, Washington, this 9 day of October, 2015.

Carol L. Myers

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Attached for filing in .pdf format is **Respondents Jason H. Jones, M.D., and Spokane Eye Clinic's Answer to Petition for Review,** in *Cheng v. Spokane Eye Clinic, Jason H. Jones, M.D., Robert Wirthlin, M.D.*, Supreme Court No. 92167-9. The attorney filing this document is Christopher J. Kerley, WSBA 16489, email address: ckerley@ecl-law.com .

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