NO. 321274-III

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

MICHAEL CHIOFAR GUMMO BEAR,

Appellant.

v.

MICHAEL UNDERWOOD,

Respondent.

BRIEF OF RESPONDENT MICHAEL UNDERWOOD

Sam B. Franklin, WSBA No. 1903
Michael P. Ryan, WSBA No. 33535
Of Attorneys for Respondent

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Table of Cases

Page(s)

Cases

Statutes

Rules and Regulations

I. INTRODUCTION

This is a legal-malpractice claim in which Michael Chiofar Gummo Bear ("Bear") as a *pro se* sued his public defender, Michael Underwood ("Underwood"). As part of the same suit, Bear also sued Washington State, various State entities, Pierce and King County, City of Seattle, and three other attorneys. All claims against other defendants were dismissed by the United States District Court for the Western District of Washington, and the Ninth Circuit Court of Appeals later affirmed that decision.

Underwood was never served with process; Bear attempted to mail process to Underwood's business address. Bear's claim against Underwood was dismissed in Pierce County Superior Court on summary judgment due to his failure to serve Underwood with the summons and complaint.

Moreover, Bear is no stranger to litigation; a search of the Washington Court's website and Federal Pacer website has found a total of 210 cases where Bear is listed as a party.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Underwood assigns no error to the trial court's decision.

Assignments of Error

Underwood disagrees with Bear's statement of the issues on appeal, which Underwood believes are more correctly stated as follows:

(1) Whether the trial court properly granted summary judgment in Underwood's favor where Bear:

(i) Failed to timely respond to Underwood's motion for summary judgment;

(ii) Failed to present any evidence that Underwood was served with process; and

(iii) Failed to offer any legal authority in opposition to Underwood's motion for summary judgment.

(2) Whether the trial court committed an abuse of discretion in refusing Bear's request to appoint a guardian for Bear under RCW 4.08.060 where Bear:

(i) Has been a party litigant in 210 cases in Washington State;

(ii) Has sued his former court appointed guardians and attorneys as a *pro se*;

(iii) Was declared a vexatious litigant in King County in 2008 and in Thurston County in 2010 due to his numerous *pro se* suits;

(iv) Filed a *pro se* Complaint with the statement, "We reserve rights to have professional counsel amend this suit"; and

(v) Understands the significance of his legal actions.

III. STATEMENT OF THE CASE

A. Underwood was Bear's public defender on a felony harassment charge in Pierce County.

On June 6, 2008, Underwood was appointed Bear's public defender in Pierce County Cause No. 08-1-02447-6. CP 117. Bear was charged with felony harassment for phone calls to a Pierce County Judicial Assistant threatening a "Virginia Tech" type incident. CP 110. Bear entered an *Alford* plea on August 19, 2008, to an amended charge of gross misdemeanor harassment. CP 144-48. Bear stated on the record, "I'm pleading because I want to go home today." CP 128-29. Seven days later, on August 26, 2008, Bear, *pro se*, filed a "Notice of Appeal and/or Motion for Reconsideration" based upon "My 'Newly-Found Freedom from Jail'". CP 157.

B. The Court of Appeals reversed Bear's conviction for harassment.

Bear's August 26, 2008, *pro se* motion based upon "Newly-Found Freedom from Jail" was treated as an appeal to Division II and attorney Valerie Marushige was appointed as appellate counsel. CP 212. Division II remanded to Pierce County and ordered that Bear be allowed to withdraw his plea. CP 214-16. The Mandate was issued October 20, 2009, and filed in Pierce County Superior Court on November 13, 2009.

CP 218-19. Pierce County dismissed the charge on November 19, 2009. CP 221. Bear, as a *pro se*, then sued Ms. Marushige for legal malpractice. CP 226-32.

C. The United States District Court Western District of Washington dismissed all claims against other defendants.

1. Bear filed a Complaint in Pierce County.

On February 19, 2010, Bear, *pro se*, filed "Complaint for Civil Right(s) & Due Process Violation Damages and for Equitable Relief" ("Complaint") in Pierce County Superior Court. CP 3-9. Named defendants were, Washington State, its superior court, COA-I Hon. Comm. Ellis, COA-II Hon. Comm. Schmidt, DSHS, DOC, DOL, Pierce County, King County, City of Seattle, and attorneys Michael Underwood, William Michelman, Valerie Marushige, and Larry Garrett. CP 3. Bear also filed a Summons with the Complaint. CP 1-2. The Complaint contains the statement: "We reserve the right to have professional counsel amend this suit." CP 9. On March 23, 2010, Bear filed, "Confirmation of Service(s) By Plaintiff Upon All Defendant(s) with a List of Notice(s) of Appearances for Each Named Defendant." CP 236-237. The attached declaration states an "agent(s) of the federal Postal Service" delivered letters with the summons and complaint; no address is stated for Mr. Underwood on the declaration of service. CP 237.

2. The case was removed to U.S. District Court.

On April 2, 2010, the case was removed to United States District Court Western District of Washington, Tacoma. CP 239. Bear, *pro se*, filed an "Amended Complaint [Supplement to Original Complaint]" on May 25, 2010, in Federal Court. CP 241 -56. The "Affidavit of Service" attached thereto indicates that a copy of the Amended Complaint [Supplement to Original Complaint]" was provided to each attorney of record, but no addresses are listed. CP 256. On June 29, 2010, United State District Court Judge Benjamin H. Settle issued an Order regarding Bear's "request for accommodations, application to proceed *in forma pauperis* and renewed application for Court appointed counsel." CP 258. The court denied Bear's request that depositions be taken in his own home, denied Bear's request to proceed *in forma pauperis*, and denied "Bear's renewed application for Court appointed counsel." CP 259.

Bear then filed "'Amended' Amended Complaint Motion to Join Party, United States of America" on June 30, 2010. CP 261-65. The attached "Affidavit of Service" states attorneys of record were provided a copy, but no addresses are provided. CP 263.

a. The U.S. District Court appointed a guardian ad litem for Bear.

On September 9, 2010, Judge Settle entered an "Order Granting Request for Appointment of Guardian Ad Litem." CP 267. "The purpose

of the guardian ad litem will be to advise Bear, and the Court, of how this lawsuit should proceed to serve Bear's best interests." CP 267. On September 23, 2010, attorney John O'Melveny was appointed as guardian ad litem and ordered to submit a report by November 5, 2010. CP 269-70. O'Melveny's report was filed with the court on February 4, 2010. CP 273-92. The germane portion of O'Melveny's report relating to Underwood is as follows:

> I do not believe that Mr. Underwood breached a duty to plaintiff in regards to not having a second bail hearing. I have reviewed the pleadings in this case, and note that a bail review hearing was in fact scheduled twice by Mr. Underwood. I also note that the plaintiff was sent to Western State Hospital to determine his competency. I do not think there is a necessary duty on the part of an attorney to have a bail review hearing simply because a client asks for it, nor do I feel that Mr. Underwood forced the defendant to plead guilty. The statement that he may have to stay in jail pending trial is an accurate statement.
>
> However, I do find that plaintiff may have a valid claim against Mr. Underwood. I do not know if Mr. Underwood interviewed the victim before the guilty pleas, nor do I know the details of any discussion between Mr. Underwood and the plaintiff regarding his plea of guilty and the element necessary to prove the crime. However, the fact that one of the necessary elements was missing should have been made known to the plaintiff prior to his guilty plea. It may very well be that these discussions took place and the plaintiff made an informed decision. However, based on the record that I have reviewed, I am not able to say that there is no question of fact. Therefore, I believe this aspect of the plaintiff's suit against Mr. Underwood should not be dismissed at this time.

> I do not feel there is a factual basis for a Section 1983 action, and ADA action, or WLAD action to proceed against Mr. Underwood, for the legal reasons stated in the above discussion of those actions.
>
> ...
>
> I conclude that the plaintiff has no claims against any defendant. ... The one exception of this is that plaintiff may have a tort claim against Mr. Underwood. This would be a factual question.

CP 286-88, 292.

On March 24, 2010, "Order of Dismissal and Remand" was entered in accord with the recommendation of O'Melveny's report. CP 294-301. All claims against all defendants were dismissed, with the exception of the malpractice claim against Underwood which was remanded to Pierce County. CP 301.

3. Bear appealed to the Ninth Circuit.

On April 7, 2011, Bear, *pro se*, filed an 11-page "Motion for Reconsideration," arguing that O'Melveny did not meet his obligations as a guardian ad litem. CP 303-13. The motion cited RCW provisions, case law, and court rules to support Bear's arguments why his claims should not have been dismissed on summary judgment. CP 303-313. Bear specifically argued that O'Melveny, "is supposed to be acting in the best interests of the plaintiff, and he is supposed to be interviewing the parties and getting information about the claim as the rules and statute requires[.]"

CP 309. Bear further argued that O'Melveny should have sought discovery from the City of Seattle and King County. CP 310.

On May 5, 2011, Bear filed "Motion to Proceed in Forma Pauperis," noting the motion for May 20, 2011. CP 315-16. An issue stated by Bear was "[w]hether the guardian ad litem fulfilled his duties to fairly present my defense by disclosing the evidence I had to defend against summary judgment." CP 315.

The Ninth Circuit treated Bear's motions as an appeal. CP 325. On May 6, 2011, the Ninth Circuit issued a Time Schedule Order. CP 325-26. On January 11, 2012, the Ninth Circuit denied Bear's motion for appointment of a guardian ad litem and for appointment of counsel and noted that briefing was complete. CP 328.

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

D. Bear filed an amended Complaint in Pierce County, alleging that Underwood had committed legal malpractice.

While the Ninth Circuit Appeal was pending, on May 23, 2011, Bear, *pro se*, filed, "Amended Complaint" in Pierce County, under cause

number 10-2-06657-3. CP 105-107. Bear's Amended Complaint alleged Underwood committed legal malpractice. CP 105-107. The Declaration of Mailing of Amended Complaint states Underwood was mailed a copy of the Amended Complaint at Suite 101, 2120 State Ave NE, Olympia, WA 98506. CP 337-39. This was the business mailing address for Underwood. CP 341.

E. Pierce County Superior Court dismissed Bear's Amended Complaint.

On July 31, 2013, Underwood filed a motion for summary judgment. CP 78-98. Bear filed "Response to Summary Judgment; Motion for Continuance" on September 16, 2013, which requested a continuance in order for a guardian ad litem to be appointed, citing RCW 4.08.060, and including a declaration from disbarred attorney John Scannell. CP 342-44. Counsel for Underwood was never served with Bear's response. CP 352-53. Underwood filed a Reply in support of his motion for summary judgment on September 18, 2013. CP 345-51.

On September 27, 2013, Pierce County Superior Court granted Underwood's Motion for Summary Judgment. CP 407-10. At oral argument, disbarred attorney John Scannell appeared as a person with power of attorney for Bear. CP 405, 408. The court held that Underwood

was never served with the summons and complaint and dismissed the case without fees or costs. CP 408.

Bear, *pro se*, filed "Notice of Appeal to Division 2 Court of Appeals" in Pierce County on October 25, 2013. CP 411.

F. Bear has been declared a vexatious litigant in King and Thurston Counties.

On October 14, 2008, the King County Superior Court entered an order in 06-2-26798-2 SEA noting that Bear had filed at least 15 frivolous lawsuits in King County since 2005. CP 172 -75. Attorney Larry Garrett was appointed a litigation guardian for Bear. CP 172-75. Bear was restrained from filing any lawsuits in King County unless a court appointed litigation guardian signed the Complaint per CR 11. CP 172-175. In 2010, Mr. Garrett was appointed litigation guardian for Bear in Thurston County Superior Court cause numbers 09-2-02878-2 and 09-2-02876-9. CP 177-180, 191-94.

Bear filed a bar Complaint against Mr. Garrett that was summarily dismissed in 2009. CP 206. Bear also sued Mr. Garrett in federal court in case number c13-5102; Bear's *pro se* suit was summarily dismissed on the Court's own motion on February 14, 2013. CP 208-10. Mr. Garrett was also a named defendant in Bear's Pierce County suit. CP 3.

IV. SUMMARY OF ARGUMENT

The Pierce County Superior Court properly granted Underwood's motion for summary judgment because the uncontroverted facts are that Underwood was never served. Bear mailed the summons and complaint to Underwood's business address, which is contrary to the plain language of Washington's service statute RCW 4.28.080. Therefore, the superior court had no jurisdiction over Underwood, and immediate dismissal was required.

Further, Bear never responded to Underwood's motion for summary judgment, therefore the facts are uncontroverted on appeal that Underwood was never served. Instead of offering a response, Bear requested a continuance of Underwood's motion for summary judgment and requested the superior court appoint a litigation guardian ad litem under RCW 4.08.060. The superior court properly denied Bear's requests, recognizing that Bear has extensive experience as a party litigant and is capable of understanding the significance of legal proceedings, and recognizing the request for what it really was: a request for court appointed counsel to litigate a civil matter. The superior court acted well within its sound discretion is denying Bear's requests contained in his untimely response to Underwood's motion for summary judgment.

V. ARGUMENT

A. The superior court properly granted Underwood's motion for summary judgment.

An appellate court reviews an order granting summary judgment *de novo*. *Green v. Am. Pharmaceutical Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). An appellate court may affirm a judgment for any reason supported by the record, even if the precise issue was not raised below. RAP 2.5(a); *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (citations omitted).

1. Bear failed to respond to Underwood's motion for summary judgment.

"Uncontroverted, relevant facts offered in support of summary judgment are deemed established." *Parrot Mech., Inc. v. Rude*, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003) (citations omitted). Underwood asserted he was never properly served. CP 78-98. Bear offered nothing to controvert Underwood's assertion. CP 342-44. As a result, the uncontroverted fact on appeal is Underwood was never served with process.

Whether a plaintiff properly served a defendant is a pure legal issued that cannot be presented to a jury and is thus appropriately resolved by the trial court. *See, e.g., Jackson v. Sacred Heard Med. Ctr.*, 153 Wn. App. 498, 500, 225 P.3d 1016 (2009). "[P]roper 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) (citations omitted). Underwood was never served; therefore, the superior court had no jurisdiction, and thus Underwood was entitled to immediate dismissal. *Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970) (citation omitted).

Underwood's motion for summary judgment was properly granted, and this court should affirm that ruling.

2. Bear failed to present any evidence that Underwood was served with process.

The uncontroverted facts in Underwood's motion for summary judgment were: Bear attempted to serve Underwood with process by mailing a copy of the Amended complaint filed on May 23, 2011, in Pierce County Superior Court (following the dismissal in Western District Court and while the case was on appeal to the Ninth Circuit) to Underwood's business address. CP 337-39, 41. The original complaint filed in Pierce County on February 19, 2010, was never served on Underwood. CP 237. The Amended Complaint filed in the Western District on May 25, 2010, was never served on Underwood. CP 256. The "Amended Amended" complaint of June 30, 2010, was never served on Underwood. CP 263.

Bear did not offer any evidence to the contrary. CP 342-44. As a result, the superior court correctly determined that Underwood was never served with process, therefore dismissal was required.

3. Bear failed to offer any legal authority in opposition to Underwood's motion for summary judgment.

Bear also failed to address any legal authority offered by Underwood in his motion for summary judgment that mailing process to Underwood's business address is ineffective to secure jurisdiction over Underwood. CP 342-44.

Likewise, Bear fails to assign any error to the trial court finding that Underwood was never properly served. App. Br. At 1. "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005), *review denied* 155 Wn.2d 1026, 126 P.3d 820 (citation omitted).

Assuming arguendo that Bear properly preserved for appeal the issue of whether Underwood was properly served, reasonable minds can reach but one conclusion: Underwood was never served, and therefore the superior court had no jurisdiction, and Underwood was entitled to immediate dismissal.

The purpose of summary judgment is to avoid useless trials on issues that cannot be factually supported, or, if factually supported, cannot, as a matter of law, lead to a result favorable to a non-moving party. *Burris v. General Ins. Co of America*, 16 Wn. App. 73, 553 P.2d 125 (1976).

"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, 899, 988 P.2d 12 (1999). "[B]eyond due process, statutory service requirements must be complied with in order for the court to finally adjudicate [a] dispute." *Farmer v. Davis*, 161 Wn. App. 420, 433, 250 P.3d 138 (2011) (citations omitted).

Statutory service requirement are stated in RCW 4.28.080, which provides:

> Service made in the modes provided in this section is 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 to be 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**.

RCW 4.28.080 (emphasis added).

Bear attempted to mail a copy of the summons and complaint to Underwood's business address. CP 337-39, 341. Underwood was not served with process under the plain language of RCW 4.28.080.

The superior court's ruling granting Underwood's motion for summary judgment was correct, and this court should affirm it.

B. The superior court acted well within its sound discretion in denying Bear's request for a litigation guardian ad litem under RCW 4.08.060.

"The court's determination of the need for a GAL under RCW 4.08.060 is reviewed for an abuse of discretion." *In re Marriage of Blakely*, 111 Wn. App. 351, 358, 44 P.3d 924 (2002). "The statute sets out no procedure for appointment of the GAL beyond application requirements." *Id.* If the alleged incapacitated person resists appointment of a GAL then the court must hold a hearing to allow the alleged incapacitated person to be heard. *Id., citing Graham v. Graham*, 40 Wn.2d 64, 68, 240 P.2d 564 (1952). The alleged incapacitated person is only guaranteed the opportunity to be heard if he or she resists

appointment of a GAL. *In re Marriage of Blakely*, 111 Wn. App. 351, 360, 44 P.3d 924 (2002), *citing Graham*, 40 Wn.2d at 68-69, 240 P.2d 564, *Vo v. Pham*, 81 Wn. App. 781, 786, 916 P.2d 462 (1996), *In re Welfare of Houts*, 7 Wn. App. 476, 481-82, 499 P.2d 1276 (1972).

Bear himself sought the appointment of a guardian ad litem; therefore, he was not guaranteed the opportunity to be heard. Further, the record before the superior court clearly demonstrated that Bear is not only capable of pursing a civil matter in superior court, but also fully aware of the significance of the legal proceedings therefore he is not incapacitated for purposes of RCW 4.08.060.

1. Bear has been a party litigant in 210 cases in Washington.

A search of the Washington courts' website and Federal Pacer website has shown a total of 210 cases to which Bear is a party. CP 83, 103. Bear selectively presents his mental condition to meet his needs. The sheer volume of cases indicates Bear understands how to initiate and pursue a lawsuit. Bear professes an inability to understand civil proceedings, but his history of initiating and pursuing lawsuits demonstrates otherwise.

2. Bear sued his former court appointed guardians and attorneys, as a *pro se*, on multiple occasions.

In the superior court matter, Bear, *pro se*, sued Ms. Marushige, the court appointed attorney whom handled Bear's appeal to Division II which ultimately led to Pierce County dismissing the charges. See, CP 3, 212, 221. Bear also named attorney William Michelman as a defendant; Bear privately retained Michelman to handle probation violations in the Pierce County criminal matter. CP 288-89. Once the probation violations were adjudicated and Bear was released from custody, Bear demanded that Michelman refund fees. CP 289. Michelman refused, and he later was named a defendant in the superior court matter with the other defendants. CP 3, 289. Mr. Garrett, who served as Bear's court appointed guardian ad litem in King and Thurston Counties, was the subject of a complaint by Bear to the Washington State Bar Association, CP 206, a federal suit initiated by Bear, CP 208-210, and the superior court matter that is the subject of this appeal. CP 3.

The common thread in all of these is that Bear, *pro se*, pursued legal action against his own court-appointed attorneys who he believes wronged him in some way. It demonstrates that he is capable of identifying a defendant, initiating an action against that defendant, and pursuing that action. The test for incapacity under RCW 4.08.060 is not

whether such suits are advisable or likely to succeed, but whether Bear understands what a civil action is and how to proceed with one. *See, generally, In re Marriage of Blakely*, 111 Wn. App. at 357- 60.

3. Bear has been declared a vexatious litigant in King and Thurston County due to his numerous *pro se* civil suits.

Further proof of Bear's ability to understand and pursue civil litigation are the King County Superior Court's 2008 order declaring Bear a vexatious litigant, CP 172-75, and Thurston County's 2010 order adopting the 2008 King County Order. CP 177-80, 191-94. The Orders restrain Bear from filing any lawsuits in King or Thurston County unless a court-appointed guardian signs the complaint pursuant to CR 11. CP 174. It is no accident that Bear filed the Complaint in Pierce County.

4. Bear filed the pro se Complaint with the statement, "We reserve rights to have professional counsel amend this suit."

Bear's *pro se* complaint, filed in 2010, contemplates court-appointed counsel. CP 9. The Pierce County Superior Court recognized Bear's request for a litigation guardian under RCW 4.08.060 for what it really was: a request for court-appointed counsel in a civil matter. A litigant generally has no right to counsel in civil actions. RAP 15.2; *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). "In civil cases, the constitutional right to legal representation is presumed to be limited to

those cases in which the litigant's physical liberty is threatened, or where a fundamental liberty interest, similar to the parent-child relationship, is at risk. *In re Grove*, 127 Wn.2d at 237 (citations omitted).

Whether an attorney committed legal malpractice which entitles a former client to monetary compensation is not a case where liberty or parent-child relationships are at issue. Bear was not entitled to court-appointed counsel in his civil action against his former court-appointed attorney Underwood. The Pierce County Superior Court acted well within its discretion in denying Bear's requests for a continuance of the motion for summary judgment and for the appointment of a litigation guardian.

5. Bear understands the significance of his legal actions.

O'Melveny was appointed Bear's litigation guardian by the Western District of Washington. CP 269-71. O'Melveny later filed a 19-page report with the superior court. CP 273 -292. Bear, *pro se*, then filed a 10-page "Motion for Reconsideration" detailing his disagreements with the findings of O'Melveny's report. CP 303-13. Bear's motion cited state and federal statutes, court rules, and case law in support of his argument that O'Melveny's report was deficient. CP 303-13. Yet Bear now asserts he is unable to understand a civil proceeding and is therefore entitled to a guardian ad litem.

The only reasonable conclusion is that Bear selectively asserts that he is incapacitated when it suits his needs. When his court-appointed attorneys fail to meet his expectations, he sues them, *pro se*; the public record reflects Bear not only understands the civil litigation system in Washington but also that he manipulates it to suit his needs.

The superior court did not abuse its discretion in refusing to appoint a litigation guardian ad litem for Bear.

C. Bear's opening brief cites cases that are irrelevant to the issues on appeal.

Not only do Bear's citations to case law and statutes in "Petitioner's Opening Brief" further show that he can understand a civil suit, but they also are irrelevant. There is no dispute that Underwood was never served, and therefore Underwood was entitled to immediate dismissal. *Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970) (citation omitted). Therefore, whether the statute of limitations was tolled under the authority cited by Bear is irrelevant. Bear cites "RCW 4.15.190" (by which he presumably means RCW 4.16.190) and *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 224, 770 P.2d 182 (1989) for the proposition that the statute of limitations concerning the legal-malpractice action was not subject to dismissal on summary judgment because Bear was incapable of understanding the legal

proceedings. App. Br. At 2. "[A] person is incapacitated for the purpose of tolling the statute of limitations if he or she 'cannot understand the nature of the proceedings claimed to be tolled because of an incapacity or disability that creates 'a significant risk of personal harm upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety." *Rivas v. Overlake Hosp. Med. Cntr.*, 164 Wn.2d 262, 264-65, 189 P.3d 753 (2008). The plaintiff has the burden of proof. *Id.* at 267 (citations omitted). Bear presents no evidence that he is unable to feed, clothe, or house himself; the standards for a RCW Title 4 guardian are different than the standards for an RCW Title 11 guardian. *See,* RCW 4.08.090; 11.88.010.

Bear cites *In re Carlstad*, 150 Wn.2d 583, 80 P.3d 587 (2003) for the proposition that the superior court would have allowed for equitable tolling. (Br. of Pet. 2). Equitable tolling is used only sparingly when a plaintiff exercises due diligence and there is evidence of bad faith, deception or false assurances. *Id.* at 593. None of these factors is present here. Bear cites *Ames v. Dept. of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239, 91 A.L.R. 1392 (1934), for the proposition that equitable tolling is allowed for a person adjudicated insane. App. Br. At 2. The issue in *Ames* was whether an injured worker who was housed in Western State Hospital for an extended period should be allowed to pursue worker's-

compensation benefits when the State acted *ex parte* to foreclose those benefits when it knew the worker was "insane" and housed in Western State Hospital. *Ames*, 176 Wash. at 514. The finding of bad faith in *Ames* led to the application of equitable tolling. *Id.* at 514. There is no hint, much less proof, of bad faith by Underwood in this action.

VI. CONCLUSION

The superior court properly granted Underwood's motion for summary judgment. The uncontroverted facts are that Underwood was never served with process; therefore, he was entitled to immediate dismissal. Bear failed to offer any opposition to Underwood's motion for summary judgment; instead, Bear filed an untimely request for a continuance to permit appointment of a guardian ad litem pursuant to RCW 4.08.060. The superior court acted well within its sound discretion in denying Bear's requests. Public records show that Bear is a vexatious litigant, is fully capable of understanding civil legal proceedings, and selectively presents his mental condition to suit his needs. The superior court rightly recognized that Bear's request for a litigation guardian was merely an improper request for counsel at public expense in a civil action.

This court should affirm the ruling of the superior court in granting Underwood's motion for summary judgment and denying Bear's request for court-appointed counsel.

Respectfully submitted this 7th day of May, 2014.

LEE SMART, P.S., INC.

By: _____

Sam B. Franklin, WSBA No. 1903
Michael P. Ryan, WSBA No. 33535
Of Attorneys for Michael Underwood

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 8, 2014, I caused service of the foregoing pleading on each and every person herein:

VIA FEDERAL EXPRESS

Mr. Michael Chiofar Gummo Bear
318 6th Avenue S., #117
Seattle, WA 98104

Mr. John R. Scannell
Actionlaw.net
501 S. Jackson
Seattle, WA 98104

DATED this 8th day of May, 2014 at Seattle, Washington.

Linda Bender, Legal Assistant