NO. 321983

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

CHARLIE Y. CHENG

Appellant/Plaintiff

vs.

SPOKANE EYE CLINIC, et al.,

Respondents/Defendants

BRIEF OF RESPONDENTS JONES AND SPOKANE EYE CLINIC

James B. King, WSBA #8723
Christopher J. Kerley, WSBA #16489
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0916
(509) 455-5200 phone
(509) 455-3632 fax
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. COUNTERSTATEMENT 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 of Drs. Jones, Wirthlin and SEC.

B. Pertinent facts.

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

- The court had jurisdiction over the action under RCW 7.70, et seq. *CP 2*
- Cheng, at all material times, was a Department of Corrections inmate in custody at the Airway Heights Correction Center. *CP 3*
- 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, 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 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.*
- 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*
- In September of 2010, the Harborview Medical Center lab found that Cheng's left eyeball had been suffering from "severe suppurative . . . retinitis." *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 6, 2010, the day after the vitreous tap procedure, Dr. Jones documented "no view" of the left retina. *CP 7*
- On August 11, 2010, Dr. Jones still found "no view" of the left retina. *Id.*
- 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.*
- In August of 2010, Cheng was experiencing high levels of pain. *CP 8*
- On August 24, 2010, 21 days after the vitreous tap surgery, Dr. Nicholas Ranson did a pre-enucleation evaluation of Cheng on referral from Dr. Jones. *CP 9*
- 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*
- After Dr. Jones' 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.*
- On January 29, 2013, two and a half years after the unsuccessful vitrectomy, Dr. Jones revealed the "secret" that he actually had not removed the massive affected vitreous: "I removed such vitreous . . . that it was not the amount of vitreous that is removed that will necessarily result in a cure." *CP 85*

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

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*

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 court is to view all facts and reasonable inferences therefrom, most favorably toward 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).

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

1. To properly commence the action, Cheng was required to serve Dr. Jones and SEC on or before September 26, 2013.

RCW 4.16.350 is the statute of limitations applicable to "any civil action for damages" based upon health care or related services. Such actions must be filed within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient "discovered or reasonably should have discovered that the injury or condition was caused by said act or omission." RCW 4.16.350(3). "The three-year limitations period commences at the time of the last act or omission that allegedly caused the injury." *Unruh v. Cacchiotti,* 172 Wn.2d 98, 107, 257 P.3d 631, 635 (2011); *Caughell v. Group Health Coop. of Puget Sound,* 124 Wn.2d 217, 229, 237 n. 6, 876 P.2d 898 (1994).

A patient/plaintiff "discovers" an injury for purposes of the statute of limitations when he has pain, numbness or other unusual symptoms

from the procedure. *Zaleck v. Everett Clinic,* 60 Wn.App. 107, 111, 802 P.2d 826, 827 (Div.1,1991). In addition, a plaintiff must exercise reasonable diligence in discovery of an injury. *Id.* To discover the injury, the patient need not understand the full amount of damage or injury, but must simply be aware that some actual and appreciable damage occurred. *Steele v. Organon, Inc.,* 43 Wn.App. 230, 235, 716 P.2d 920, *review denied,* 106 Wn.2d 1008 (1986).

In the instant case, Cheng complained that the treatment he received from Dr. Jones on August 5, 2010 was negligently performed, and that Dr. Jones and SEC failed to secure informed consent prior to the procedure on that date. *CP 11, CP 79-85.* According to Cheng, after the August 5, 2010 procedure, he immediately noticed pain in the "L.side head [was] the worse he has ever had." *CP 88.* As of August 18, 2010 Mr. Cheng believed Dr. Jones' care was at fault for his pain: "On 8/18/10, Plaintiff complained to Dr. Wirthlin that Dr. Jones's 8/5/10 surgery caused his painful eye." *CP 90.* On the same date, Cheng alleged he told Dr. Wirthlin: "I don't want Dr. Jones to touch my eye again because his eye surgery caused my left eye pain and cataract." *Id.* Thus, the statute of limitations began to run on August 5, 2010, the date of the procedure, or in any case, in August of 2010.

For purposes of the statute of limitation, a lawsuit is commenced by filing the complaint or serving the summons RCW 4.16.170. The plaintiff must then perfect commencement by filing or serving within ninety (90) days. *Id.*

Cheng's Complaint was filed on June 28, 2013. Accordingly, the 90-day tolling period expired on September 26, 2013.

2. Cheng failed to properly serve Dr. Jones before September 26, 2013

A trial court does not have jurisdiction over a defendant who is not properly served. *Scott v. Goldman*, 82 Wn.App. 1, 6, 917 P.2d 131, review denied, 130 Wn.2d 1004, 925 P.2d 989 (1996). Service of process is only sufficient if it satisfies the requirements set forth by statute. *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455 (1995).

RCW 4.28.080(15) requires that an individual defendant be served personally, or that a copy of the Summons and Complaint be left "at the house of his or her usual abode with some person of suitable age and discretion then resident therein."

Here, Cheng failed to obtain personal or abode service on Dr. Jones. On August 7, 2013, Cheng attempted to personally serve Dr. Jones by having the sheriff leave a copy of the Summons and Complaint with Lisa Warner at 427 S. Bernard, Spokane Washington. *CP 351.* But that is

the business location for SEC, not the house or usual abode of Dr. Jones, and Lisa Warner did not reside with Dr. Jones.

3. Cheng failed to properly serve SEC before September 26, 2013

A corporation is served by the delivery of the summons to "the president or other head of the company or corporation, the registered agent, the secretary, cashier or managing agent thereof, or to the secretary, stenographer, or office assistant of the president or other head of the company or corporation, registered agent, secretary or managing agent." RCW 4.28.080(9). At the time of Cheng's attempted service on SEC, the Washington State Secretary of State website identified a corporation as the registered agent for SEC. *Declaration of James B. King (See Appendix A).*[1] Cheng purported to obtain service on SEC by leaving a copy of the Summons and Complaint with Erin Hill. *CP 351.* Because Erin Hill, a legal assistant of Michael D. Currin, at 422 W Riverside Ave., Ste. 1100, Spokane Washington, was not a person authorized to accept service on behalf of the corporation under the statute, SEC was never properly served.

[1] The Declaration of James B. King in Support of Defendants Spokane Eye Clinic and Jason H. Jones' Motion for Summary Judgment was inadvertently omitted from Dr. Jones and SEC's Designation of Clerk's Papers. Pursuant to RAP 9.6(a), Dr. Jones and SEC have submitted a Supplemental Designation of Clerk's Papers identifying this document.

4. Cheng's attempted service on Dr. Jones and SEC by mail was ineffective

CR 4(d)(4) describes the circumstances under which service of original process may be accomplished by mail, and the requirements to perfect such service:

> *Alternative to Service by Publication.* In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

Cheng's efforts to serve Dr. Jones and SEC by mail were ineffective for three reasons. First, Cheng has failed to satisfy the components of CR 4(d)(4), in that he did not: (1) file an affidavit stating that service by mail would be just as likely to give actual notice to the defendants as service by publication, (2) failed to obtain a court order directing service by mail, (3) failed to mail copies of the summons and

complaint to the last known address of the defendants, and (4) failed to mail two copies of the documents by first class and the other by certified mail.

Second, as set forth in Rule 4(d)(4), service by mail may only be had where it is appropriate under the rules justifying publication. RCW 4.28.100 sets forth the requirements for service by mail and the narrow circumstances under which service by mail is permitted. Alternative service is only appropriate "when the defendant cannot be found within the state." The plaintiff must file "an affidavit...stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that he or she has deposited a copy of the summons....and complaint in the post office, directed to the defendant at his or her place of residence..." *Id.* The Supreme Court has held "that an affidavit in support of service by mail must contain every requirement found in RCW 4.28.100..." *Jones v. Stebbins,* 122 Wn. 2d 471, 481, 860 P.2d 1009, 1014 (1993).

Third, RCW 4.28.100 limits alternate service to the following circumstances:

> (1) When the defendant is a foreign corporation...
>
> (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her

creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent;

(3) When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action;

(4) When the action is for (a) establishment or modification of a parenting plan or residential schedule; or (b) dissolution of marriage, legal separation, or declaration of invalidity, in the cases prescribed by law;

(5) When the action is for nonparental custody...

(6) When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;

(7) When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate...

(8) When the action is against any corporation, whether private or municipal, organized under the laws of the state, and the proper officers on whom to make service do not exist or cannot be found;

(9) When the action is brought under RCW 4.08.160 and 4.08.170 to determine conflicting claims to property in this state.

None of the foregoing circumstances applied to Cheng's claims, and therefore, he was not eligible for an order permitting service by mail.

5. Dr. Jones and SEC did not waive the affirmative defenses of insufficiency of process/service of process

CR 12(b) allows a defendant to assert certain affirmative defenses in a responsive pleading. CR 12(a) further states that a defense of lack of jurisdiction and/or insufficiency of process or service of process is waived if it is omitted from a motion or is not included in a responsive pleading. Here, Dr. Jones and SEC chose to assert the affirmative defenses of insufficient process/service of process by motion.

The affirmative defenses of insufficiency of service of process/service of process can be waived if the defendant engages in conduct inconsistent with the assertion of the defense. *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991). But, neither Dr. Jones nor SEC engaged in such conduct here.

6. Dr. Jones and SEC did not engage in fraud or fraudulent concealment within the meaning of RCW 4.16.350(3)

Cheng alleges the statute of limitations did not run against him because Dr. Jones and SEC engaged in fraud, or fraudulently concealed information from him within the meaning of RCW 4.16.350(3). But there are no facts in the record, no reasonable inference therefrom, that Dr. Jones or SEC engaged in fraud or intentional concealment so as to prevent Cheng from discovering sufficient information to commence running of the statute of limitations. Cheng's argument seems to be that he did not

discover the "secret" of Dr. Jones' not removing all of the vitreous when he performed the procedure on August 5, 2010 until January 29, 2013 when Dr. Jones wrote to Mary Creeley, Health Investigator at the Department of Health, stating that "I removed such vitreous as I thought was appropriate given the obscured field knowing that it is not the amount of vitreous that is removed that will necessarily result in a cure but rather obtaining an appropriate laboratory information so that effective antimicrobial therapy can be pursued which is of the utmost importance." *CP 120-124.* But Dr. Jones' August 5, 2010 operative report clearly states that "it was not possible to do a thorough vitrectomy because of the extremely poor view." *CP 133, 134.*

Moreover, the fraud/intentional concealment proviso of RCW 4.16.350(3) requires more than just the alleged negligent act or omission forming the basis of the cause of action. The proviso is aimed at conduct or omissions intended to prevent the discovery of negligence or of the cause of action. *Gunnier v. Yakima Heart Center, Inc.*, 134 Wn.2d 854, 953 P.2d 1112 (1998). Here, one of Cheng's liability claims against Dr. Jones was that he did not remove sufficient material from the left eye during the vitrectomy. Cheng's allegation of fraud or concealment is essentially the same allegation that forms the basis of his liability claim.

7. Notwithstanding the above, the trial court properly dismissed Cheng's standard of care claim for lack of supporting expert testimony.

RCW 7.70.040 sets forth the necessary elements of proof in a medical negligence action where plaintiff claims the defendants failed to follow the accepted standard of care. The statute specifies these elements as follows:

> (1) the 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; (2) such failure was the proximate cause of the injury complained of.

It is well settled in the State of Washington that expert testimony is essential in malpractice cases where the plaintiff alleges the defendant violated the standard of care. *Stone v. Sisters of Charity*, 2 Wn. App. 607, 469 P.2d 229 (1970). In the case of *Swanson v. Brigham*, 18 Wn. App. 647, 571 P.2d 217 (1977), at page 651, the Court stated:

> Absent special exceptions, a plaintiff patient must establish the standard of professional practice at the time of the alleged injury and a violation of that standard through the testimony of the professional equals of the defendant physician. (Emphasis added).

From the above, it is clear that in a medical malpractice case the burden is on the plaintiff to come forward with a supporting affidavit of a

medical practitioner establishing the necessary elements of a prima facie case. *Shoberg v. Kelly*, 1 Wn. App. 673, 463 P.2d 280 (1969).

Here, Cheng failed to come forward with an affidavit from a qualified medical expert stating that Jason Jones, M.D. violated the standard of care. Thus, Cheng's standard of care claim against Dr. Jones and SEC were properly dismissed.

8. Notwithstanding the above, summary judgment was proper on Cheng's informed consent claim

RCW 7.70.030 also permits a patient to bring an action against a health care provider if the patient's injury resulted from health care to which the patient or his representative did not consent.

The necessary elements of proof are:

> (1) That the health care provider failed to inform the patient of a material fact(s) relating to the treatment;
>
> (2) That the patient consented to the treatment without being aware of or fully informed of such material fact(s);
>
> (3) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact(s); and
>
> (4) That the treatment in question proximately caused injury to the patient.

Expert testimony is required to prove the existence of a risk, its probability of occurrence, and the harm which may result. *Bays v. St.*

Luke's Hospital, 63 Wn. App. 876, 881, 825 P.2d 319 (1992). *See also* RCW 7.70.050(2).

Here, Cheng failed to come forward with expert testimony proving that Dr. Jones failed to inform him of a material risk relating to his treatment and that Cheng consented to the treatment without being aware of or fully informed of such material risks or facts. In the absence of such expert testimony, the trial court properly dismissed Cheng's informed consent claim.

9. The trial court properly dismissed Cheng's 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, a 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, 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).

The courts have recognized the 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).

If the plaintiff, in response to summary judgment, provides no 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, summary judgment in favor of the defendant is appropriate. *See, e.g., Fleming v. Lefevre*, 823 F.Supp.2d 1064 (C.D. Cal. 2006).

Here, Cheng failed to respond to Dr. Jones and SEC's summary judgment motion with evidence that Dr. Jones had actual knowledge of a serious medical need that posed an excessive risk to Cheng's health, or that Dr. Jones chose a medically unacceptable course of treatment that was deliberately indifferent to Cheng's serious medical needs. In the absence of such evidence, summary judgment on Cheng's Eighth Amendment claim was appropriate.

III. CONCLUSION

Based on the foregoing argument and authorities, Respondent Jason H. Jones, MD and Spokane Eye Clinic respectfully request that summary judgment in their favor be affirmed.

RESPECTFULLY SUBMITTED this 15 day of August, 2014.

EVANS, CRAVEN & LACKIE, P.S.

By _____
JAMES B. KING, #8723
CHRISTOPHER J. KERLEY, #16489
Attorneys for Respondents/Defendants

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 15 day of August, 2014, the foregoing was delivered to the following persons in the manner indicated:

Charlie Y. Cheng 370 Field Place NE Renton, WA 98059	VIA REGULAR MAIL [X] VIA CERTIFIED MAIL [ ] VIA FACSIMILE [ ] HAND DELIVERED [ ]
Ed Bruya Dan Keefe Keefe, Bowman & Bruya 221 N. Wall, Ste. 210 Spokane, WA 99201	VIA REGULAR MAIL [ ] VIA CERTIFIED MAIL [ ] VIA FACSIMILE [ ] HAND DELIVERED [X]

8/15/14 / Spokane, WA
(Date/Place)

Frances Cera

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

CHARLIE Y. CHENG,

Plaintiff,

vs.

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

Defendants.

No. 13-2-02619-2

DECLARATION OF JAMES B. KING IN SUPPORT OF DEFENDANTS SPOKANE EYE CLINIC AND JASON H. JONES, M.D.'S MOTION FOR SUMMARY JUDGMENT

James B. King, under the penalty of perjury under the laws of the State of Washington, states and declares as follows:

1. I am the attorney for defendants Spokane Eye Clinic and Jason H. Jones, M.D. in the above-captioned matter. I am over the age of 18, have personal knowledge and am competent to testify with regard to the matters contained therein.

2. Attached to this Declaration as Exhibit A is a true and correct copy of the webpage from the Secretary of State for the State of Washington, Business Corporation Division for Spokane Eye Clinic, P.S. The website shows that the registered agent of Spokane Eye Clinic, P.S. is Eleven Fourteen, Inc., U.S. Bank Building, 422 W. Riverside Ave., Ste. 1100, Spokane, WA 99201.

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

3. Attached to this Declaration as Exhibit B is a true and correct copy of the listing for the Spokane Eye Clinic, P.S. in the *dex Official Directory for Spokane, Coeur d'Alene and Spokane Valley* issued September 2012 showing the business address of the Spokane Eye Clinic at 427 S. Bernard, Spokane, WA.

4. Attached to this Declaration as Exhibit C are true and correct copies of the Affidavits of Service re Plaintiff's Summons and First Amended Complaint on defendants Jason H. Jones, M.D. and Spokane Eye Clinic, P.S.

DATED in Spokane, Washington, this 8th day of October, 2013.

James B. King, WSBA No. 8723

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 8 day of October, 2013, the foregoing was delivered to the following persons in the manner indicated:

Charlie Cheng, DOC 307920
Airway Heights Correctional Facility
P.O. Box 2049 NA-1
Airway Heights, WA 99001

VIA REGULAR MAIL [X]
VIA CERTIFIED MAIL [ ]
VIA FACSIMILE [ ]
HAND DELIVERED [ ]

Dan Keefe
Keefe, Bowman & Bruya
221 N. Wall, Ste. 210
Spokane, WA 99201

VIA REGULAR MAIL [ ]
VIA CERTIFIED MAIL [ ]
VIA FACSIMILE [ ]
HAND DELIVERED [X]

10-8-13 / Spokane, WA
(Date/Place)

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

EXHIBIT A

Search Results

Retrieving Corporations Information...

Viewing 1 - 2 of 2 results for **"spokane eye clinic"**

- SPOKANE EYE CLINIC, P S

SPOKANE EYE CLINIC, P S

View Additional Information »
Purchase Documents for this Corporation »

UBI Number	600012071
Category	PRO
Profit/Nonprofit	Profit
Active/Inactive	Active
State of Incorporation	WA
WA Filing Date	09/30/1969
Expiration Date	09/30/2014
Inactive Date	
Duration	Perpetual

Registered Agent Information

Agent Name	ELEVEN-FOURTEEN INC
Address	U S BANK BLDG 422 W RIVERSIDE 1100
City	SPOKANE
State	WA
ZIP	99201

Special Address Information	
Address	
City	
State	
Zip	

- SPOKANE EYE CLINICAL RESEARCH, PLLC

« Start New Search

Search Apps on Mobile Devices

Available on the App Store | android market

All Corporations Data Download

Download the whole Corporations search database in XML format. Average file size is 70 Mb compressed, 750 Mb uncompressed.

EXHIBIT B

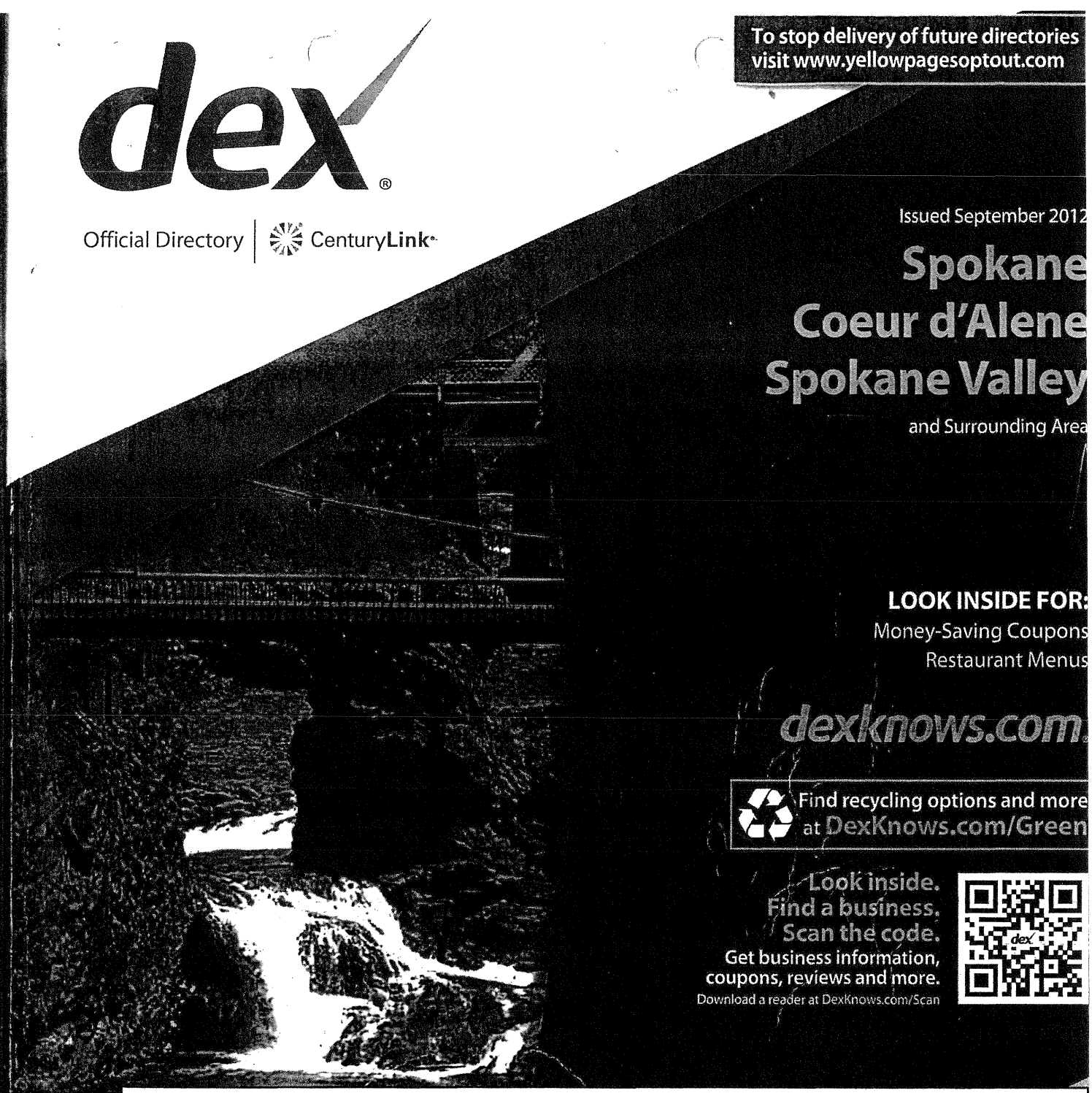
dex®

Official Directory | CenturyLink

Issued September 2012

Spokane
Coeur d'Alene
Spokane Valley

and Surrounding Area



LOOK INSIDE FOR:
Money-Saving Coupons
Restaurant Menus

dexknows.com

Find recycling options and more at DexKnows.com/Green

**Look inside.
Find a business.
Scan the code.**
Get business information, coupons, reviews and more.
Download a reader at DexKnows.com/Scan

Spokane County Head Start/ECEAP/Early Head Start 4410 N Market ---- 99207 533-8500
Spokane County Library District —
For Services Outside The City Of Spokane —
Library Branches —
Airway Heights 1213 S Lundstrom --- ARWY HTS 99001 893-8250
Argonne 4322 N Argonne Rd ---- 99212 893-8260
Cheney 610 First ---- CHNY 99004 893-8280
Deer Park 208 S Forest Av ---- DR PRK 99006 893-8300
Fairfield 305 E Main St ---- FRFLD 99012 893-8320
Medical Lake 321 E Herb ---- MDCL LK 99022 893-8330
Moran Prairie 6004 S Regal ---- 99223 893-8340
North Spokane 44 E Hawthorne Rd ---- 99218 893-8350
Otis Orchards 22324 E Wellesley ---- OTIS ORCH 99027 893-8390
Spokane Valley 12004 E Main Av ---- SPKN VLLY 99206 893-8400
Administration 4322 N Argonne Rd ---- 99212 893-8200
Airway Heights Branch
1213 S Lundstrom ---- ARWY HTS 99001 244-5510
Spokane County Medical Society 104 S Freya St -- 99202 325-5010
Spokane County Of ---- See Government Section
Spokane County Of Fire Protection District ---- 226-1482
Spokane County Of Fire Protection District ---- 226-5384
Spokane County Raceway 750 N Hayford Rd ---- 244-3333
Spokane County Sheriffs Office
Spokane County Sheriff's Office
See Government Section See Government Section

SPOKANE COUNTY TITLE COMPANY
1010 N Normandie Ste-100 St ---- 99201 **326-2626**
www.spokanetitle.com

Spokane County Water District #3
5221 E Desmet Ave ---- SPKN VLLY 99212 536-0121
Spokane Courier Services
320 W Sporford Ave Ste A ---- 99205 688-0125

SPOKANE CRANE AND MACHINERY MOVERS LLC
SPOKANE CRANE & MACHINERY MOVERS, LLC
Serving the Cascades to the Rockies
888-950-4850 • 509-981-6571
OZZIE MILLS, PRESIDENT
www.spokanecrane.com
Comm LLC's SPOKACRESSDH
276-4850

Spokane Custom Cabinets 5105 N Freya St ---- 99217 487-8416
Spokane Dairy Mart 2023 W Maxwell Ave ---- 99201 325-3069
Spokane Dance Company 2424 N Monroe ---- 99205 328-4717
Spokane Dental Clinic The —
Corner Of Central & Mayfair
5901 N Mayfair Suite 203 Spokane ---- 487-1270
Spokane Dental Emergency Center —
Corner Of Central & Mayfair
5904 N Mayfair Spokane Suite 203 ---- 487-1270

SPOKANE DERMATOLOGY
104 W 5th Ave ---- 99204 624-1184
104 W 5th Ave Ste 330 ---- 99204 **624-1184**
http://www.spokanederm.com

Spokane Diesel Pump Repair Inc
See Washington Injection Technology Inc XII
Spokane Diesel Pump Repair Inc
628 E Pacific Ave ---- 99202 838-3556

SPOKANE DIGESTIVE DISEASE CENTER PS—
Arnold N Cohen MD
Steven E Goodell
Steven W Hong
Michael F Kestell
Michael C Murphy
Michael D Dixson
David M Maccini
Karl R Houglum
Janette Worley ARNP
Sacred Heart Doctors Bg Suite 6010W ---- 838-5950
Deaconess Medical Bg ---- 747-5145

Spokane Discount
523 S Dishman Mica Rd ---- SPKN VLLY 99206 487-3386
Spokane Discount 6715 N Division St ---- 99208 467-8063
Spokane District Dental Society 202 E Pacific Ave - 99202 838-0436
Spokane Ditch & Cable Inc P O Box 6219 ---- 99217 483-1272
Spokane Dog Training Club Inc
2620 N Locust Rd ---- SPKN VLLY 99206 922-2645
Spokane Dog Waste Removal Service ---- 487-7667
Spokane Door Systems ---- 924-7643
Spokane Door And Window
3018 N Edgerton Rd ---- SPKN VLLY 99212 315-8920
Spokane Dream Center 2128 N Pines Rd - SPKN VLLY 99206 924-2630
Spokane Dream Center Resource Ctr
2128 N Pines Rd ---- SPKN VLLY 99206 926-7878
Spokane Dream Center Womens Discipleship
2005 W 4th Ave ---- 99201 536-6444
Spokane Driving School
14415 E Sprague Ave ---- SPKN VLLY 99216 927-2630
Spokane Driving School Inc 2727 N Division St ---- 99207 327-1900

Spokane Ear Nose & Throat Clinic —
217 W Cataldo Ave ---- 99201 624-2326
9922 N Nevada St ---- 99218 624-2326
13414 E Mission Ave ---- 99216 624-2326
Spokane Education Association
230 E Montgomery Ave ---- 99207 325-4503
Spokane Elite Dance Studio
10623 E Sprague Ave ---- SPKN VLLY 99206 891-5678
Spokane Elite Gymnastics
5615 E Broadway Ave ---- SPKN VLLY 99212 533-9646

SPOKANE ENDODONTICS PS
620 N Argonne Rd Rd ---- SPKN VLLY 99212 **928-8762**
Spokane Enhanced Health 10115 N Newport Hwy -- 99218 466-1188
Spokane Excercise Equipment Sales
530 W Main Ave ---- 99201 624-8726
Spokane Exercise Equipment ---- 483-5583
Spokane Eye Clinic ---- 483-9419

SPOKANE EYE CLINIC PS—
Stephen C Maher MD
Jerry E LeClaire MD
Jeffery M Snow MD
Steven E Day MD
Randall K Jacobson MD
Jason H Jones MD
F Jane Durcan MD
Erik D Skoog MD
Kelly M Moffatt OD
Nicholas T Ranson MD
Barbara A Smit MD PhD
Robert S Wirthlin MD
Alan M Johnson OD
Mitchell JV Maier OD
Jennifer J Pirie OD
Sheila A Wadhwa OD
Jeffrey D Colburn MD
Eric Guglielmo MD
Jeanine N Stolp
Appointments All Locations ---- 456-8121
Southside Clinic 427 S Bernard ---- 99204 456-0107
Valley Mission 12525 E Mission Av ---- 99216 924-7211
Northside Clinic 31 E Central Av ---- 99208 489-1270
Optical Departments —
Southside Optical 427 S Bernard St ---- 99204 838-2739
Northside Optical 31 E Central Av ---- 99208 489-1272
Valley Mission 12525 E Mission Av ---- 99216 924-3020
Spokane Eye Surgery Center —
427 S Bernard Suite 200 ---- 456-8150
HTTP://WWW.SPOKANEEYE.COM

Spokane Faith Center 3330 W Central Ave ---- 99205 327-9673

SPOKANE FALLS COMMUNITY COLLEGE
3410 W FORT GEORGE WRIGHT DR
SPOKANE
Information/Services —
College Switchboard ---- 533-3500
Out Of Area Number
Toll Free Dial 1 & Then ---- 888 509-7944
TTY Information (For Hearing & Speech Impaired)
---- 533-4886
Campus Security (24-Hour) ---- 475-7040

SPOKANE FALLS FAMILY CLINIC
120 W Mission AVE ---- 99201 **326-4343**

Spokane Falls Insurance —
South ---- 325-5300
Valley ---- 924-8300

SPOKANE FALLS INSURANCE
Spokane Falls Insurance
Your Full Service Agency
Saving You Up To 42% Or More
Secure Online Quotes
www.spokanefallsins.com
Valley (509) 924-8300 - Downtown/South (509) 325-5300
8607 N Division St Ste A ---- 99208 **465-8000**

Spokane Federal Credit Union —
Main Office 601 W Mallon Ave ---- 99201 328-2900
Northside Office 1212 W Francis ---- 99205 755-1350
Spokane Fencers Club ---- 891-1344
Spokane Fire Fighters Local 29
911 E Baldwin Ave ---- 99207 484-5598
Spokane Firefighter's Credit Union
2002 N Atlantic ---- 99205 484-5650
Spokane Fireplace And Home 27 W Boone Ave ---- 99201 326-7388
Spokane Fitness Center 110 W Price Ave ---- 99208 467-3488
Spokane Florist ---- 456-6066
Spokane Flowers
Toll Free Dial 1 & Then ---- 888 789-7673
Spokane Food Services 3123 E Bridgeport Ave ---- 99217 489-5531

SPOKANE FOOT CLINIC-FRANCIS
123 W Francis Ave ---- 99205 483-9363

Spokane Foot Clinic Number 2
606 N Pines Rd ---- SPKN VLLY 99206 921-0971
Spokane Foot Clinic PS 3151 E 29th Ave ---- 99223 535-3130
Spokane For Sale By Owner ---- 232-4663
Spokane Forest Products 400 S Jefferson St ---- 99204 777-1107

Spokane Friends Church 1612 W Dalke Ave ----
Spokane FSBO ----
Spokane Furniture Co 1901 N Division St ----
Spokane Furniture Co 107 E Holland Ave ----
SPOKANE GALVANIZING INC
2727 S Garfield Rd ---- ARWY HTS 9
Spokane Graphics And Glass ----
Spokane Guild School 2118 W Garland Ave ----
Spokane Guilds School 2118 W Garland Ave ----
Spokane Gun Club Inc
19615 E Sprague Ave ---- GRNACR
Spokane Gypsum And Lime Co
See Greenacres Gypsum And Lime Co
Spokane Hair & Body Lounge
1221 W Northwest Blvd ----

SPOKANE HARDWARE SUPPLY INC
Builder Hardware Speciali
Door Lo
& B
Commercial
SHS
www.spokanehardware.com • www.theha
2001 E Trent Ave ----

Spokane Health Insurance 421 W Riverside Ave ----
Spokane Heart Research Foundation ----
Spokane Home Builders 5813 E 4th Ave - SPKN VL
Spokane Home And Garden Show ----
Spokane Home Healthcare 1309 W 1st Ave ----
Spokane Home Program 610 S Sherman St ----
Spokane Homeopathic Clinic 2814 S Grant Blvd ----
Spokane Hope Christian Reformed Church ----
806 W Knox Ave ----
Spokane House Hotel Restaurant & Lounge ----
4301 W Sunset Blvd ----

SPOKANE HOUSE OF HOSE INC
5520 E Sprague Av ---- 99
http://www.spokanehose.com

Spokane House Of Hose Inc 5520 E Sprague Ave ----
Toll Free Dial 1 And Then ----
Spokane Housing Authority ----
55 W Mission Ave —
TDD
55 W Mission Ave ----
http://www.spokanehousing
Spokane Housing Ventures 1723 E Desmet ----
Spokane Housing Ventures 715 E Sprague Ave ----
Spokane Humane Society 6607 N Havana St ----
www.spokanehumanesociety.

Spokane Hyperbaric ----
13007 E Mission Ave ---- SPKN
Spokane Indian Housing Authority ---- TTY
6403 Sherwood Addition Rd ---- WL
Spokane Indians Baseball Club Avista Stad
Business Office 602 N Havana ----
Tickets Office 602 N Havana ----
Spokane Indicare Inc 3415 N Market St ----
Spokane Industrial Park ----
3808 N Sullivan Rd Bldg N-15 ----
Spokane Industrial Supply 5211 N Freya St ----
Spokane Industries Inc
3808 N Sullivan Rd BLDG 2 STE A ---- SPKN
Spokane Industries Inc
3808 N Sullivan Rd ---- SPKN
Spokane Industries Inc 3808 N Sullivan Rd ----

SPOKANE INTERNAL MEDICINE PS
Here W
You Ne
www.spokaneinternalme
1215 N Mcdonald Rd ---- SPKN VL

SPOKANE INTERNATIONAL AIRPO
Spokane International Airp
9000 W. Airport Drive, Spokane
ARRIVAL, DEPARTURE
Information www.spokanea
or Contact Airline Dir

Continued Next Page

Business

EXHIBIT C

Spokane County Sheriffs Office
Spokane County, Washington
Sheriff's Return of Service

State of Washington)
) ss
County of Spokane)

Sheriff Number: 2013/08-0017
Court Number: 13202619-2
Prosecutor/Records Number:

Plaintiff / Petitioner

CHARLIE Y CHENG

Defendant / Respondent

SPOKANE EYE CLINIC
JASON H JONES MD
ROBERT S WIRTHLIN MD

I, Ozzie D. Knezovich, Sheriff in and for said County and State, do hereby certify that on August 02, 2013 I received the following:

Summons; First Amendment Complaint

and that I served the same on August 07, 2013 at the hour of 01:44 PM within the County of Spokane, State of Washington as following:

Substitute

After diligent search and inquiry, was unable to find:

JASON H JONES MD

427 S BERNARD ST SPOKANE, WA 99204-2509

I served by delivering to and leaving with:
LISA WERNER, H.R.

personally, a person of suitable age and discretion, then resident therein at the house and usual abode of said:
JASON H JONES MD

Service	Fee
Copies	$45.00
Service 2	$70.00
Return	$45.00
Mileage	$20.00
Total:	$180.00

Ozzie D. Knezovich, Sheriff

Spokane County, Washington

By: J. Mitchell

Deputy Sheriff

Dated: AUG 15 2013

FOR USE ON OUT-OF-STATE OR FEDERAL SERVICE:

Subscribed and Sworn to before me this:

_____ day of _____

NOTARY PUBLIC in and for the State of Washington,

residing in Spokane. My commission expires: _____

PRIOR TO YOUR COURT DATE, THIS RETURN OF SERVICE MUST BE FILED IN THE COURT OF JURISDICTION WHERE YOUR CASE RESIDES!

Spokane County Sheriffs Office
Spokane County, Washington
Sheriff's Return of Service

State of Washington)
) ss
County of Spokane)

Sheriff Number: 2013/08-0017
Court Number: 13202619-2
Prosecutor/Records Number:

Plaintiff / Petitioner

CHARLIE Y CHENG

Defendant / Respondent

SPOKANE EYE CLINIC
JASON H JONES MD
ROBERT S WIRTHLIN MD

I, Ozzie D. Knezovich, Sheriff in and for said County and State, do hereby certify that on August 02, 2013 I received the following:

Summons; First Amendment Complaint

and that I served the same on August 13, 2013 at the hour of 12:38 PM within the County of Spokane, State of Washington as following:

Substitute

After diligent search and inquiry, was unable to find:

SPOKANE EYE CLINIC

MICHAEL D. CURRIN, R/A
422 W RIVERSIDE AVE STE 1100, SPOKANE, WA 99201-0302

I served by delivering to and leaving with:
ERIN HILL, Legal Assistant

personally, a person of suitable age and discretion, then resident therein at the house and usual abode of said:
SPOKANE EYE CLINIC

Service	Fee
Copies	$45.00
Service 2	$70.00
Return	$45.00
Mileage	$20.00
Total:	$180.00

Ozzie D. Knezovich, Sheriff

Spokane County, Washington

By: J. Mitchell

Deputy Sheriff

Dated: AUG 15 2013

FOR USE ON OUT-OF-STATE OR FEDERAL SERVICE:

Subscribed and Sworn to before me this:

_____ day of _____

NOTARY PUBLIC in and for the State of Washington,

residing in Spokane. My commission expires: _____

PRIOR TO YOUR COURT DATE, THIS RETURN OF SERVICE MUST BE FILED IN THE COURT OF JURISDICTION WHERE YOUR CASE RESIDES!