SUPREME COURT NO. 92164-4
COURT OF APPEALS NO. 321274-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL CHIOFAR GUMMO BEAR,

Petitioner,

v.

MICHAEL UNDERWOOD,

Respondent.

ANSWER TO PETITION FOR REVIEW

Sam B. Franklin, WSBA No. 1903
Sarah L. Lee, WSBA No. 27364
Of Attorneys for Respondent

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Other Authority

I. IDENTITY OF PETITIONER

Defendant-respondent, Michael Underwood, asks that this Court deny the Petition for Review by plaintiff-petitioner, Michael Chiofar Gummo Bear.

II. CITATION TO COURT OF APPEALS DECISION

Bear v. State, et al., 187 Wn. App. 1035 (2015) (unpublished).

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny plaintiffs-petitioner Michael Chiofar Gummo Bear's Petition for Review, where:

1. The Court of Appeals' decision does not conflict with any other reported Washington decision that would warrant review under RAP 13.4(b)(1) or (2);
2. The Court of Appeals' decision is unpublished and therefore has no precedential value;
3. Mr. Bear fails to identify or substantiate any significant question of constitutional law that would warrant review under RAP 13.4(b)(3);
4. This case presents no substantial public interest under RAP 13.4(b)(4), because the present dispute involves no one but the parties to this action and will not recur; and
5. The Court of Appeals' decision was correct on its merits.

IV. STATEMENT OF THE CASE

Mr. Bear sued his public defender, Mr. Underwood, for allegedly negligently defending him in a 2008 prosecution for felony harassment concerning a threatening phone call Mr. Bear made to a judicial assistant in the Pierce County Superior Court. CP 110. On November 19, 2009, the State ultimately dismissed that Pierce County charge on November 19, 2009. CP 221.

On February 19, 2010, Mr. Bear, *pro se*, filed his complaint in this action under cause number 10-2-06657-3. Mr. Underwood was one of several defendants named in complaint who Mr. Bear alleged had committed malpractice. CP 3-9. On April 2, 2010, the case was removed to United States District Court for the Western District of Washington at Tacoma. CP 239. On September 9, 2010, Judge Benjamin Settle entered an "Order Granting Request for Appointment of Guardian Ad Litem." CP 267. John O' Melveny was appointed as guardian ad litem and was ordered to submit a report concerning how the lawsuit should proceed to serve Mr. Bear's best interests. CP 267. On February 4, 2011, Mr. O'Melveny filed his report that the only viable claim Mr. Bear might have was the tort claim against Mr. Underwood because of factual questions concerning Mr. Underwood's representation. CP 292.

On March 24, 2011, Judge Settle entered an Order of Dismissal and Remand in accord with the recommendations of O'Melveny's report. CP 294-301. All claims against all defendants were dismissed, with the exception of the malpractice claim against Mr. Underwood which, was remanded to Pierce County. CP 301.

On April 7, 2011, Mr. Bear, *pro se*, appealed Judge Settle's order to the Ninth Circuit Court of Appeals, arguing that O'Melveny did not meet his obligations as guardian ad litem and requesting appointment of counsel. CP 303-13.

While the Ninth Circuit Appeal was pending, on May 23, 2011, Mr. Bear, *pro se*, filed an "Amended Complaint" in Pierce County Superior Court, alleging that Mr. Underwood committed legal malpractice. CP 105-07. The Declaration of Mailing by Mr. Bear stated that Mr. Underwood was mailed a copy of the Amended Complaint at Suite 101, 2120 State Avenue NE, Olympia, WA 98506. CP 337-39. This was the business mailing address for Mr. Underwood. CP 341. Mr. Underwood was not personally served. CP 90.

On June 20, 2013, the Ninth Circuit affirmed the District Court's decision, holding that the District Court had not abused its discretion in denying Mr. Bear's motion for appointment of counsel and that Bear's argument concerning O'Melveny were unpersuasive. CP 33-35.

On July 31, 2013, more than two years following the filing of Mr. Bear's amended complaint, Mr. Underwood moved for summary judgment on the basis that Mr. Bear had not served process as required by RCW 4.28.080 and CR 4 and the three-year statute of limitations for a legal-malpractice action had run. CP 78-98. Mr. Underwood argued that Mr. Bear's malpractice claim accrued at the latest on November 19, 2009, when the criminal harassment charge was dismissed and that the three-year limitations period expired on November 19, 2012. CP 78-98.

On September 16, 2013, Mr. Bear filed a response to Mr. Underwood's motion for summary judgment, which asked for a continuance and asserted he had no guardian ad litem at that time and that he expected that a guardian ad litem would be appointed by the court in King County for investigation of a guardianship under RCW 4.08.060. Mr. Bear did not respond to the service-of-process issue. CP 432-44.

The superior court granted summary judgment in favor of Mr. Underwood and dismissed Mr. Bear's legal-malpractice claim against Mr. Underwood. CP 407-410. Mr. Bear, *pro se*, appealed the trial court's dismissal of his legal malpractice action against Michael Underwood to the Court of Appeals, Division III on April 14, 2014.

On May 26, 2015, the Court of Appeals affirmed the trial's court's dismissal of Mr. Gummo Bear's legal-malpractice claim in an unpublished

opinion, *Bear v. State, et al.*, 187 Wn. App. 1035 (2015). The Court of Appeals found that many of Mr. Bear's own *pro se* submissions demonstrated that he is an intelligent person and that he is more capable than many *pro se* parties in some of his legal reasoning, even if his lack of education and experience together with his mental health issues make him a poor judge of which claims are worthy of pursuit. The Court of Appeals also considered other court orders from King and Thurston Superior courts finding Mr. Bear a vexatious litigant. Mr. Bear had filed 15 lawsuits in King County since 2005, and all 15 had been dismissed with prejudice as having no merit. CP 172.

In addition, the trial court on summary judgment was not presented with any motion for appointment of a guardian ad litem, and there was no manifest indication that Mr. Bear was in need of appointment of a guardian ad litem. The Court of Appeals held the trial court did not abuse its discretion in failing to appoint a guardian ad litem sua sponte.

Finally, the Court of Appeals held the trial court did not abuse its discretion to deny Mr. Bear a CR 56(f) continuance. The Court of Appeals held that Mr. Bear did not raise the defense of equitable tolling with the trial court, identify evidence supporting the defense, and explain why only a guardian of his person would be able to gather and present such evidence.

On June 15, 2015 Mr. Gummo Bear *pro se* filed a motion for reconsideration of the Court of Appeals May 26, 2015 decision. On July 28, 2015, the court filed an Order Denying Motion for Reconsideration. On August 25, 2015, Mr. Gummo Bear *pro se* filed his Petition for Review, which was filed in this Court on September 1, 2015.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Mr. Bear fails to establish any basis under RAP 13.4 for this Court to accept review.

Mr. Bear's Petition for Review does not present a proper basis for review by this Court under RAP 13.4 (b) (1)-(4). Under that rule, this Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Furthermore, nothing in RAP 13.4 or in Washington law entitles Mr. Bear to review by this Court simply because he disagrees with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for

> review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

Mr. Bear asserts that all four criteria for Supreme Court review, RAP 13.4(b)(1)-(4), apply here, but he fails to explain how or why any of those four criteria fit the present case. They do not.

Mr. Bear bases his Petition for Review on the Court of Appeals' unpublished decision. Because the Court of Appeals' decision is unpublished, it has no precedential value. RCW 2.06.040. Washington law has long held that unpublished opinions do not have precedential value. *State v. Fitzpatrick*, 5 Wn. App. 661, 668, 491 P.2d 262, (1971). Unpublished opinions of the Court of Appeals will not be considered in the Court of Appeals and should not be considered in the trial courts. *Id.* They do not become a part of the common law of the State of Washington.

If the trial courts were to consider them, it not only would waste their time but also would permit any group of lawyers to collect such opinions and create an unfair advantage by citing cases not available to their opponents. *Id.* "Unpublished opinions ... should not be cited or relied upon in any manner." *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701, *rev. denied* 144 Wn.2d 1021, 34 P.3d 1232 (2001) (citing RAP 10.4(h)).

Washington courts strongly discourage citing unpublished cases, and sanctions can be imposed on those that do. In *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519-20, 108 P. 3d 1273, 1278 (2005,) the court admonished Allstate for its use of citing unpublished opinions to the trial court in the guise of "non-controlling authority." The court held, "We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court." *Id.*

The Court of Appeals' Decision here has no precedential value. Therefore, there is no possibility that the Court of Appeals' Decision creates supposedly bad precedent, because it is not precedent at all.

B. Plain language of RCW 4.28.080 specifies requirements of Service of Process.

Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011) (citation omitted). Service of process

is sufficient only if it satisfies the minimum requirements of due process and the requirements set forth by statute. *Powell v. Sphere Drake Ins. PLC*, 97 Wn. App. 890, 999, 988 P.2d 12 (1999).

The applicable statute, RCW 4.28.080, provides in relevant part:

> Service made in the modes provided in this section **shall** be taken and held to be personal service. The **summons shall** be served by delivering a copy thereof, as follows:
>
> ...
>
> (15) In all other cases, **to the defendant personally**, or by leaving a copy of the summons **at the house of his or her usual abode** with some person of suitable age and discretion then resident therein.
>
> (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person served at his or her usual mailing address. For the purposes of this subsection, **"usual mailing address" does not include** a United States postal service post office box or **the person's place of employment.**

(Emphasis added.)

Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004) (citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-

64, 977 P.2d 554 (1999)). Unless clear contrary legislative intent exists, the word "shall" in a statute is a mandatory directive. *Kabbae v. Dep't of Social & Health Servs.*, 144 Wn. App. 432, 441, 192 P.3d 903 (2008).

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 (1996). If a trial court has not acquired jurisdiction over a defendant, that defendant is entitled to immediate dismissal. *See Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970) (citation omitted).

Mr. Bear acting *pro se*, timely filed his initial complaint on February 19, 2010 and timely filed his amended complaint on May 23, 2011 in the trial court following the remand from U.S. District Court. Mr. Bear had until November 19, 2012 to effect proper service of process on Mr. Underwood so that the trial court could acquire jurisdiction. Despite the plain language of RCW 4.28.080 directing methods of service and warning what did not constitute proper service, Mr. Bear simply did not serve Mr. Underwood in the manner the statute directs so as to effect proper service. This is a mistake that attorneys as well as pro se plaintiffs sometimes make that has harsh results and fatal consequences for the action. Mr. Bear failed to address the failure to effect proper service of Mr. Underwood before either the trial court or the Court of Appeals. Because of the statutory mandate, the trial court properly dismissed

Mr. Bear's action, and the Court of Appeals properly affirmed the dismissal.

C. Mr. Bear's actions demonstrated comprehension of legal process.

Mental competency is presumed; order to establish mental incompetency, the evidence must be clear, cogent, and convincing. *Binder v. Binder*, 50 Wn.2d 142, 148-49, 309 P.2d 1050 (1957) (citing *Tecklenburg v. Wash. Gas & Electric Co.*, 40 Wn.2d 141, 241, P.2d 1172, 1174 (1952).

Courts can appoint guardians ad litem for parties litigant when reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceeding and the effect and relationship of such proceedings in terms of the best interest of such party litigant. *Graham v. Graham*, 40 Wn.2d 64, 66-67, 240 P.2d 564 (1952).

Mr. Bear has asserted that the statute of limitations applicable in his case could have been tolled under RCW 4.16.190 or under equity principles so that the trial court sua sponte could appoint a guardian ad litem to assist his alleged tolling defense. Mr. Bear's petition for review should be denied because his assertion is incorrect in law and in fact.

On July 8, 2008 the trial court presiding over the underlying felony harassment charge entered an Order for Examination by Western State Hospital (15 Day Evaluation) to determine Mr. Bear's capacity to

understand the proceedings and to assist in his own defense of the charge. Judge Ronald E. Culpepper signed the Order. CP 135-139. On August 20, 2008, the trial court had reviewed the report of Barry Ward, Psy. D., Licensed Psychologist, dated August 13, 2008 and was satisfied that Mr. Bear was competent to understanding the proceedings against him, and to assist in his own defense. The court entered an Order Regarding Competency of Defendant finding Mr. Bear was competent to understand the criminal proceedings against him and to assist in his own defense. Judge Culpepper signed the Order. CP 141-42.

The court that presided over Mr. Bear's criminal proceedings was the same court that presided over his legal malpractice proceedings. CP 410-413. Judge Culpepper had actual knowledge of Mr. Bear's legal competency five years before the summary judgment argument, which arose out the same events in the underlying action. Moreover, there was no evidence presented by Mr. Bear at summary judgment concerning his lack of competency to comprehend the significance of the proceedings so that the court would be reasonably convinced that a GAL should be appointed. Accordingly, it was well within the trial court's sound discretion not to appoint a GAL. As the Court of Appeals noted, Mr. Bear's unique mental health issue related to litigation is not that he cannot comprehend legal proceedings but that is irrationally addicted to

bringing lawsuits. Only when incomprehension of legal proceedings by a party appears evident from the court's perspective would the trial court need to consider appointment of a GAL under RCW 4.08.060.

VI. CONCLUSION

Mr. Bear has entirely failed to meet any of the criteria of RAP 13.4(b) that would permit review by this Court. The Court of Appeals' decision affirming the trial court's decisions not to appoint a GAL and dismissing the action based on lack of service of process is consistent with prior decisions from other Courts of Appeals and this Court. Accordingly, this Court should deny Mr. Bear's petition for review.

Respectfully submitted this 8th day of October, 2015.

LEE SMART, P.S., INC.

By: _____
Sam B. Franklin, WSBA No. 1903
Sarah L. Lee, WSBA No. 27364
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Kimberly J. Paul, do declare that on October 8, 2015, I caused *Respondent Underwood's Answer to Petition for Review* to be delivered to the following:

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DATED this 8th day of October, 2015.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Kimberly J. Paul, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Kimberly J. Paul
Cc: Sarah L. Lee; Sam B. Franklin; gummobear@hotmail.com
Subject: RE: 92164-4; Bear v. Underwood - Answer to Petition for Review

Received on 10-08-2015

Supreme Court Clerk's Office

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Sent: Thursday, October 08, 2015 10:52 AM
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Subject: 92164-4; Bear v. Underwood - Answer to Petition for Review

Re: Case Name: *Michael Chiofar Gummo Bear v. Michael Underwood*
Supreme Court Cause No: 92164-4
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Attached please find the Answer to Petition for Review for filing in this matter. Please confirm receipt. Thank you.

Kimberly

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