

**FILED**

APR 14 2014

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION THREE**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**MICHAEL CHIOFAR GUMMO BEAR, *Alleged Incapacitated Person***

**MICHAEL UNDERWOOD *et al Respondents***

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**ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
STATE OF WASHINGTON**

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**PETITIONER'S OPENING BRIEF**

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Michael Chiofar Gummo Bear  
pro se  
4915 SW 319<sup>th</sup> Lane Apt E-304  
Federal Way WA., 98023-4123  
253-661-3876

**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR  
REVIEW**

A. Assignments of error

1. The trial court erred in refusing to either appoint a guardian ad litem or granting a continuance until a guardian could be appointed.

2. The trial court erred dismissing the complaint without a guardian or guardian ad litem being appointed. .

B. Issues relating to the Assignment of error

1. Did the court abuse its discretion when it dismissed the lawsuit when it knew that the plaintiff was incompetent and was trying to get a guardian appointed?

2. Did the plaintiff have possible arguments against the statute of limitations argument that was presented to dismiss the case?

**STATEMENT OF THE CASE**

1. On February 19, 2010, the plaintiff filed suit against the defendant for malpractice in connection with jail time he unnecessarily served because of the defendant's legal advice. The complaint was signed by his durable power of attorney Richard Lennstrom and the plaintiff (CP3-9)

2. The case was removed to federal court on April 2, 2010. (CP 10-73).

3. At the time the present action was dismissed, the plaintiff had been declared incompetent by four different court, the most recent being in 2010 in Western District of Washington case ##10-5227-BHS (CP343)

4. Richard Lennstrom, a friend, and John Scannell, an attorney in the ninth circuit, petitioned the court to have a guardian appointed in Pierce County Superior Court Case #13-4-

00357-3 so he could appear in this action Unfortunately, Mr. Lennstrom passed away before a guardian could be appointed. The court, after several months, decided that venue had to be transferred to King County which was accomplished on September 5, 2013 by the transfer to King County case # 13-4-10580-0. (CP 343-4).

The defendants filed a motion for summary judgment on July 31, 2013 citing statute of limitations for failure to serve. (CP 78-98)

The plaintiff filed a response on September 17, 2013 moving for a continuance so he could appear by guardian as required by RCW . At the time of his response, the King County Superior Court was going to appoint a guardian ad litem that day to determine whether a guardian should be appointed. (CP 344)

The court dismissed the case on September 27, 2013 without appointing a guardian ad litem and without granting a continuance so that a guardian could be appointed. (CP-409-410)

### **ARGUMENT**

#### **1. THE COURT SHOULD NOT HAVE DISMISSED THE CASE WHEN THE APPELLANT COULD NOT DEFEND AGAINST A DISMISSAL BECAUSE NO GUARDIAN WAS APPOINTED.**

RCW 4.08.060 states as follows:

When an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem. Said guardian shall be appointed as follows:

(1) When the incapacitated person is plaintiff, upon the application of a relative or friend of the incapacitated person.

(2) When the incapacitated person is defendant, upon the application of a relative or friend of such incapacitated person, such application shall be made within thirty days after the service of summons if served in the state of Washington, and if served out of the state or service is made by publication, then such application

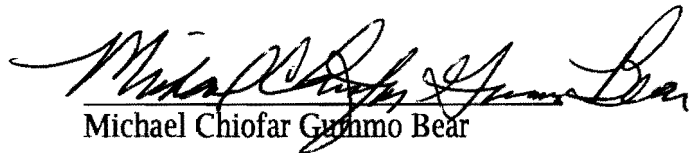
shall be made within sixty days after the first publication of summons or within sixty days after the service out of the state. If no such application be made within the time above limited, application may be made by any party to the action.

**2. THE PLAINTIFF COULD HAVE RAISED DEFENSES HAD HE BEEN ALLOWED TO APPEAR.**

RCW 4.15.190 allows for the tolling of the statute of limitations for the period of time that the appellant was incapable of understanding the nature of the proceedings, which could be indefinitely for a permanently disabled person. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash. 2d 216, 224, 770 P.2d 182 (1989).

The plaintiff also might have asked for equitable tolling for the period of time he was requesting a guardian be appointed. Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed. *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 80 (2003). The court may allow for relief through equitable tolling for a person adjudged insane.. *See Ames*, 176 Wash. 509. (plaintiff adjudicated insane);

Dated this 10<sup>th</sup> day of April, 2014

  
Michael Chiofar Gummio Bear