No. 92167-9

SUPREME COURT OF THE STATE OF WASHINGTON

CHARLIE Y. CHENG
Appellant,

vs.

SPOKANE EYE CLINIC, JASON H. JONES, MD and ROBERT S. WIRTHLIN, MD
Respondents.

RESPONDENT ROBERT S. WIRTHLIN, MD RESPONSE TO PETITION FOR REVIEW

Edward J. Bruya, WSBA #32770
Eric R. Byrd, WSBA #39668
KEEFE, BOWMAN & BRUYA, P.S.
Attorneys for Respondent Robert S. Wirthlin, MD
221 N. Wall St., Suite 210
Spokane, WA 99201
(509) 624 8988

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5B Wash. Prac., Evidence Law and Practice § 702.48 (5th ed.)

I. INTRODUCTION

Defendant/ Respondent ROBERT S. WIRTHLIN, MD (herein after "Respondent") filed its CR 56 Motion in Spokane County Superior Court moving for an order dismissing the Complaint of Plaintiff/ Appellant Charlie Cheng's (herein after "Appellant"). Clerks Papers 294-296, 297-305, 347-348, 330-339, 340-341, 342-346.

Appellant was a patient of Respondent ophthalmologist/retinal specialists Dr. Wirthlin, Jason H. Jones, MD, as well as others at the Spokane Eye Clinic. CP 330-339. Appellant was provided medical treatment on August 5, 2010, upon an emergency referral for loss of vision to his left eye secondary to infection suffered by Appellant while an inmate at Airway Heights Correction Center in the State of Washington. CP 330-339. As a result of an infectious process, Appellant ultimately had an enucleation (surgical removal) of the left eye on September 3, 2010 by another ophthalmologist at the Spokane Eye Clinic. CP 1-77, 78-167. Respondent Wirthlin denies all of Appellant's allegations, and timely moved for summary judgment dismissal of Appellant's claims. CP 318-329.

Respondent's motion was based upon Appellant's failure to present evidence, specifically expert testimony to present genuine issues of material fact to support allegations of medical negligence, or evidence

to support Appellant's §1983 claim. CP 294-296, 297-305, 347-348, 330-339, 340-341, 342-346.

In relevant part, Respondent's Motion for Summary Judgment argued that Appellant failed to establish that the particular medical procedures and sophisticated treatment at issue were within the common understanding of a layperson to circumvent the need for expert medical testimony helpful to the trier of fact in understanding the Appellant's claims of medical negligence, and Appellant's failure to present evidence beyond allegations that the medical treatment was administered with deliberate indifference. CP 294 – 296, 297-305, 347-348, 330-339, 340-341, 342-346.

II. STATEMENT OF THE CASE

Dr. Wirthlin filed his Motion for Summary Judgment on October 8, 2013. CP 340-341, 330-339. The summary judgment hearing was scheduled for and conducted on November 8, 2013. CP 239-243, 273-275. After hearing oral argument and reviewing pleadings filed by all parties, Judge Moreno dismissed Appellant's claims, declined Appellant's Motion for Reconsideration and issued the Order dismissing Respondent Wirthlin on December 20, 2013. CP 276-277. The Court of Appeals' decision should be affirmed for the following reasons:

(1) Appellant failed to establish that the adequacy of a vitrectomy and post-surgical treatment was observable by a lay person and describable within the common understanding or experience of a layperson without medical training.

(2) Appellant failed to present facts beyond allegations that Respondent's acts or omissions while providing medical treatment were negligent, and performed with deliberate indifference of Appellant's serious medical need.

(3) Appellant failed to present any evidence that Respondent's acts or omissions caused his injury.

CP 239-243, 294-296, 297-305, 330-339, 340-341, 342-346, 347-348.

III. ARGUMENT

A. Standard of Review

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). Washington Courts will engage in de novo review of a trial court's granted motion for summary judgment as a matter of law, and perform the same inquiry as the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126, 131 (2003); *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). The court will review the evidence in the light most favorable to Mr. Charlie Y. Cheng, drawing all reasonable inferences in his favor. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816, 819 (1997). Judgment as a matter of law will be sustained if no rational, unbiased person could return a verdict in the nonmoving party's favor. *Davis*, 149 Wn. 2d 521, 531.

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). Here, the record supports the underlying appellate court's affirmation of the trial court's decision to grant Respondent Dr. Wirthlin's motion for summary judgment.

B. The Court of Appeals Properly Affirmed the Trial Court Decision to Grant Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's Claims due to Appellants Failure to Produce Admissible Testimony to Explain Claims beyond the Understanding and Knowledge of a Layperson.

Sophisticated medical conditions and treatments are beyond the ordinary understanding of laypersons; medical facts must be proven by expert testimony unless they are observable by lay persons and describable without medical training. *State v. Green*, 182 Wn. App 133, 146-149, 328 P.3d 988 (2014). Expert testimony is not just admissible, but required

when specialized knowledge will assist the trier of fact to understand the evidence or to determine a factual issue, and prevent a trier of fact from speculating or engaging in conjecture regarding liability. *5B Wash. Prac., Evidence Law and Practice* § 702.48 (5th ed.).

Expert testimony is necessary if it is helpful to trier of fact, addresses matters beyond the common knowledge of a layperson, and does not mislead the jury. *State v. King County Dist. Court West Div.*, 175 Wn. App. 630, 307 P.3d 765, review denied 179 Wn.2d 1006, 315 P.3d 530 (2013). A trial court's determination that expert testimony will be helpful in understanding evidence or determining a fact in issue, as required by ER 702, will not be overturned on appeal except for abuse of discretion. *Group Health v. Department of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986).

Likewise, argumentative assertions and speculation that a genuine material issue exists will not defeat a summary judgment motion. CR56(c). See *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Civil Rule 56(e) instructs that "an adverse party may not rest upon mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." CR 56(e).

Judge Moreno held "[b]ecause performance of the vitrectomy and post-surgical treatment is not within the common understanding or experience of a layperson" expert medical testimony was not only helpful to the trier of fact, but necessary to raise a genuine issue of material fact in response to Respondent's Summary Judgment Motion. The underlying trial court correctly determined that expert medical testimony was necessary to support the allegations; the facts were not observable by lay persons and describable without specialized training, and the issues in dispute were beyond the realm of knowledge and understanding of a lay person. Appellant's failure to present expert medical testimony to raise a genuine issue of material fact in response to Respondents CR 56 motion was fatal to his claims; the underlying Court's decision should be affirmed.

C. The Trial Court Properly Granted Respondent's Motion for Summary Judgment on Appellant's §1983 claim because Plaintiff failed to Offer Testimony Sufficient to Establish that the Medical Treatment was Administered Negligently, or with Deliberate Indifference.

The Washington State Supreme Court should affirm the underlying decisions and hold as a matter of law that expert testimony is necessary to support a §1983 claim alleging administration of medical care was negligent and conducted with deliberate indifference. 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). The United States Court of Appeals, Ninth Circuit in *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir.1998) held that "showing of merely inadvertent or even negligent medical care is not enough to establish a constitutional violation." (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106, 97 S.Ct. 285, 50 L.Ed.2d 251 (U.S. 1976). *See also 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).

The United States Court of Appeals, Eight Circuit in *Alberson v. Norris*, 458 F.3d 762 (8th Cir. 2006) held:

> To state a claim of inadequate medical treatment for § 1983 purposes, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106, 97 S.Ct. 285. The plaintiff "must show more than negligence, more even than gross negligence, and mere disagreement with treatment decisions does not rise to the level of a constitutional violation." *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995). Where the complaint involves treatment of a prisoner's sophisticated medical condition, expert testimony is required to show proof of

causation. *Gibson v. Weber*, 433 F.3d 642, 646 (8th Cir. 2006).

Alberson v. Norris, 458 F.3d 762, 766.

Appellant alle ged a claim for negligent treatment but failed to support his argument with any testimony beyond his allegations; the Court rightfully found that no reasonable juror could reach a conclusion that the treatment amounted to deliberate indifference. *See, e.g., Francisco v. Correctional Medical System*, 548 F. Supp. 2d 128, 131 (DC Del. 1978). In her Order dismissing Appellants § 1983 claim, Judge Moreno referred to the United States Supreme Court's decision in *Estelle v. Gamble*, which held:

> a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.
>
> *Estelle*, 429 U.S. at 106.

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).

The underlying Court correctly reasoned that "'[m]ere allegations of malpractice do not state a claim' under the 8th Amendment" and dismissed Appellant's 1983 claim because Appellant "fail[ed] to provide facts that would support an inference of deliberate indifference." CP 239-243, 294-296, 297-305, 330-339, 340-341, 342-346, 347-348. Appellant failed to present competent evidence to satisfy his burden of showing that the defendant chose a medically unacceptable course of treatment in conscious disregard of a risk to the plaintiff's health and therefore summary judgment in favor of the defendant was appropriate. *See, e.g., Fleming v. Lefevre*, 823 F.Supp.2d 1064 (C.D. Cal. 2006). Matters of "medical judgment" are not encompassed by the Eighth Amendment. *Id*; See also *Willis v. Ritter*, 2008 WL 821828 (DC Cal. 2008).

If Washington's well established RCW 7.70 *et seq* requires expert testimony to establish claims of medical negligence and a §1983 claim of deliberate indifference requires *more proof* than evidence of medical negligence, Appellant's failure to produce any expert testimony in support of his claims in response to Respondent's CR 56 summary judgment motion is fatal to his claims.

Appellant not only failed to present expert testimony to explain the sophisticated medical condition, but he failed to establish that Respondent Wirhtlin was negligent under RCW 7.70 *et seq.* and he failed to raise genuine issues of material fact beyond allegations that the allegedly negligent medical treatment was administered with deliberate indifference. The underlying court's dismissal, denial on reconsideration, and the appellate court's decision affirming the trial court's dismissal of Plaintiff's claims should be affirmed. The trial court properly granted Respondent's motion for summary judgment on Appellant's §1983 claim because Appellant failed to offer testimony sufficient to establish that the medical treatment was administered negligently, or with deliberate indifference.

D. The Trial Court Properly Granted Respondent's Motion for Summary Judgment on Appellant's §1983 claim because Plaintiff failed to Offer Testimony Sufficient to Establish that the Medical Treatment Administered by Respondents Caused his 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). Expert testimony is necessary to raise a material issue of fact with respect to the causal relationship between a defendants' alleged deliberate indifference to a serious medical need and a plaintiff's injury/damages to establish a claim for deliberate indifference. *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, Appellant failed to provide expert testimony that Respondent's alleged deliberate indifference caused his injury/damages. Appellant's failure to present evidence to support the necessary element of proximate causation to raise a genuine issue of material fact in response to Appellant's Summary Judgment Motion was fatal to his claims. The underlying record supports the appellate court's decision to affirm the trial court decision to grant Respondent's summary judgment motion to dismiss Appellant's §1983 claim because Appellant failed to offer testimony sufficient to establish that the medical treatment administered by Respondents caused his injury.

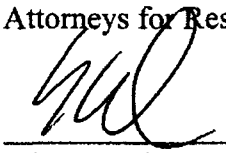
CONCLUSION

The underlying court's requirement that Appellant produce admissible medical testimony to support claims regarding sophisticated medical conditions and treatments beyond the realm of understanding of a lay witness, and to support claims of medical negligence, and establish a §1983 claim of deliberate indifference was appropriate and consistent with Washington law. The trial courts dismissal of Appellant's claims, and the appellate court's decision to affirm the trial court should be affirmed because the underlying record is sufficient to support the trial court's

decision to grant summary judgment because Appellant filed to raise a genuine issue of material fact with evidence to support his claims against Respondent Wirthlin.

Respectfully submitted this 9th day of October, 2015.

KEEFE, BOWMAN & BRUYA, P.S.
Attorneys for Respondent Wirthlin, MD



Edward J. Bruya, WSBA #32770
Eric R. Byrd, WSBA #39668

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of October, 2015, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsel of record:

Appellant Pro Se:

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

VIA REGULAR MAIL [✓]
VIA CERTIFIED MAIL [✓]
VIA FACSIMILE/EMAIL [ ]
HAND DELIVERED [ ]

Counsel for Respondent Spokane Eye Clinic:

James B. King
Evans Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201

VIA REGULAR MAIL [ ]
VIA CERTIFIED MAIL [ ]
VIA FACSIMILE/EMAIL [ ]
HAND DELIVERED [✓]

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

Annette C Kienty

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Attached for filing in .pdf format is **Respondent Robert S. Wirthlin, M.D. Response 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 attorneys filing this document are Eric R. Byrd, WSBA #39668, email address: ebyrd@kkbowman.com and Edward J. Bruya, WSBA #32770, email address: ebruya@kkbowman.com.

Annette Kuntz
Keefe, Bowman & Bruya, P.S.
221 North Wall Street, Suite 210
Spokane, WA 99201

Phone: 509-624-8988
Fax: 509-623-1380
