No. 321983

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

CHARLIE Y. CHENG

Appellant

vs.

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

Respondents

BRIEF OF RESPONDENT

ROBERT S. WIRTHLIN, MD

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1. Washington Practice; Washington Pattern Jury Instructions: Civil 15.01.01 at 183 (4th ed. 2002)

SUMMARY

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. The motion was based upon Appellant's failure to present evidence of genuine issues of material fact to support allegations of negligence, liability, causation and all other claims including requests for injunctive relief and punitive damages. CP 294-296, 297-305, 347-348, 330-339, 340-341, 342-346. Specifically, Respondent's Motion for Summary Judgment argued that Appellant failed to produce the requisite expert testimony to substantiate claims of (1) medical negligence, (2) proximate causation, and (3) lack of informed consent. Respondent also alleged that Appellant (4) failed to allege the elements of fraud with necessary particularity in its pleadings, and (5) failed to show that the particular medical procedures and treatment at issue were within the common understanding of a layperson sufficient to apply the doctrine of Res Ipsa Loquitor, and (6) failed to establish that any medical treatment was performed by state actor under authority of state law in order for the Civil Rights Act to apply. CP 294 – 296, 297-305, 347-348, 330-339, 340-341, 342-346.

In the underlying action, Appellant first became a patient of the Spokane Eye Clinic 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. He was subsequently treated by defendant ophthalmologist/retinal specialists Jason H. Jones, MD and Robert S. Wirthlin, MD, as well as others at the Spokane Eye Clinic. CP 330-339. As a result of the 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. CP 318-329.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the trial court properly granted Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's medical malpractice claims due to Appellant's failure to produce expert testimony in support of Appellant's medical malpractice claims.

(2) Whether the trial court properly granted Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's informed consent claims due to Appellant's failure to produce expert testimony to establish material facts relative to treatment as well as the risks, complications, benefits and alternatives to the proposed treatment.

(3) Whether the trial court properly granted Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's informed consent claims due to Appellant's failure to produce expert testimony to establish that Respondent's actions were a proximate cause of Appellant's injuries.

(4) Whether the trial court properly determined that the performance of a vicrectomy and post-surgical treatment was beyond the common understanding or experience of a layperson.
(5) Whether the trial court properly determined that the doctrine of Res Ipsa Loquitor did not apply in the present case.
(6) Whether the trial court granted Respondent 's CR 56 Summary Judgment Motion to Dismiss Appellant's claim for Fraud based upon Appellant's failure to plead Fraud with particularity in the Complaint or Amended Complaint.
(7) Whether the trial court abused its discretion by granting Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's Eight Amendment claim due to Appellant's failure to produce evidence beyond mere allegations that Respondent's acts or omissions were performed with deliberate indifference while acting under the authority of state law.
(8) Whether the trial court properly granted Respondent's CR 56 Summary Judgment Motion to Dismiss Appellant's claims for injunctive relief and punitive damages, due to Appellant's failure to establish that RCW 7.70 did not apply to preclude punitive damages, and Appellant's failure to produce evidence beyond mere allegations that Appellant would suffer irreparable injury to obtain injunctive relief.

COUNTERSTATEMENT 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. During the summary judgment hearing, Judge Maryann Moreno inquired of the Appellant whether he presently had an expert witness to offer the necessary testimony to support his claims, or whether he intended to engage an expert witness, and Appellant responded in the negative to both inquiries. CP 239-243. After hearing oral argument, reviewing pleadings

filed by all parties, Judge Moreno declined Appellant's Motion for Reconsideration and issued the Order dismissing Respondent Wirthlin on December 20, 2013. CP 276-277. Judge Moreno based her decision regarding Respondent Wirthlin on the following:

(1) The lack of expert testimony in support of Appellant's medical malpractice claim;
(2) The lack of expert testimony to establish Respondent's proximate causation of Appellant's injury;
(3) The lack of expert testimony in support of Appellant's informed consent claim;
(4) Appellant's failure to establish that the performance of a vicrectomy and post-surgical treatment is within the common understanding or experience of a layperson, and Appellant's inability to establish that the doctrine of Res Ipsa Loquitor is applicable to the present case;
(5) Appellant's failure to plead the elements of Fraud in his Complaint and Amended Complaint with the requisite particularity required under Washington law;
(6) Appellant's failure to produce facts to show that RCW 7.70 does not precludes punitive damages in a medical malpractice claim;
(7) Appellant's failure to produce facts to show that Respondent's acts or omissions were performed under authority of state law to substantiate an Eighth Amendment claim;
(8) Appellant's failure to produce facts to show that Respondent's acts or omissions were performed with deliberate indifference of Appellant's serious medical need to substantiate an Eighth Amendment claim; and
(9) Appellant's failure to produce facts to show that Appellant would suffer irreparable injury to necessitate injunctive relief in the present case.

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

STANDARD OF REVIEW

Washington Courts will engage in de novo review of a trial court's granted motion for summary judgment as a matter of law. *Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 530-31, 70 P.3d 126, 131 (2003). 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.

ARGUMENT

(1) **The Trial Court Properly Granted Respondent's Motion for Summary Judgment on the Issue of Medical Negligence because Appellant Failed to Offer the Necessary Expert Witness Testimony to Establish a Genuine Issue of Material Fact Demonstrating That Respondent Dr. Robert Wirthlin Deviated from the Required Standard of Care in Washington.**

In responding to Respondent's motion for summary judgment, Appellant was required to bring forth medical testimony to establish standard of care and proximate cause. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113, 118-19 (1983); *Bauer v. White*, 95 Wn. App. 663, 666-67, 976 P.2d 664, 666 (Div. III 1999). Appellant Cheng bore the burden to produce supporting affidavits from a medical practitioner familiar with the standard of care, and proximate causation to establish the necessary

elements of a prima facie case. *Shoberg v. Kelly*, 1 Wn. App. 673, 676-77, 463 P.2d 280, 282-83 (Div. I 1969) (Affirming a summary dismissal due to the plaintiff's failure to proffer medical testimony). Dr. Wirthlin could meet his burden as the moving party by either establishing the material facts through evidence and allege that there is no genuine issue as to the facts as set out or alternatively, Dr. Wirthlin could have met his burden by simply pointing out to the trial court that the non-moving party lacks sufficient evidence to support its case. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689, 692 (1993). In the latter situation, the moving party is not required to support its summary judgment motion with affidavits. *Guile*, 70 Wn. App. At 22; *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182, 187-188 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S.Ct. 2548, 2554 (1986)). Here, Dr. Wirthlin asserted that Appellant lacked the requisite expert testimony to support his allegations.

It is well settled law that expert testimony is required in malpractice cases where the plaintiff alleges that the defendant violated the standard of care. *Stone v. Sisters of Charity*, 2 Wash. App. 607, 611, 469 P.2d 229 (1970). In *Marthaller v. King Cty. Hosp.*, the Court of Appeals stated: "[t]o survive a defendant's motion for summary judgment in a medical malpractice claim, a plaintiff normally must establish with expert medical

testimony the appropriate standard of care and specific facts concerning a breach of that standard. *Marthaller*, 94 Wash. App. 911, 917, 973 P.2d 1098, 1101-1102 (1999). The necessary elements to establish a claim for the violation of the accepted standard of care to substantiate a medical malpractice action are set out in RCW 7.70.040, which provides in pertinent part:

> (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;
>
> RCW 7.70.040(1).

The Appellant failed to produce any expert testimony in the form of affidavits in response to Respondent's motion for summary judgment on the issue of medical negligence; Appellant failed to meet his burden to establish the appropriate standard of care for an ophthalmologist in the State of Washington, and whether the actions of the Respondent Dr. Wirthlin fell below the appropriate standard of care for an ophthalmologist in the State of Washington and therefore the trial court's dismissal of Appellant's medical malpractice claims as a matter of law should be affirmed. CP 239-243, 276-277, 330-339, 340-341, 347-348.

(2) Appellant failed to Produce Necessary Expert Testimony to Substantiate Material Facts regarding the Lack of Informed Consent Sufficient to Survive Respondent's Motion to Summary Judgment.

Under Washington law, Appellant was required to establish the following in order to assert a claim alleging Dr. Wirthlin's failure to secure informed consent:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
(b) That the patient consent to the treatment without being aware of or fully informed of such material fact or facts;
(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
(d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1).

A material fact is one to which "a reasonably prudent person in the position of the patient or his or her representative would attach significance." RCW 7.70.050(2). RCW 7.70.050(3) specifically provides that: "material facts under the provisions of this section which must be established by expert testimony shall be either:"

> (a) The nature and character of the treatment proposed and administered;
>
> (b) The anticipated results of the treatment proposed and administered;

> (c) The recognized possible alternative forms of treatment; or
>
> (d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including non-treatment.
>
> RCW 7.70.050(3).

Appellant was required to present expert testimony to prove the existence of a risk associated with the medical treatment he sought from Dr. Wirthlin, its probability of occurrence, and the harm which may result during the medical treatment in order to establish an informed consent claim. *Bays v. St. Luke's Hospital*, 63 Wn. App. 876, 881, 825 P.2d 319, 321-322 (1992). Appellant failed to produce the requisite expert testimony to the trial court in response to Respondent Wirthlin's Motion for Summary Judgment on the issue of Informed Consent, and specifically failed to establish via expert witness affidavits any material facts that may have made Respondent's efforts to obtain informed consent ineffective, and therefore the trial courts order dismissing Appellant's claims for lack of informed consent as a matter of law should be affirmed. CP 239-243, 276-277, 330-339, 340-341, 347-348.

(3) **Appellant failed to Present Necessary Expert Testimony Sufficient to establish that Respondent Dr. Robert Wirthlin's Actions Were the Proximate Cause of Plaintiff's Alleged Injuries.**

Dr. Wirthlin's proximate causation of Appellant's injuries is a necessary element of a prima facie claim for both medical negligence and failure to obtain informed consent in Washington, and it requires expert testimony to establish that "(1) the cause produced the injury in a direct sequence, and (2) the injury would not have happened in the absence of the cause." Washington Practice; Washington Pattern Jury Instructions: Civil 15.01.01 at 183 (4th ed. 2002); *McLaughlin v. Cooke*, 112 Wn.2d 829, 837, 774 P.2d 1171, 1175; *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210, 213 (Div. III 2001); *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348, 3 P.3d 211, 215 (Div. II 2000). RCW 7.70.040 (2) and (4)(d) required Appellant Cheng to show that Dr. Wirthlin's breach of the standard of care and/or Dr. Wirthlin's failure to obtain informed consent was the proximate cause of Appellant's injury. RCW 7.70.040 (2) and (4)(d). Appellant Cheng produced nothing more than layperson assertions. CP 239-243, 276-277, 330-339, 340-341, 347-348. Summary judgment is appropriate where evidence rising above speculation, conjecture or possibility has been presented to allow a reasonable person to infer from the facts, circumstances and medical

testimony that there is a causal connection between the acts or omission and the injuries, and that the medical testimony presented by Appellant demonstrates that the alleged negligence was "more likely than not" causally connected to the injury. *McLaughlin* 112 Wn. 2d at 837; *Colwell* 104 Wn. App. at 611; *Shellenbarger,* 101 Wn. App. at 348; *Davis*, 149 Wn. 2d at 531.

The Appellant failed to produce expert testimony in the form of affidavits in response to Respondent's motion for summary judgment on the issue of medical negligence or informed consent, specifically neglecting to produce expert testimony regarding the element of proximate causation; Appellant failed to meet his burden to establish whether any breach of the standard of care, or any failure to obtain informed consent produced the injury suffered in a direct sequence, or whether the injury suffered by Appellant would not have occurred in the absence of Respondent's actions, and therefore the trial court's decision to dismiss Appellant's medical malpractice and informed consent claims as a matter of law should be affirmed. CP 239-243, 276-277, 330-339, 340-341, 347-348.

(4) **Summary Judgment was Appropriate to Dismiss Appellant's Claims for Punitive Damages.**

In Washington, punitive damages are not allowed unless expressly authorized by the legislature. *Barr v. Interbay Citizens Bank,* 96 Wn.2d 692, 699, 635 P.2d 441, 444 (1981); *Kennewick Educ. Ass'n v. School Dist. 17,* 35 Wn. App. 280, 282, 666 P.2d 928, 930 (1983). RCW 7.70 et seq., does not provide for punitive damages because the measure of typical damages in a tort action are only intended to compensate the injured person for the loss suffered or the injury sustained as a direct, natural and proximate consequence of the wrongful act or omission. *Puget Power v. Strong,* 117 Wn.2d 400, 403, 816 P.2d 716, 717 (1991). Appellant Cheng failed to establish an exception to the limitations imposed by RCW 7.70 et. seq., regarding punitive damages, and therefore the trial court did not abuse its discretion by denying Appellants claims for punitive damages as a matter of law. CP 239-243, 276-277, 330-339, 340-341, 347-348.

(5) **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. Wirthlin's summary judgment motion with evidence that Dr. Wirthlin had actual knowledge of a serious medical need that posed an excessive risk to Cheng's health, or that Dr. Wirthlin 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.

Conclusion:

For the reasons explained above, the trial court's decision to grant Respondent's Motion to Summary Judgment dismissing claims against Dr. Wirthlin should be affirmed.

Respectfully submitted this 15 day of August, 2014.

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Attorneys for Respondent Wirthlin, MD

By: _____
Edward J. Bruya, WSBA# 32770

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that, on the 15th day of August, 2014, I caused a true and correct copy of the foregoing document, "Brief of Respondent Roberts S. Wirthlin, MD" to be delivered in the manner indicated below to the following counsel of record:

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DATED this 15th day of August, 2014, at Spokane, Wasington.

Carol L. Myers

Carol Myers, Legal Assistant