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.

BRIEF OF APPELLANT

Appeal from Spokane County Superior Court
Case No. 13-2-02619-2
The Honorable Maryann C. Moreno

CHARLIE Y. CHENG
Pro se Appellant

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Dated: **7/14/2014**

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I. INTRODUCTION

Appellant, Charlie Y. Cheng ("**CHENG**"), was a prison-patient when the alleged injury/damage – Respondent created eye pain, then used the pain as an excuse to removed CHENG's left eyeball -- was happening[1].

Respondent Jason H. Jones, M.D. ("**DR. JONES**") was a physician employed by Spokane Eye Clinic ("**SEC**") when the alleged 2010 damage – the Appellant's left eyeball was removed – happened [2]; Respondent Robert S. Wirthlin ("**DR. WIRTHLIN**") was a physician employed by Spokane Eye Clinic ("**SEC**") , Respondent, when the alleged 2010 injury and damage happened .[3]

The Respondents' service to the prisoner patient, the Appellant, during the incident time was under Agreement No. K8351 signed by the Respondent SEC and Washington State Department of Corrections ("DOC") on **8/5/2010**.[4]

II. ASSIGNMENT OF ERROR

Error No. 1: THE TRIAL COURT FAILED TO REQUIRE THE RESPONDENTS TO SHOW THE ABSENCE OF DISPUTED ISSUES OF FACT; AND THE COURT ERRED IN GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTIONS WITHOUT CONSIDERING THE EXISTENT GENUINE ISSUES OF MATERIAL FACTS ON THE RECORDS.

Error No. 2: THE TRIAL COURT ERRED IN DISMISSAL

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[1] INDEX page **78** (page 1 of "FIRST AMENDMENT COMPLAINT" (hereafter "**COMPLAINT**")), see its part II.3.

[2] INDEX page **80** (page 3 of the COMPLAINT, see its part 6).

[3] INDEX page **82** (page 5 of the COMPLAINT, see its part 7).

[4] INDEX page **79** (page 2 of the COMPLAINT, see its parts 5.1 & 5.2).

OF APPELLANT'S EIGHTH-AMENDMENT VIOLATION CLAIM BY IGNORING THE EXISTING EVIDENCE OF "*DELIBERATE INDIFFERENC TO APPELLANT'S 'SERIOUS MEDICAL NEED.*"

Error No. 3 THE TRIAL COURT ABUSED ITS DISCRETION BY ALTERING APPELLANT'S "STATUTORY VIOLATION" CLAIM TO AN IRRELEVANT "*MEDICAL MALPRACTICE*" ACTION; THEN MADE ITS RULINGS UPON AN IRRELEVANT MEDICAL-MALPRACTICE STANDARED.

Error No. 4 THE TRIAL COURT ERRED IN CONCLUDING "*SERVICE IS INSUFFICIENT*" BY SOLELY FOCUSING ON INRELEVENT **8/7/2013** AND **8/13/2013** SERVICE, BUT OMITTING THE INITIAL SERVICE ON **6/13/2013**.

Issues Pertaining To Assignment of Error

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 this* ***negligence*** *of his, the Plaintiff would not have*

been injured by the harmful effects of "Vit.Tap" ...)[5] (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?

III. STATEMENT OF THE CASE

A. Substantial Facts

1. DR. JONES PERFORMED VITREOUS TAP OPERATION WITHOUT OBTAINING APPELLANT'S CONSENT; THE OPERATION CAUSED SEVERE EYE-PAIN, RETINA DETACHMENT, RETINITES, CATARACT, AND MADE APPELLENT'S LEFT EYE COMPLETELY BLIND.

On **8/5/2010**, Appellant CHENG's left eye temporarily lost vision without having any pain.[6] He was transferred from Airway Heights Correction Center ("AHCC") to Spokane Eye Clinic ("SEC") for evaluation, where Dr. Jane Durcan found that CHENG's affected left eye was able to response to the "***blue & yellow color with using a penlight***."[7]

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[5] INDEX page 95 (page 18 of the COMPLAINT), see its part 34. in which the Appellant did not even mention the term "***medical malpractice***", as the trial judge alleged in her ruling.

[6] It has been documented on the top portion of the Spokane Eye Clinic (**SEC**) 8/5/2010 'Triage Exam' sheet (see INDEX page 105); See also the COMPLAINT, part 8.1 (see INDEX page 83).

[7] It had been documented on the upper left hand of SEC "Triage Exam" sheet (INDEX page 105), see the handwriting on its left hand.

Without Appellant CHENG's consent, Dr. Jones performed Vitreous Tap ("**Vit.Tap**") inside of the eyeball[8] -- an operation withdrew some vitreous from the affected eyeball into "*a 3 cc syringe*"[9]. After Vit.Tap operation, the affected-eye's function to response to the "*blue & yellow color with using a penlight*" was completely disappeared[10].

Besides, the Vit.Tap operation also caused "*vitreitis,*"[11] "*retinitis,*"[12] "loss of retinal neurons,"[13] "*retinal detachment*"[14] and "cataract."[15]

2. DR. JONES KNEW THE FACT THAT HE DID NOT DO THROUGH VITRECTOMY WHICH WAS APPELLANT'S SERIOUS NEEDS TO RESTORE THE VIRSON, BUT HE NEVER TRIED AGAIN FOR A 'CURE' PURPOSE.

(a) Dr. Durcan Recommended Virectomy

Dr. Jones stated, "*Dr. Durcan did an ultrasound , which demonstrate echogenic vitreous ... I was able to see an opaque vitreous, but there was no view of the retina;*"[16] "*Dr. Durcan referred the patient* (CHENG) *to me to evaluate for possible vitrectomy.*"[17]

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[8] Dr. Jones' 8/5/2010 surgery report, page 1. See INDEX page **134** (Ex. M).

[9] Citing page 2 of Dr. Jones' 8/5/2010 surgery repot. See INDEX page **134**, paragraph 2.

[10] See INDEX page **86** (page 9 of the COMPLAINT), part **17.1**.

[11] See INDEX page **87** (page 10 of the Complaint), part **17.2**.

[12] See INDEX page **87** (page 10 of the COMPLAINT), part **17.3**.

[13] See INDEX page **87** (page 10 of the COMPLAINT), part **17.4**.

[14] See INDEX page **87** (page 10 of the COMPLAINT), part **17.5**.

[15] See INDEX page **87** (page 10 of the COMPLAINT), part **17.6**.

[16] See INDEX page **133** (page 2 of Dr. Jones' 8/5/2010 surgery report),

[17] Citing Dr. Jones' **3/29/2013** letter to Department of Health investigator, page 2 (see INDEX page **121**), paragraph **3**.

(b) Dr. Jones Knew That Vitrectomy And Antibiotic Treatment Were Cheng's Serious Need For The Endophalmitis

Respondent Dr. Jones stated, "*with findings on the diagnostic ultra-sound performed by Dr. Durcan of an opaque material in the back of the chamber of the eye were all typical for bacterial endophalmitis.*"[18] Regarding how to treat the Appellant's "*bacterial endophalmitis*," the Respondent disclosed the standard of care, as:

> "*With a preoperative diagnosis of bacterial endophalmitis ... the recommended approach to attempt to salvage or to 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 INDEX page **121** (page 2 of Dr. Jones' **1/29/2013** letter to Department of Health investigator), paragraph 5.

(c) Dr. Jones Admitted His Vitrectomy Was Defective And Not For "Cure"

On **8/5/2010**, Respondent Dr. Jones admitted the fact that his vitrectory operation was defective: "*It was not possible to do through vitrectomy because of the extremely poor view.*"[19] On **1/29/2013**, he then disclosed a secret that his **8/5/2010** vitrectomy was not for "*cure*" purpose:

> "*I removed such vitreous as I thought ... that is not the Amount of vitreous that is* removed that will necessary *Result in a cure ...*"[20]

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[18] Citing Dr. Jones' **1/29/2013** letter to Department of Health investigator, page 2 (see INDEX page **121**), paragraph **4**.

[19] INDEX page **134** (page 2 of Dr. Jones' 8/5/2010 surgery report), see paragraph **2**. Dr. Jones did not persuade a second Vitrectomy after the 8/5/2010 defective vitrectomy.

[20] INDEX page **124** (page 6 of Dr. Jones' 1/29/13 letter). see paragraph **2**.

(d) Dr Jones Stopped Antibiotic Treatment After Appellant's 8/18/2010 Complaint.

At **8/18/2010** post-surgery check up, Appellant CHENG told Dr. Wirthlin, Respondent, that Dr. Jones' 8/5/2010 surgery caused his painful eye;[21] Dr. Wirthlin found the reason: there had been a piece of ***"large plaque"*** left over inside of CHENG's left eyeball after the **8/5/10** surgery.[22]

On or before **8/24/2010**, couple days after CHENG's 8/18/10 complaint against Dr. Jones, Dr. Jones decided to stop the necessary antibiotic treatment by referral CHENG to Dr. Ranson to have enucleation (to remove eyeball). See INDEX **91** (page 14 of the COMPLAINT), part **21.2**.

3. DR. WIRTHLIN COVERED UP DR. JONES' **8/5/2010** DEFECTIVE SURGERY BY ORDERING TO REMOVE THE ENTIRE PAINFUL EYEBALL.

Respondent Dr. Wirthlin diagnosed CHENG having "***endopthalmitis***".[23] -- Dr. Jones said that vitrectomy is "***recommended***" to treat endopthalmis,[24] -- but, Dr. Wirthlin did not operate a vitrectomy to treat

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[21] See INDEXT page **90** (page 13 of COMPLAINT), part **21.1.4**.

[22] INDEX page **90** (page 13 of COMPLAINT), part **21.1.2**.

[23] INDEX page **90** (page 13 of COMPLAINT), part **21.1.3**.

[24] Regarding the standard of care for CHENG's endopthalmits, Dr. Jones wrote, as: "*with a preoperative diagnosis of bacterial endophthalmitis ... the recommended approachto attempt to attempt to salvage or restore vision is removal of the vitreous fluid in affected eye through a vitrectomy.*" See INDEX page **121** (page 2 of Dr. Jones' **1/29/2013** letter to Department of Health investigator), paragraph 5.

CHENG's endopthalmitis, no had removed the "***large plaque***" from the affected vitreous fluid, but rather "ordered" to remove the entire eyeball (enucleation).[25]

4. THE EYEBALL WAS REMOVED AFTER CHENG'S **8/18/2010** COMPLAIN AGAINST DR. JONES' **8/5/2010** NEGLIGENCY,

Dr. Jones stated that "*institution of antibiotic treatment*" is necessary to treat CHENG's "*bacterial endopthalmitis*"[26]. After CHENG's **8/18/2010** complaint against his **8/5/10** defective surgery, Respondent Dr. Jones decided not continue the necessary antibiotic treatment by "recommending" to remove CHENG's entire eyeball.[27]

B. Procedural Facts

1. AFTER RECEIVING THE INITIAL COMPLAINT AND SUMMONS, DEFEFNDANTS DEMENDED APPELLANT TO FILE. THEN THEY ASKED FOR A 12-PERSON JURY.

On **6/13/2013**, the Respondents received the copies of Appellant CHENG's Summons (date d **6/12/2013**) with initial Complaint .

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[25] INDEX page **91** (page 14 of COMPLAINT), part **21.1.5**.

[26] Dr. Jones wrote, "*with a preoperative diagnosis of bacterial endophthalmitis ... the Recommended approachto attempt to attempt to salvage or restore vision is ... and the institution of antibiotic treatment ....*" See INDEX page **121** (page 2 of Dr. Jones' **1/29/2013** letter to Department of Health investigator), paragraph 5.

[27] See INDEX **91** (page 14 of the COMPLAINT), part **21.2.2**.

(dated **6/12/2013**)[28].

After receiving the **6/12/2013** Summons and Complaint, respondents did not claim that the **6/13/2013** service was insufficient, but demanded Appellant "*to pay the filing fee and file the Summons and Complaint.*"[29] On **7/30/2013**, the Respondents then asked for a 12-person jury and paid for **$250** for the jury fee. See INDEX page **349-350**

2. APPELLANT AMENDED HIS COMPLAINT

On **7/9/2013**, the AMENDED COMPLAINT (dated **7/3/2013**, see INDEX **78-167**) and "MOTION TO PERMIT SERVICE BY CERTIFIED MAIL TO RESPONDENTS" (dated 7/5/2013, see INDEX **168-69**) were filed[30]. On **8/7/2013** and **8/13/2013,** the copies of the

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[28] See INDEX **173-193** ("PROOF OF SERVICE – SUPPLEMENTAL"). (**Note**: The trial court's analysis of service has omitted this initial service dated **6/13/2013**.)

The fact that the Respondent had received the copies of **6/12/2013** Summons and Complaint – but did not dispute the **6/13/2013** service -- was reflected in defense attorney James B. King's **6/19/2013** letter. See INDEX **188**.

[29] Defense attorney James B. King's **6/19/2013** letter reads in part: "*Enclosed please find my Notice of Appearance on behalf of the Spokane Eye Clinic, Jason H. Jones, M.D. and Robert S. Wirthlin, M.D. Pursuant to CR 3(a), deemed is herewith made upon you to pay the filing fee and file the Summons and Complaint ... .*" See INDEX **188** (James B. King's 6/19/2013 letter to CHENG, Appellant).

[30] Thought Appellant's "MOTION TO PERMIT SERVIE BY CERTIFIED MAIL" was filed in the Superior Court a years ago, up today, 7/12/2014, the trial court has not made a ruling over it yet.

Amended Complaint ("COMPLAINT") were serviced to Respondents via Spokane County Sheriff's Office (see INDEX **351-59**)[31]

3. THE TRIAL COURT'S THREE (3) RULINGS ON THE FAVOR OF RESPONDENTS' SUMMARY JUDGMENT MOTIONS

On 11/22/2013, the trial court issued a letter ruling (INDEX **239-43**) on favor of the Respondents' Motions for Summary Judgment; Before it the trial court received Appellant's five (5) objections to Respondents' summary judgment motions. They are dated 10/23/2013 (INDEX **194-217**), 10/25/2013 (INDEX **218-231**), 11/4/203 (INDEX **232-235**), 11/14/2013 (INDEX **236-238**) and 11/22/2013 (INDEX **244-249**). On 12/20/2013, the Court issued two final Orders granting the Respondents' summary judgment motions (INDEX **273-277**).

IV. ARGUMENT

Standard of Review For Summary Judgment

The purpose of a summary judgment is to examine the sufficiency of the evidence behind the plaintiff's allegations in hope of avoiding necessary trial there is no genuine issue as to any material fact. *See* Zobrist v. Culp, 18 Wn.App. 622,

[31] The trial court's "*insufficient service*" ruling was solely based upon the 8/7/2013 and 8/13/2013 personal service by the Spokane County Sheriff – not the 6/13/2013 service.

637 (1977). An appellate court reviews a summary judgment order *de novo*, applying the same standard as the trial court. Hubbard v. Spokane County, 146 Wn.2d 699, 50 P.3d 602 (2002). "[*W*]*hen reviewing an order of summary judgment, this court considered the facts in the light most favorable to the nonmoving party*." Keithly v. Sanders, 170 Wn. App. 683, 686 (Div. 1 2012).

Summary Judgment Standard

Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, show there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56; Ross v. State Farm Mut. Auto. Ins. Co., 132 Wn.2d 507, 940 P.2d 252 (1997). "The judgment sought shall be rendered ... with the affidavits." CR 56(c).

"[*A*] *trial court must accept the truth of the nonmoving party's evidence and must view all reasonable inferences in the light most favorable to the nonmoving party*." Thomas v. James, 65 Wn.App. 255, 260 (Div. 3 1992).

"[I]f there are any genuine issue of material fact, summary judgment is not warranted." Tucson Woman's Clinic v. Eden, 379 F.3d 531, 538 (**9th Cir.** 2004).

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,

a. Undeniable Genuine Issues On the Record

The following genuine issues of material fact had been listed in the COMPLAINT, but was not denied by the respondents WITH rebutted evidence:

(1) The cause of damage (eyeball was removed):

(i) Respondent Dr. Jones had violated his statutory duty to obtain informed consent for Vitreous Tap ("**Vit.Tap**") inside of CHENG's left eyeball[32]; (ii) CHENG's post-surgery eye pain was the result of Dr. Jones' **8/5/2010** ***"Vit.Tap"***[33] ; *(iii) The post-surgery eye pain was controllable by medications*[34]; (iv) But, after CHENG's **8/18/2010** complaint against Respondent Dr. Jones that his **8/5/2010** eye surgery caught the Appellant's left-eye pain[35]; and after Dr. Wirthlin discovered that there had been a "***large plaque***" left over inside of CHENG's left eyeball after Dr. Jones' **8/5/2010** surgery[36], the Respondents stopped treating CHENG's bacterial "*endopthalmitis*" by recommending Dr.

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[32] *See* INDEX **86** (page **9** of the COMPLAINT), part **16.** **Note:** Appellant CHENG had pointed out that Dr. Jones' failure to secure informed consent was a violation of **RCW 7.70.050(1)**, but Dr. Jones did not explain why he did not violate the said law.

[33] See INDEX **88** (page **11** of the COMPLAINT), part **18.2**. Dr. Jones stated that the "Vit.Tap" he performed "is a recognized risk of the procedure." INDEX **86** (page 9 of the COMPLAINT), part **16.4**.

[34] On 8/18/2010, Respondent Dr. Wirthlin used "*painful eye*" as an excuse, "*Refer to Dr. Nick Ranson for enucleation* (to remove eyeball)". See INDEX **164**, its lower portion.

Dr. Wirthlin documented the fact: "*severe pain ... despite Torado ... and Oxycodone*" See INDEX **89** (page **12** of the COMPLAINT), part **19**. I.e., he has the knowledge that there is no need to stop Appellant's post-surgery eye pain by *enucleation* (remove the eyeball), because the post-surgery eye pain had been well controlled by medication.

[35] See INDEX **90** (page **13** of the COMPLAINT), part **21.1.4**.

[36] See INDEX **90** (page **13** of the COMPLAINT), part **21.1.2**. Note: Though Respondent Dr. Wirthlin had discovered the secret -- after Dr. Jones' 8/5/2010 eye surgery, there had been a "***large plaque***" left inside of CHENG's affected eyeball -- he did not disclose this material fact to the Appellant even though he has a statutory duty to do so under RCW 7.70.050(1)(a) ("*the health care provider failed to inform the patient of a material fact ... related to the treatment.*"). See INDEX **92** (page 15 of COMPLAINT) **n.23**.

Ranson (who is not a respondent) to remove CHENG's entire eyeball;[37] and (v) the Appellant's left eyeball was removed "*without legitimate medical reasons. BUT FOR RETALIATION.*"[38]

(2) Deliberate in difference to serious medical need

(i) Respondents knew that Appellant CHENG's left eye was suffering from "*bacterial endopthalmitis*"[39]; (ii) Dr. Jones' professional opinion was that an adequate Vitrectomy "*and the instruction of antibiotic treatment*" were CHENG's serious medical need to treat his "*bacterial endopthalmitis*" (see footnotes 24, 26 on page 6, supra), because they were "*recommended*" procedure to restore vision;[40] (iii) but, Dr. Jones did not follow the "*recommended approach to attempt to salvage or restore visions*", as he stated,[41] to perform an adequate vitrectomy even though he knew that the "*vitrectomy*" and "*antibiotic treatment*" were CHENG's serious medical need.[42]

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[37] See INDEX **96** (page **19** of the COMPLAINT), **n.27**. In response to the COMPLAINT, Respondents Dr. Jones and Dr. Wirthlin did not give the reason why a "painful eye" needed to be removed, nor had explained that why their decisions to remove the eyeball was happing after Appellant's complaint about Dr. Jones' 8/5/10 eye surgery.

[38] See INDEX **96** (page **19** of the COMPLAINT), part **41**; See also its **n.18**. Note: In defendants' response, they did not give legitimate medical reason – why not continue using medication to control the Appellant's post-surgery eye pain, but rather to remove it.

[39] On **8/5/2010**, Respondent Dr. Jones diagnosed that CHENG's affected left eye was suffering from "*bacterial endopthalmitis*". See INDEX **84** (page **7** of the COMPLAINT), part **10.1**. On **8/18/2010**, Deffendant Dr. Wirthlin also diagnosed that CHENG's affected left eye was suffering from "*endopthalmitis.*" See INDEX **90** (page **13** of the COMPLAINT), part **21.1.3.**

[40] See INDEX **121** (page 2 of Dr. Jones' 1/29/2013 letter to Department of Health investigator), paragraph 5.

[41] Citing page 2 of Dr. Jones' 1/29/2013 letter to Department of Health investigator), paragraph 5. See INDEX **121.**

[42] Respondent Dr. Jones' vitrectomy was defective. INDEX 85 (page 8 of COMPLAINT),

b. The Moving Party Must Establish That There Is No Genuine Issues of Any Material Fact

In Hallauer v. Certain, 19 Wn.App. 372, 575 P.2d 732 (1978) the Court of Appeals ruled as follows at page 375:

> *It is well settled that a party moving forsummary judgment must establish that thereis no genuine issue as to any material fact and that the undisputed facts require judgment in his favor.* (Emphasis added)

In Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 961 P.2d 358 (1998) the Court of Appeals ruled as follows at page 22-23:

> **CR 56 (c)** directs a court to grant summary judgment to a moving party "*if the pleadings, depositions, answers to interrogatories, and admission on file,* ***together with the affidavits****, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*" (emphasis added)

A material fact is one upon which the outcome of the litigation depends. *Ruffv. King County, 125* Wn.2d 697, 703, 887 P.2d 886 (1995). In Guile, the Court of Appeals set forth the requisite for defendant moving for summary judgment, as:

> The respondent can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. (Inter-citation omitted.) Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lack sufficient evidence to support its case. • •• However, **the moving part MUST identify those portion of the record, together with the affidavits**, if any, which he or she believes demonstrate

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see its part 13 ("Evidence of Dr. Jones' Vitrectomy was defective").

the absence of a genuine issue of material fact." (emphasis added) (inter-citation omitted)

See Guile v. Ballard Comnunity Hosp., 70 Wn.App. 18, at 21-22 (1993).

In applying of **CR 56(c)**[43] and above-mentioned case law, the Respondents (the moving party) (1) "*MUST identify those portions of the record*", and (2) MUST "*together with the affidavit*," when they asking for a Summary Judgment, but the Respondents failed to do so.

c. The Trial Court's Ruling is contrary to the Summary Judgment Standard

In reviewing a summary judgment motion, the appellate court stands in the same position as the trial court and must consider all of the evidence and reason-able inferences therefrom in the light most favor-able to the nonmoving party. Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 351, 779 P .2d 697 (1989). Orders granting summary judgment are subject to de novo review on appeal. Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 517, 210 P.3d 318 (2009).

All facts must be considered in the light most favorable to the nonmoving party and summary judgment can be granted only if, from all of the evidence, reasonable persons could reach but one conclusion. Vallandi-gham v. Clover Park School Dist. No. 400, 154 Wn.2d 16,26, 109 P.3d 805

[43] "*The judgment sought shall be rendered ... with the affidavits.*" **CR 56(c)**.

(2005); *See* also **CR 56(c).** Under this circumstances that the respondents' Motion for Summary Judgment only barely alleged that there is no genuine issue of material fact, but failed to "*identify those portions of the record, together with affidavit*" -- as the summary judgment law required – thus, this court erred in granting the Summary Judgment on favor of the moving party, the Respondents .[44]

In the Amended COMPLAINT (INDEX **78-167**), Appellant CHENG had submitted his evidence by providing the records of the Respondents' (see INDEX **99-167**) – they are undeniable, but all of the evidence were omitted by the trial court. "[*A*] *trial court **MUST** accept the truth of the nonmoving party's evidence and must view all reasonable inferences in the light most favorable to the nonmoving party.*" (emphasis added) Thomas v. James, 65 Wn.App. 255, 260 (Div. 3 1992). The trial court erred in granting the summary judgment when there are genuine issues of material fact existing.[45] Thus, the Summary Judgment is not proper – it must be reversed.

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[44] There is not one request from the trial court to require the moving party to establish the absence of disputed issues of fact even though the trial court had been advised by Appellant, as: "*The respondents's rrotion for summary judgment failed on the to basis that (1) they failedJ\challenge the material facts established in the COMPIAINT (e.g., CHENG's left eyeball was removed upon Dr. Jones's retaliation and post-surgery eye pain which was generated from Dr. Jones's 8/5/10 surgery) -- they actually omitted the genuine issue of material facts being presented in the COMPLAINT; And, (2) their "Declaration" dated 1 0/8/2013 was regarding the service process but -- The record is silent.*" See INDEX **212** (page **19** of PLAINTIFF'S RESPONSE and MOI'ION TO DISMISS SPOKANE EYE CLINIC'S AND JASON H. JONES'S MOI'ION FOR SUMMARY JUDGMENT), paragraph 1.

[45] "[I]f there are any genuine issue of material fact, summary judgment is not warranted." Tucson Woman's Clinic v. Eden, 379 F.3d 531, 538 (**9th Cir. 2004**). **Note**: The trial court's "ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL TO DEFENDANTS SPOKANE EYE CLINIC AND JASON H. JONES, M.D." even not

2. THE TRIAL COURT ERRED TO DISMISS APPELLANT'S "*EIGHTH AMENDMENT VIOLATION*" CLAIM BY INGNORING THE EVIDENCE OF DELIBERATE INDIFFERENT TO APPELLANT'S SERIOUS MEDICAL NEED.

On page 18 of the COMPLAINT (INDEX **95**), part **36**, Appellant CHENG accused,

> "*Dr. Jones' retaliation ... not only the 8th Amendment to the U.S. Constitution, but it is the proximate cause for the enucleation ... Accordingly, Respondent Dr. Jones s liable for Plaintiff's lost property: The left eyeball.*")

To prove the fact that without Respondent Dr. Jones' deliberate indifference to CHENG's serious medical need, CHENG's left eyeball would not have been removed, CHENG established in the COMPLAINT (IDEX **78- 167**):

a. **The Court knew the fact that Dr. Jones having the knowledge that vitrectomyand antibiotic treatment were CHENG's "serious medical need"**

The trial court should have known the material facts -- if they had read thorough the evidence being presented to the trial court with the COMPLAINT -- that the following material facts were undeniable because they were supported by evidence, and Respondent Dr. Jones had admitted in his documents: (i) "*Dr. Durcan referred the patient* (Appellant CHENG) *to me* (Dr. Jones) *to evaluate for possible vitrectomy;*"[46] (ii) Dr. Jones knew

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considered Appellant's COMPLAINT as its evidence. See INDEX **273-275**.

[46] INDEX **121** (page 2 of Dr. Jones' 1/29/2013 letter to Depart of Health investigator), paragraph **3**.

that the standard of care to treat CHENG's "*bacterial edopthalmitis*" was performing adequate vitrectomy and instruction of antibiotic, because they were "*the recommended approach to attempt to salvage or restore vision;*"[47] and (iii) Dr. Jones had the knowledge that CHENG had been suffering from "bacterial edopthalmitis" as CHENG was being under his care[48].

b. The Court had the knowledge that Dr. Jones was well known the standard of care to treat CHENG's edophalmitis, but Dr. Jones failed to follow it; And, Dr. Jones stopped the necessary antibiotic treatment after CHENG's 8/18/10 complaint against his defective surgery.

The trial court should have known the material facts -- if they had read thorough the evidence being presented to the trial court with the COMPLAINT -- that Respondent Dr. Jones had the knowledge of standard of care to treat Appellant CHENG's endopthalmitis (see n.**47**), but he neither perform an adequate vitrectomy[49], nor had continued the necessary antibiotic treatment[50].

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[47] Dr. Jones wrote, "*With a preoperative diagnosis of bacterial endopthalmitis ... 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 ...*" INDEX **121** (page 2 of Dr. Jone's 1/29/2013 letter), paragraph **5**.

[48] Regarding the bacterial endopthalmitis, Dr. Jones stated, "*after her history and physical, Dr. Durcan concluded that the patient likely had:an infectious endoplhalmitis.*" See INDEX **121** (page 2 of Dr. Jones' 1/29/13 letter), paragraph **3**. Dr. Jones also stated, "*my history and physical' exam of August 5th were consistent with the progressive onset of bacterial endopthalmitis in the left eye.*" Id. paragraph **4**.

[49] INDEX **85** (page 8 of the COMPLAINT), see its part 13 (evidence of Dr. Jones' vitrectomy was defective).

[50] On 8/18/2010, CHENG complained that Respondent Dr. Jones' 8/5/2010 surgery had caused his painful eye (INDEXT 90, *see* its part 21.1.4); then Dr. Jones decided to stop the necessary antibiotic by referring CHENG to Dr. Ranson for enucleationon (to

c. The trial court abused its discretion In concluding that CHENG "fails to provide evidence ... deliberate indifference" by ignoring the deliberate indifference evidence on the record.

The facts (supra) that Respondent Dr. Jones knowingly not performing an adequate vitrectomy and continuing of antibiotic treatment, which were Appellant's serious medical need to treat of his bacterial endopthalmits, are undeniable evidence of deliberate indifference. However, the trial court ignored it, then made a baseless conclusion, as: "*he fails to provide facts that would support an inference of deliberate indifference. Therefore, the § 1983 claim is dismissed.*"[51]

"*[A] court abuse its discretion when an 'order is manifestly unreasonable or based on untenable grounds.*" Washington Physician Insurance v. Fisons Corp. 122 Wn.2d 299, 339 (1993). The trial court's conclusion, "*he* (CHENG) *fails to provide facts that would support an inference of deliberate indifference,*" was not supported by evidence on the record, so it is "manifestly unreasonable or based on untenable grounds," Frison (supra).

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remove the eyball). See INDEX 91 (page 14 of the COMPLAINT), part **21.2.2**.

[51] INDEX **242** (page 4 of 11/22/2013 letter ruling), *see* its paragraph 2. The courts 11/22/2013 letter ruling was part of the Court's 12/20/2013 Order for Summary Judgment. which reads in part: "*The Court considered the following: ... and for the reasons set forth in the Court's Memorandum Opinion of November 22, 2013, ...*" See INDEX 273-74 (ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL TO DEFENDANTS SPOKANE EYE CLINIC AND JASON H. JONES, M.D.)

Thus, the Court's 12/20/2013 Order for Summary Judgment, which was made upon "untenable ground", must be revised for the interest of justice.

3. THE TRIAL COURT ERRED IN CHANGING APPELLANT'S '*NEGLIGENCE*' ISSUE TO A **NON-EXISTING** 'MEDICAL MALPRACTICE' ISSUE; THEN MADE ITS RULING UPON THE THE **IRRELEVANT** '*MALPRACTICE*' ISSUE.

On page 1 of the 11/22/2013 letter, which is the memorandum to support its 12/20/2013 two Summary Judgment Motions (INDEX 273-77), the trial Judge wrote:

> "Dear Sirs:
>
> I've had the opportunity to review the pleadings and the memoranda presented and heard oral argument on the defendants' motions for summary judgment. Several issues are raised as follows: 1. Lack of expert testimony to support the claims for **medical malpractice** ...
>
> Defendants Spokane Eye Clinic (SEC), Dr. Jason H. Jones (Dr. Jones) and Dr. Robert Wirthlin (Dr. Wirthlin) contend that summary judgment is proper here where the **plaintiff (Mr. Cheng) provides no expert testimony** ..."

Citing INDEX **239** (emphasis added). Here, the court disputed its discretion again because its "*medical malpractice*" argument was not based upon CHENG's argument – CHENG never raised the "medical malpractice" issue in his Amended Complaint (INDEX 78-167), -- but based upon "unreasonable grounds." *See* Washington Physician Insurance v. Fisons Corp. 122 Wn.2d at 339.

After the trial Court's 11/22/2013 letter ruling (INDEX 239-243), Appellant CHENG had pointed out the trial court's material error regarding the non-existing "*medical malpractice*" issue, as:

> *Plaintiff Cheng did not used the term "medical malpractice", as the Judge used in her 11/22/13 ruling, nor had alleged a medical malpractice in his Amended Complaint. Thus, the 11/22/13 ruling's statements regarding the non-existing "medical malpractice" -- such as "lack of expert testimony to support the claims for medical malpractice" on page 1* [of the 11/22/13 letter ruling], *"Medical malpractice claims require a showing that: ••• " on page 2* [of the 11/22/13 letter ruling] -- *is irrelevant with Cheng's action stated in the complaint. The ruling must be amended, otherwise Cheng will be prejudiced.*

Citing page 11 of Appellant's **11-29-2013** "CR 59 MJTION TO OPEN, AND TO AMEND OR ALTER RULING & MAKE ADDITIONAL FINDINGS".[52]

However, the trial Court's 12/20/2013 Summary Juegment Orders ignored this material fact – that Appellant CHENG never claimed "*medical malpractice*", -- but simply adopted the Respondents' irrelevant "*medical malpractice*" argument, then used it as the court's evidence in asking Appellant CHENG to provide expert opinion to support the non-existing "*medical malpractice*" action. Under the circumstances that the trial Court's 12/20/2013 Summary Judgment Orders was made upon "untenable grounds", a product of the trial court's abuse its discretion. Thus, the two Orders (INDEX 273-77) must be reversed. Fisons, 122 Wn.2d at 339.

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[52] INDEX **260**. See CHENG's argument under subtitle "NOT A' MEDICAL MALPRACTICE' ACTION."

4. WHEN MAKING 'SERVICE PCOCESS' RULING, THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING RULING UPON UNTENABLE GROUNDS; AND IT WAS ERRED IN OMITTING THE FIRST SERVICE ON **6/12/2013**; AND IT WAS ERRED IN RELYING UPON IRRELEVANT STATUTE.

a. Standard of Review

"[W]hen reviewing an order of summary judgment, this court considers the facts in the light most favorable to the nonmoving party." Keithly v. Sanders, 170 Wn.App 683, 686 (Div. 1 2012). In considering whether the plaintiff's serve is sufficient, "the dispositive issue is whether [plaintiff] Carras' efforts t serve Johnson satisfied the due diligence requirement of the substituted service statute RCW 46.64.010 as a matter of law. We conclude that they did and reverse." Carras v. Johnson, 77 Wn.App. 588, 589 (Div. 3 1995).

b. The trial court erred in omitting the record of due diligent service .

Providing immediate notice to the defendant is what the legislature has chosen as the appropriate method for satisfying the service process.[53]

[53] Keithly v. Standers, 170 Wn.App. 683, at 692 (2012).

Instant case, Appellant CHENG's due diligent service including: (i) in June 2013[54] and (ii) in August 2013.[55]

The trial court's 11/22/2013 letter ruling for Summary Judgment had ignored the signature first service in June 2013 -- which had never been objected by the Respondents Spokane Eye Clinic, Dr. Jason H. Jones and Dr. Robert S. Wirthlin[56], but only focused upon and irrelevant August-2013 service by Spokane County Sheriff's Office (INDEX 351-359). "[*A*] *trial court must accept the truth of the nonmoving party's evidence and must view all reasonable inferences in the light most favorable to the nonmov-ing party.*" Thomas v. James, 65 Wn.App. 255, 260 (Div. 3 1992). In applying this Court's *Thomas* standard, the trial court's 11/22/2013 "*insufficient service ruling*" cannot stand, because they (i) did not follow the common law (supra) to consider the non-moving party's evidence, and (ii) their anaylysis of the service process was relied upon an irrelevant August 2013 service.[57]

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[54] The first service was on 6/13/2013 to service the Sommons (dated 6/12/2013) with the initial Complaint (dated 6/12/2013). INDEX **173-193** (PROOF OF SERVICE – SUPPLEMENTAL with seven exhibits).

[55] See INDEX 351-359 (PROOF OF SERVICE with certificate from Spokane County Sherriff).

[56] The French Court held, "The defense of insufficient service of process is waived unless the party asserts it either in a responsive pleading or in a motion under CR 12(b)(5). CR 12(h)(1)(B)." French v. Gabrid, 116 Wn.2d 584, 587 (1991). Instant case, defendant Dr. Wirthlin did not challenge the "*insufficient service of process*" in his answers under oath; and Dr. Wirthlin's motion for Summary Judgment never asked the Court to make a ruling on the issue of "*insufficient service of process*" -- i.e., there is no legal basis for the trial court to make its conclusion over the issue whether the service to Defendant Wirthlin was "insufficient." In another words, the trial court abused its discretion in concluding that the service to Dr. Wirthlin was insufficient.

[57] The trial Court's 11/22/2013 analysis of the service process was only focused on the August-2013 service to Spokane Eye Clinic and Dr. Jones, not the signature June-2013 service to these two defendants. The trial judge wrote: "*On August 7, 2013, in an attempt to personally serve Dr. Jones, service of the summons and complaint was made upon Lisa Werner at 427 S. Bernard Street which is the location of the Spokane Eye Clinic. On August 13, 2013, SEC was served with process by serving a legal assistant for Michael Currin, at 422 W. Riverside Suite 1100. Personal service upon Dr. Jones*

c. **The trial court abused its discretion in making the baseless conclusion: *"Any attempt at service by mail fails."***

On page 5 of the trial court's 11/22/2013 letter ruling (INDEX **243**), the trial court concluded: "*Any attempt at service by mail fails.*" This conclusion is baseless, because the Court's prior argument on page 4-5 of its 11/22/13 letter ruling was nothing related to the alleged issue of "*attempt at service by mail*", but was regarding to the personal service by Spokane County Sheriff's Office (see INDEX **242-43**). Here the trial court abused its discretion – made ruling upon untenable grounds or for untenable reason[58] -- thus, its denial of Appellant's service process must be reversed. *See* Fisons, 122 Wn.2d at 339.

IN SUM, the trial court abused its discretion in its 12/20/2013 ruling and 11/22/2013 order to grant the Respondents' motions for Summary Judgment. The trial cored erred in denial Appellant's COMPLAINT by ignoring the existing genuine issues of material fact, and failed to concern the nonmoving party's undeniable evidence.

V. CONCLUSIONS

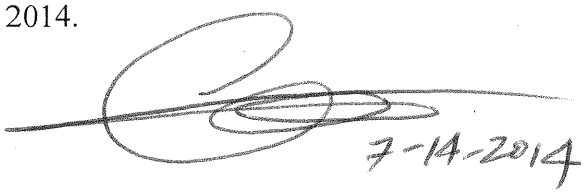
The trial courts 12/20/2013 "ORDER GRANTING SUMMARY JUDGEMENT OF DISMISAL TO DEFENDANTS SPOKANE EYE

..." (emphasis added) (see INDEX 242).

[58] In review the trial court's 11/22/2013 ruling to grant the Respondents's summary judgment motion, there is no clue why the trial court would have made this irrelevant conclusion – their argement was based upon the Spokane County Sheriff's personal service, but its conclusion was regarding to an unrelated "*service by mail.*"

CLINIC AND JONES, MD" and "ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL TO DEFENDANT WIRTHLIN MD'S MOTION FOR DISMISSAL OF ALL CLAIMS" must reversed, and allow the undisputed facts be tried by a jury.

Respectfully submitted on July 14, 2014.



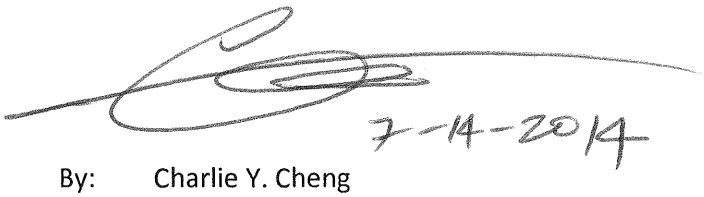
By: **Charlie Y. Cheng**
Appellant pro se

CERTIFICATE OF SERVICE

I, Charlie Y. Cheng, certify that on **7/14/2014**, I deposited the copy of this brief to defendants' attorneys: (1) **James B. King** (818 W. Riverside Ave, Ste 250, Spokane, WA 99201-0994), and (2) **Dan W. Keefe** (221 N Wall St. Ste 210, Spokane, WA 99201-0824) with USPS first class mail.

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

On this 14th day of July, 2014.



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