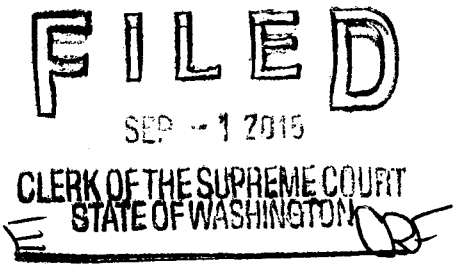
92164-4

No. 32127-4



COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION THREE

Michael Chiofar Gummo Bear, *Petitioner*
v.
Michael Underwood, *Respondent*

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

Michael Chiofar Gummo Bear
4915 SW 319th Lane Apt E-304
Federal Way WA., 98023-4123
253-754-6903
Fax: 253-517-8442
gummobear@hotmail.com

Table of Contents

TABLE OF AUTHORITIES

PETITION FOR REVIEW

A. IDENTITY OF PETITIONER

The Petitioner is Michael Chiofar Gummo Bear, who is the appellant and the plaintiff in the case under appeal.

B. CITATION TO THE COURT OF APPEALS DECISION: Court of appeals decision in case no. 32127-4-III issued on May 26, 2015 in the case of Michael Chiofar Gummo Bear , App. v. Michael Underwood, Res. Order on Motion for Reconsideration on 7-28-2015

C. ISSUES PRESENTED FOR REVIEW

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 that he was prevented from making because a guardian had not been appointed?

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 courts, 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).

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

6. 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)

7. 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)

8. Scannell was appointed guardian on 3-31-2015 King County Superior Court case #13-4-10580-0. (Judicial Notice)

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);

3. THE COURT OF APPEALS ERRED BY IGNORING PUBLISHED PRECEDENT BY RULING THAT CHIOFAR SHOULD HAVE MOVED FOR APPOINTMENT OF A GUARDIAN AND SHOULD HAVE PRESENTED A DEFENSE WHEN HE WAS PREVENTED FROM PRESENTING A DEFENSE BY STATUTE.

There are several indications that division III did not put the requisite care into analyzing this case and preparing its decision:

It used esoteric language/jargon at times which appear to attempt to obfuscate or otherwise confuse the lay person;

It used run-on sentences which at times approach word salad; It referred to cases but did not properly cite or footnote, such as Mr. Chiofar's cases against DSHS. Also, when the allusions to these cases are made, they are not cited as the Administrative Hearings but are grouped as 'cases filed' by Mr. Chiofar in an attempt to make Chiofar appear to be pathologically litigious;

It misspelled names (John Scannell is in one citation spelled correctly and in at least three other citations called John Scanlon);

Taken in isolation, these shortcomings may merely reflect a lack of care to prepare an otherwise tenable decision. But in this case, the undersigned is convinced that the above mentioned negligence is symptomatic of a larger issue. That is, the third division, for whatever reason, simply did not care enough about this case to analyze it.

Most importantly, the decision is devoid of any rational logic which can explain how Mr. Bear should have been required to present "evidence", make "required showings", and "raise defenses" when under the plain language of RCW 4.08.060 he could not even appear, let alone present arguments and evidence.

The decision creates some facts out of thin air, without any citing to any record and have no basis whatsoever in reality. For example, the court concludes that since Mr. Bear took several actions on his own behalf, including the appeal to the ninth circuit, then he must somehow be competent. In fact, the federal court was so concerned about Bear's mental status that it did appoint a guardian ad litem, so Bear did not need an appointment of a guardian. In fact, Bear did not handle his appeal at all, he was represented by his ninth circuit attorney, John Scannell.

With respect to Mr. Scannell, the court made repeated references to John Scannell being a "disbarred attorney", which has no relevance at all to this case other than the court's bias against both Scannell and Bear. What possible relevance is Scannell's disputed bar status have anything at all to do with the issues of this case?

The court then moves on to create a fiction that no one ever moved for an appointment of a guardian ad litem. In fact, Bear for two years had been attempting to get a guardian ad litem appointed through his friends Lennstrom and Scannell. A Guardian Ad Litem was appointed twice,

once in Pierce County and once in King County. Bear did not think another would be necessary, because King County was on the verge of appointing a guardian and another guardian ad litem would have been a waste of judicial resources. The court improperly switched the primary and alternate arguments of Bear, claiming there was some kind of implication by Bear, that the trial court should have sua sponte appointed a guardian ad litem. This was Bear's alternate, not primary argument.

Then the court ignores its own cited precedent *Graham v. Graham*, 40 Wn.2d 64, 67, 240 P.2d 564 (1941) that says an application is not necessary. The court criticizes Bear for not presenting evidence showing that courts have declared him incompetent, while ignoring the obvious, that Underwood himself presented the evidence to the court. Then the court came to the decision that this evidence should be ignored because it is not "manifest" enough (whatever that means) when a Superior Court judge, shortly after this summary judgment was issued, appointed Scannell as Bear's guardian.

Even the one sided presentation submitted by Underwood's counsel, cited to an expert opinion that Mr. Bear should not be allowed to sue until a guardian had been appointed. (CP 164), Neither the defendant's counsel, nor the trial court, nor the court of appeals cited to any expert testimony or medical evidence as to why this expert opinion should have been disregarded and ignored.

The court of appeals correctly cited to the correct standard for abuse of discretion in not granting a continuance: Discretion is abused when it is based on untenable grounds or is manifestly unreasonable. *In re Det. of Schuoler,* 106 Wn.2d 500,512, 723 P.2d 1103 (1986).

But then the court inexplicably turned logic on its head by referring to a case of a person who was not even arguably incompetent and in fact was represented by counsel. See court's reference to *Turner* v. *Kohler,* 54 Wn. App. 688, 693, 775 P.2d 474 (1989) on page 13 of its opinion. What possible relevance was this case to a person who has been declared mentally incompetent by four different courts and who, as a result, was forbidden by statute from even appearing, let alone presenting arguments and evidence until a guardian had been appointed?

This is what is wrong with the trial court's decision and its subsequent ratification by division III. If the court was concerned that previous courts were in error, and he was capable of proceeding without a guardian, then it should have appointed a guardian ad litem to investigate the issue. If the court of appeals judges felt the evidence was not "manifest" enough, then they should have remanded back to the trial court to give Bear an opportunity to present a defense. Instead, both courts just looked at the one sided presentation of the defendants, who obviously filed this motion in anticipation of the guardianship appointment, so that

Bear could not present a defense, and unfairly obtained a dismissal as a result.

Such decision making is obviously based upon untenable grounds and is manifestly unreasonable, because it requires the petitioner to violate a state statute in order to have his case heard.

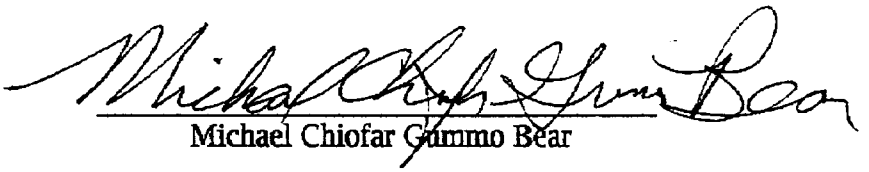
CONCLUSION

RAP 13.4 gives four possibilities as to when a petition for review will be granted. (1) If the decision of the Court of Appeals is in conflict with a decision fo the Supreme Court. (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. (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

Three of the four factors come into play here. As argued earlier, this decision is in conflict with at least two Supreme court decisions, *Graham v. Graham*, 40 Wn.2d 64, 67, 240 P.2d 564 (1941) and *In re Det. Of Schuoler*, 106 Wn.2d 500,512, 723 P.2d 1103 (1986). Second, it presents a significant question of law under both the United States Constitution and the Washington constitution concerning the right to due process by the mentally incompetent, who are among the most vulnerable members of our society.

Finally and most importantly, this petition presents of issue of immense public interest and concern. Is this court going to stand up for rights of the mentally disabled? Or are we going to be continue to be treated to the spectacle of abusers of the most vulnerable members of our society, racing to the courthouse to get suits filed against them dismissed before the mentally incompetent can get their guardians appointed?

Dated this 25 day of August, 2015



Michael Chiofar Gummo Bear

I hereby certify that on August 25, 2015, I caused to be served a copy of the appellants Petition for Review by the method indicated below and addressed to the following:

Sam Breazeale Franklin
Michael Patrick Ryan
701 Pike St Ste 1800
Seattle, WA 98101-3929

☐ Hand Delivered By:_____
☒ U.S. Mail first class postage prepaid
☐ Overnight Mail fees prepaid
☐ Federal Express fees prepaid

☑ Facsimile time of completion :_____

Michael Chiofar Gummo Bear

Dear John and Mike:

I am mentally dead; and, therefore, rely upon You two to create and present to the Supreme Court judges & commissioners Help in the document to be filed by 27 August 2015: hopefully mailed at least two (2) days prior to that to arrive on time at the Spokane Court of Appeals-III; or, to wherever the appeal should go. Maybe one, or both of You should petition the Court(s): Supreme & COA-III, for the appointment of an appropriate guardian ad litem and or whatever else they want to call themselves. If John cannot prepare the paperwork, to quote Mr. VELATEGUI, and my mind is a disaster--and, believe me, it is!--and VAUGHN {Mike} can only act as a currently non-professional, i.e. unlicensed, intense psychotherapist { living 24 hours per day with CHIOFAR for almost one-half, 1/2, year now, and over fifty (50) longstanding years' history(s) };;then,, the court(s) should appoint counsel as these are exceptional circumstances warranting such appointment.

The federal COA for the Ninth Circuit ruled that the Washington State court(s) should hear the matter of Gummo-Bear vs Underwood; not, just dismiss it through technicality(s) or the unlikely event(s) that another supreme court would refuse to even take up the case for hearing on its busy docket. This State of Washington has been ORDERED by the federal government court(s) to decide the case on the merits of the complaint, okay?
Get it? Do not just dismiss it on a bullshit technicality by a few influential paid-off shyster attorneys, i.e.-e.g. UNDERWOOD, etc, dreams of trying to hide the totally embarrassing acts of UNDERWOOD. LOOK AT THE FACTS OF THIS CASE.

No crime occurred, yet, Michael was charged and held at great loss in jail for a long time. Arguably, He was mentally tortured {an international crime}. Michael only seeks recompensation and assurance that this will never happen again--meaning, perhaps a penalty against the criminals of the government. You guys, the State of Washington, should be begging Michael CHIOFAR GUMMO BEAR to reach a reasoned settlement. You are worsening Michael's perception of this government and, thereby, exacerbating His unfortunate disability of paranoia. You should not be doing this; You should accommodate this disability: Work with Michael!! He a nice and wonderful person, just like John SCANNELL, JD. Do not just defame us, please?

APPENDIX – 1

August 14, 2015

Supreme Court of the State of Washington
Tumwater, Washington

Re.: Michael Chiofar Gummo Bear/Guardian Ad Litem request

Your Honors:

I am a life-long friend of Mr. Bear. In the past 3 years, I have had significant and consistent interactions with Mr. Bear. He has discussed with me his legal, personal, disability, and mental health issues. In listening to Mr. Bear and in observing him as well as having a long-term history with him, I have a special ability to assess him. Additionally, I am a retired mental health counselor; thus, I bring to this correspondence a broad and long capacity regarding Mr. Bear.

From my personal and professional history; from my recent consistent and near-constant interactions; and from my educational, experiential, and professional background I request that the court grant Mr. Bear special assistance for the preparation and presentation of his pending legal appeal.

Mr. Bear has attempted to, with some assistance, present a case to various jurisdictions. As an important and clear example of his inability to fully prepare and present a cogent case to the courts, Mr. Bear has repeatedly attempted to show and request relief pertaining to his mental 'incompetence'. He has been unable and was unable to understand that representing himself as 'incompetent' was improper nomenclature. He rather was attempting to assert on his own behalf that he had been found in the past by Designated Mental Health Professionals (DMHPs) and hence, in keeping with his misunderstanding and as an indication of his mental health incapacities, found to be incapacitated and thereby was severely mentally ill and was at risk to self or others and/or without mental volitional control; that he was not only in the past incapacitated but by virtue of having been found to be mentally (stress-related) disabled by the State of Washington Department of Social and Health Services (Social Security disability); and daily incapacitation including severely compromised daily living skills, inept social skills, inability to make sound decisions, obsessive-compulsive behaviors including unproductive ritualized behaviors, and more (see below). Mr. Bear needs and takes prescribed psychiatric medications on a daily basis in order to function within a very limited scope of existence.

Although I am not in any manner serving as a psychotherapist but rather as a very concerned, life-long friend, I have observed Mr. Bear's incapacitation includes but is not limited to:

- Very poor short-term memory
- Inability to be reality-based in any arena of his life, moment-to-moment
- Severe and clinical depression
- Obsessive-compulsive and highly ritualized behaviors, thoughts, and perceptions
- Paranoia
- Severe sleep disruption
- Probable life-long Asperger's Disorder and/or Pervasive Developmental Disorder
- Irrational beliefs and secondary incapacitations of social, communication, decision-making, cognitive, and other general functioning skills
- Generalized anxiety disorder
- Perseverance of thought
- Tendency to regress into infantile behaviors and thinking
- Impulse control issues
- General neuroses
- Many other significant psychological and psychiatric disturbances

In conclusion, as a friend and an individual who has observed not only current but longitudinal issues in Mr. Bear's life, in his non-reality based thought processes, behaviors, and perceptions, having been out of Mr. Bear's life for a significant span and then reunited as friends three years ago, I can see a shockingly diminished capacity for Mr. Bear to think, act, and perceive in reasonable, self-supporting, and self-caring ways.

I believe that Mr. Bear is not capable of researching, preparing, organizing, and presenting a cogent case before the court. As he has determined that an appeal to Your Honors regarding Gummo Bear v. Underwood, for him to make such a case relies upon this request that a qualified Guardian Ad Litem be granted.

APPENDIX - 3

Mr. Bear now understands that such a request is being made because, as a friend, I see him as very vulnerable and that if he is determined to make an appeal of Your Honors, he can only make such an appeal in an orderly and a respectful manner (of the court and its time) with the guidance, input, and support of a Guardian Ad Litem.

Very sincerely,

Michael Vaughn, MS

Date : Tue Aug 11 23:54:50 PDT 2015
From : Michael ChiofarGummoBear(gummobear@hotmail.com);
To : Michael Vaughn(mfv413@yahoo.com); Michael ChiofarGummoBear(gummobear@hotmail.com);
Subject :

Dear COA-III and Supreme Court, WA :

I am a friend of Michael Chiofar Gummo Bear and would like to request that at least one of the courts appoint a guardian ad litem to assist Michael with his appeal to the State Supreme Court as he has a limited legal guardian, Mr. John Scannell, JD who has been told by State officials to not give legal aid to Michael in this matter; and, Michael is legally incapacitated from doing the legal case himself due to his mental and physical disability(s); and, I, Michael F. Vaughn, an ex-psychotherapist, currently retired, but who has known Michael for about fifty (50) years and who is a current aid for his private needs at his apartment as I am a dear friend--but, no longer professionally working. It is my lay person opinion that Michael needs Help in appealing this matter to Olympia.

This request is made pursuant to Washington State law, RCW, and the values of our culture.

Respectfully Submitted,

Michael F. Vaughn
(253) 754-6903

WAIVER

Supreme Court of the United States

No. 13-8204

Michael Anthony Gummo (Petitioner) v. Pierce County, Washington, et al. (Respondent

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate boxes:

☐ Please enter my appearance as Counsel of Record for all respondents.

☒ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

Michael J. Underwood

☐ I am a member of the Bar of the Supreme Court of the United States.

☒ I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member.

Signature:

Date: 23 January 2014

(Type or Print) Name: Sam B. Franklin ☒ **Mr.** ☐ **Ms.** ☐ **Mrs.** ☐ **Miss.**

Firm: Lee Smart, P.S., Inc.
Address: 701 Pike St., Suite 1800
City and State: Seattle, WA Zip: 98101-3929
Phone: 206-624-7990

SEND A COPY OF THIS FORM TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

cc: pro se Petitioner, Michael Chiofar Gummo Bear
4915 SW 319th Lane Apt. E-304
Federal Way, WA 98023

Obtain status of case on the docket. By phone at 202-479-3034 or via the internet at http://www.supremecourtus.gov. Have the Supreme Court docket number available.

FILED
JULY 28, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

MICHAEL CHIOFAR GUMMO BEAR, by and through his DPOA, RICHARD LENNSTROM,

Appellant,

v.

WASHINGTON STATE: its superior court, COA-I Hon. Comm. ELLIS, COA-II Hon. Comm. SCHMIDT, DSHS, DOC, DOL, et al.; PIERCE COUNTY: All its agents and Employees, et al; KING COUNTY: All its agents and Employees, et al; CITY OF SEATTLE: All its agents and Employees, et al; WILLIAM MICHELMAN, JD; VALERIE MARUSHIGE, JD; LARRY GARRETT, JD; and All Their agents & Employees,

Defendants,

MICHAEL UNDERWOOD, JD,

Respondent.

No. 32127-4-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 26, 2015, is hereby denied.

DATED: July 28, 2015

PANEL: Judges Siddoway, Brown, Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

APPENDIX - 8 [end]

DunnBlack&Roberts

Attorneys at Law

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Bil G. Childress
Robert A. Dunn
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FAX TRANSMISSION

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Date: August 25, 2015 **From:** Robert A. Dunn

To: Court of Appeals, Div. III **Fax No.:** 509-456-4288

Re: Bel Franklin Apartments LLC v. Harwood, et al.

# of Pages: 5 (includes this cover page) **Our File No.:** 3529

Description: Joint Motion to Stay Appeal for filing

MESSAGE:

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

BEL FRANKLIN APARTMENTS LLC, a Washington limited liability company, Appellant, v. JOSEPH D. HARWOOD, Trustee of MONEY TALKS TRUST; MONEY TALKS L.L.C., a Washington limited liability company; C & H BFB, L.L.C., a Washington limited liability company; FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign insurance company; Respondents.	Court of Appeals No. 33024-9-III Superior Court Cause No. 14-2-03192-5 **JOINT MOTION TO STAY APPEAL**

I. IDENTITY OF MOVING PARTY

Respondents Joseph D. Harwood, Trustee of Money Talks Trust; Money Talks L.L.C.; and C & H BFB, L.L.C. (collectively "Harwood"), and Appellant Bel Franklin Apartments LLC ("BFA"), by and through their undersigned counsel, jointly move this Court for the relief requested in Part II below.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 18.8(a), Respondents Harwood and Appellant BFA jointly request this Court enter an order staying this appeal and briefing schedule for six months to allow sufficient additional time for the parties to complete ongoing settlement discussions.

III. FACTS RELEVANT TO MOTION

Respondents Harwood and Appellant BFA are presently engaged in settlement discussions which, if successful, could eliminate certain issues on appeal and possibly the appeal itself. Accordingly, the parties jointly request a stay of this appeal for six months to allow sufficient additional time for them to complete these ongoing settlement discussions. In the event a negotiated settlement is reached, the parties will promptly notify this Court.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RAP 18.8(a) authorizes this Court to "*enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice.*" Here, good cause exists to grant the parties' Joint Motion to Stay Appeal, because the requested stay results in no prejudice to any party and might resolve this matter in

its entirety, thereby eliminating the appeal itself. Accordingly, justice and fairness will be served by ordering that this appeal and briefing schedule be stayed for six months.

V. CONCLUSION

For the foregoing reasons, Respondents Harwood and Appellant BFA respectfully request this Court grant their Joint Motion to Stay Appeal.

DATED this 25 day of August, 2015.

DUNN BLACK & ROBERTS, P.S.

ROBERT A. DUNN, WSBA #12089
BIL G. CHILDRESS, WSBA #45203
Attorneys for Respondents Harwood; Money Talks L.L.C.; and C & H BFB, L.L.C.

WORKLAND & WITHERSPOON, PLLC

JAMES A. MCPHEE, WSBA #26323
Attorney for Defendant Bel Franklin Apartments LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of August, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

- [x] HAND DELIVERY
- [ ] U.S. MAIL
- [ ] OVERNIGHT MAIL
- [ ] FAX TRANSMISSION
- [ ] EMAIL

James B. King
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Suite 250
Spokane, WA 99201

ROBERT A. DUNN

FILED
MAY 26, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MICHAEL CHIOFAR GUMMO BEAR, by and through his DPOA, RICHARD LENNSTROM,	)	
Appellant,	)	No. 32127-4-III
v.	)	
WASHINGTON STATE: its superior court, COA-I Hon. Comm. ELLIS, COA-II Hon. Comm. SCHMIDT, DSHS, DOC, DOL, et al.; PIERCE COUNTY: All its agents and Employees, et al; KING COUNTY: All its agents and Employees, et al; CITY OF SEATTLE: All its agents and Employees, et al; WILLIAM MICHELMAN, JD; VALERIE MARUSHIGE, JD; LARRY GARRETT, JD; and All Their agents & Employees,	)	UNPUBLISHED OPINION
Defendants,	)	
MICHAEL UNDERWOOD, JD,	)	
Respondent.	)	

SIDDOWAY, C.J. — Michael Chiofar Gummo Bear appeals the trial court's dismissal of his legal malpractice action against Michael Underwood, whom he alleged

negligently represented him in a 2008 prosecution for felony harassment. The trial court granted summary judgment dismissing Mr. Bear's complaint notwithstanding Mr. Bear's request that consideration of the motion be continued until a limited guardian could be appointed to handle litigation on his behalf.

The trial court never addressed Mr. Bear's legal capacity on the record. Mr. Bear's assignments of error implicitly contend that the court should have appointed a guardian ad litem (GAL) sua sponte. We do not find the manifest evidence of need for a GAL that would demonstrate an abuse of discretion by the trial court, however, nor did Mr. Bear make the showing required to justify a continuance.

Because the undisputed evidence demonstrated that Mr. Bear had never personally served Mr. Underwood with process and that the statute of limitations had run, we affirm the trial court's dismissal of Mr. Bear's claim.

FACTS AND PROCEDURAL BACKGROUND

In May 2008, Mr. Bear was charged with felony criminal harassment after he made a threatening phone call to a judicial assistant in the Pierce County Superior Court. The court appointed Michael Underwood to represent him.

The State later amended the information, reducing the charge to misdemeanor harassment, because it recognized it would be difficult to prove the victim was in

reasonable fear that the threat would be carried out. The judicial assistant told prosecutors she was not afraid Mr. Bear would act on his threat.

In August 2008, after Mr. Bear was found competent to stand trial, he entered an *Alford*[1] plea to an amended charge of gross misdemeanor harassment. The State and Mr. Bear recommended a 365-day sentence with 277 days suspended and credit for the 88 days served; Mr. Bear told the court he was entering the guilty plea because he wanted to get out of jail that day. *State v. Chiofar*, noted at 152 Wn. App. 1017, 2009 WL 2942666.[2] The record on which the court relied in accepting the plea did not include evidence that the threatened judicial assistant reasonably feared that Mr. Bear would carry out his threat; to the contrary, it included the deputy prosecutor's admission that the State would have difficulty proving the fear element of felony harassment.

Shortly after pleading guilty, Mr. Bear appealed, seeking to withdraw his guilty plea. In an unpublished decision, Division Two of this court overturned Mr. Bear's guilty plea, finding that it lacked a factual basis. *Id.* As the court observed, "[a]n element of criminal harassment, *whether felony or misdemeanor*, is that 'the person

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[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] We cite the unpublished decision not as an authority, but for the history of the criminal prosecution as relevant to the malpractice action. *Cf.* GR 14.1(a) (prohibiting citation to unpublished opinions of the Court of Appeals as authority). We note that Mr. Bear has referred to himself in earlier litigation by different names, including, "Michael Theodore Bear," "Michael Chiofar," and "Michael Gummo." We use the surname "Bear" based on the summons and complaint filed below.

threatened [be] in reasonable fear that the threat will be carried out.'" *Id.* at *2 (quoting RCW 9A.46.020(1)(b) (emphasis added)). The court concluded that Mr. Bear's "stated belief that conviction was likely if he went to trial shows a misunderstanding of the law," and his plea was therefore not voluntary. *Id.* at *3 (footnote omitted). It vacated the conviction and remanded to the trial court with instructions to allow Mr. Bear to withdraw his guilty plea and to dismiss the charge. The charge was dismissed on November 19, 2009.

The present action was commenced in Pierce County Superior Court several months later by the filing of a summons and complaint. Named as plaintiff was "CHIOFAR GUMMO BEAR, Michael, by and through his DPOA: LENNSTROM, Richard." Clerk's Papers (CP) at 1. The first sentence of the complaint stated

> Michael CHIOFAR, Plaintiff herein, together with his Durable Power of Attorney ("DPOA") Richard LENNSTROM, is authorized to act upon the Plaintiff's involuntary incapacity.

CP at 4.

The complaint named ten defendants: Michael Underwood, three other lawyers, two judicial officers, and four state or local agencies. It alleged that each of the lawyers named as defendants "has committed malpractice in my case(s)." CP at 5. After naming the defendants and alleging jurisdiction and venue, the complaint included this first allegation of fact:

> Michael CHIOFAR and his "DPOA", Richard LENNSTROM, are and have been recipients of DSHS payments for Social Security, Disability benefits, and Supplemental Security income. They have been determined to be eligible for medical benefits for the medically needy. Michael CHIOFAR has a mental handicap which qualifies under State and Federal law as a handicap. He has been determined to be incapacitated to handle certain legal affairs. Richard LENNSTROM has a mental and physical handicap which qualify as handicaps under State and Federal law. They have and continue to ask for accommodations to their disabilities.

CP at 6. Elsewhere, the complaint alleged, "Plaintiff's diagnosis of 'Paranoid Schizophrenia' needs to be accommodated as . . . acts and omissions [by attorneys and officials] and lack of explanation exacerbate Plaintiff's mental disability." CP at 7.

The case was timely removed to the United States District Court for the Western District of Washington. In response to a motion by Mr. Bear for appointment of a guardian ad litem on his behalf (a motion joined in by one of the lawyer-defendants), the federal court appointed John O'Melveny as a guardian ad litem "for the limited purpose of reviewing the pleadings in this action and making a determination as to whether [Mr.] Bear's pending claims have merit and whether it is in [Mr.] Bear's best interest to proceed with the lawsuit." CP at 269.

Mr. O'Melveny submitted a report to the federal court in February 2011, in which he concluded that while none of Mr. Bear's claims against any other defendant had merit, Mr. Bear may have a tort claim against Mr. Underwood for not informing Mr. Bear before he entered his guilty plea that the evidence did not support each element of criminal harassment. Mr. O'Melveny acknowledged the limits of his information on Mr.

Underwood's representation and stated that whether Mr. Bear in fact had a claim "would be a factual question." CP at 292.

After receiving Mr. O'Melveny's report, the federal court dismissed with prejudice all of Mr. Bear's claims other than the malpractice claim against Mr. Underwood. It declined to retain jurisdiction of the state law malpractice claim and remanded it to the Pierce County Superior Court.

Over two years later, in July 2013, Mr. Underwood filed an answer and affirmative defenses and shortly thereafter moved for summary judgment. He based his summary judgment motion on evidence that Mr. Bear had not yet served process on Mr. Underwood as required by RCW 4.28.080 and CR 4, and argument that Mr. Bear's legal malpractice claim had become time-barred, pointing out that the statute of limitations for a legal malpractice action in Washington is three years, as provided by RCW 4.16.080(3). A cause of action accrues and the limitation period begins to run when the client "discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action." *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976). Mr. Underwood argued that Mr. Bear's malpractice claim accrued at the latest on November 19, 2009, when the criminal harassment charge was dismissed. On that basis, the three-year limitations period expired on November 19, 2012.

Mr. Underwood eventually noted his motion for a September 27, 2013 hearing date. On September 16, 2013, Mr. Bear filed a "Response to Summary Judgment:

Motion for Continuance." CP at 342. He did not respond to the substantive merits of Mr. Underwood's motion but instead requested a continuance "until at least December 4, 2013." *Id.* The submission was signed by Mr. Bear and a new "durable power of attorney," John Scannell.

The response and motion for continuance cited RCW 4.08.060, which contemplates that a party to a superior court action who is incapacitated shall appear by guardian or have a guardian ad litem appointed. Alleging that he had been declared mentally incompetent by at least four different courts, Mr. Bear argued:

> Michael Chiofar Gummo Bear has no guardian at the present time. His former durable power of attorney Richard Lennstrom attempted to petition the Pierce County Superior Court for appointment of guardian but passed away before one was appointed. John Scannell attempted to have the action finished but the court decided that proper venue was King County. The case was then transferred to King County for appointment of a guardianship. It is expected that a guardian ad litem will be appointed today for investigation of a guardianship which would be accomplished on November 4, 2013.

CP at 343.

The record of the hearing on September 27 is sparse. No transcript has been filed. Courtroom minutes state:

> **Start Date/Time: 09/27/13 9:11 AM**
>
> September 27, 2013 09:10 AM Atty Michael Ryan present on behalf of deft Underwood[.] John Scannlon present as person with power of attorney for petitioner. Court hears from Atty Ryan. 09:14 AM Court inquires of

> Mr. Scannlon (who is disbarred from Washington State[3]). 09:15 AM
> Court grants motion for summary judgment . . . .
>
> **End Date/Time: 09/27/13 9:15 AM**

CP at 408.

The court signed the order granting summary judgment that was presented by Mr. Underwood's counsel. In reciting the materials reviewed by the court, the order included "Response of plaintiff, if any," but it did not reflect any disposition of Mr. Bear's motion for a continuance. It did not address Mr. Bear's legal capacity. Mr. Bear appeals.

ANALYSIS

Mr. Bear does not contend that he ever properly served Mr. Underwood with process. He does not dispute that if he was competent for a three year period running between the time the harassment charges against him were dismissed on November 19, 2009, and the dismissal of his malpractice case against Mr. Underwood on September 27, 2013, then the statute of limitations for a legal malpractice would have run and summary judgment dismissal would have been proper.

He suggests, however, that if he proved he was "incompetent or disabled to such a degree that he . . . [could not] understand the nature" of his malpractice action so as to toll the running of the statute of limitations under RCW 4.16.190 or as a matter of equity,

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[3] Reply materials filed by Mr. Underwood had included a Washington State Bar Association Notice of the disbarment of John R. Scannell effective September 9, 2010.

then summary judgment would be improper. He raises two related assignments of error: first, that the trial court erred in refusing to appoint a GAL or grant a continuance until a guardian could be appointed and second, that it erred by dismissing the complaint where no guardian or GAL had been appointed. We address his assignments of error in turn.

I. Failure to appoint a GAL or grant the requested continuance

A. Failure to appoint a GAL sua sponte

Mr. Bear did not move the trial court to appoint a GAL, so his implicit position is that the trial court should have appointed a GAL sua sponte.

RCW 4.08.060(1) provides:

> 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.

(Emphasis added). Although the statute addresses appointment of a GAL following application for such an appointment, "[a]n application by one of the parties to a lawsuit is not a prerequisite. A trial court on its own motion may appoint a guardian ad litem." *Graham v. Graham*, 40 Wn.2d 64, 67, 240 P.2d 564 (1941) (emphasis omitted).

Moreover,

> the court *should* appoint a guardian ad litem for a litigant when it is 'reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal

> proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant.'

Vo v. Pham, 81 Wn. App. 781, 790, 916 P.2d 462 (1996) (quoting *Graham*, 40 Wn.2d at 66-67) (emphasis added).

We review a trial court's determination of the need for a GAL for an abuse of discretion. *Id.* at 784. Where a trial court is not presented with any application or request for appointment of a GAL, we must review the record and determine whether any reasonable judge would have recognized a need to appoint one.

Mr. Underwood's submissions included evidence that Mr. Bear's unique mental health issue related to litigation is not that he cannot comprehend legal proceedings but that he is irrationally addicted to bringing lawsuits. In a somewhat sympathetic medical/psychological report by Janice B. Edward, PhD, filed in Pierce County Superior Court Case No. 08-1-02447-6, Dr. Edward stated that Mr. Bear reported having graduated from high school as his class valedictorian, having graduated from college, and having completed a year of law school; she described him as "quite intelligent." CP at 160. But she described him as "pathologically litigious," with many adverse consequences for himself:

> [H]e has incurred legal sanctions, spent money that he cannot afford, has caused himself additional stress, feels himself to be out of control and to be, at times, suicidal. It also prevents him from getting the help that he needs because professionals are concerned about being sued by him. . . . In reality he is not resolving any of his emotional issues with these lawsuits, which is

> what he hopes to do with them, but is actually adding to the burden of his mental illness.

CP at 164. She recommended that Mr. Bear only be allowed to sue through a guardian, who should be a person with no personal relationship with Mr. Bear, and that he be allowed to submit requests to initiate lawsuits only once every 90 days.

Mr. Underwood's evidence included orders from other courts that consistently treated Mr. Bear *not* as incapable of comprehending the legal process as a lawsuit proceeded, but as making repeatedly irrational decisions in bringing lawsuits in the first place. Mr. Underwood's evidence included a 2008 order of the King County Superior Court finding Mr. Bear to be a vexatious litigant and imposing, as its only limitation, a restraint against Mr. Bear filing lawsuits in King County unless a court-appointed guardian had first reviewed the matter, determined that it had probable merit, and affixed his or her signature in accordance with CR 11. His evidence included a 2010 order of the Thurston County Superior Court adopting King County's position that Mr. Bear was a vexatious litigant and imposing the same limitation.

Finally, Mr. Underwood's evidence included evidence that federal district court judge Benjamin Settle, to whom the lawsuit below was assigned during the period it was removed to federal court, found it appropriate to appoint a guardian ad litem only for the limited purpose of deciding whether the claims had sufficient merit to proceed and not for any other purpose. He included evidence that when another of Mr. Bear's actions was

assigned to Judge Settle in 2013, he dismissed the lawsuit on the pleadings without appointing any guardian ad litem at all.

Mr. Bear's own pro se submissions demonstrate 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.

"Mental competency is presumed." *Vo*, 81 Wn. App. at 784 (citing *Binder v. Binder*, 50 Wn.2d 142, 148, 309 P.2d 1050 (1957)). Because the trial court was presented with no motion and no manifest indication that Mr. Bear was in need of appointment of a guardian ad litem, it did not abuse its discretion in failing to appoint one sua sponte.

B. Failure to grant the requested continuance

Alternatively, Mr. Bear argues that the court should have granted his motion for a continuance and awaited the appointment of a limited guardian by the King County court.

By the time Mr. Underwood filed his motion for summary judgment, Mr. Bear had participated in the lawsuit below without a guardian of his person through the removal of the lawsuit to federal court, an amendment of the complaint, Mr. Bear's motion for appointment of a guardian ad litem in federal court, Mr. Bear's motion for reconsideration of the federal court's dismissal of most of his claims, and an appeal to the Ninth Circuit Court of Appeals.

He did not file his response to the motion for summary judgment and request for continuance until eleven days before the date set for the hearing of Mr. Underwood's motion. While he represented in the request for continuance that he had been declared mentally incompetent by at least four different courts, he did not provide copies of those orders and provided no explanation why he now needed a guardian of his person to proceed with a three-and-one-half-year-old lawsuit.

CR 56(f) governs continuances when a party faced with a motion for summary judgment cannot timely present by affidavit facts essential to justify his opposition to the motion. The rule "provides that 'the court . . . *may* order a continuance to permit affidavits to be obtained or depositions to be taken.' (Emphasis added.) Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion." *Farmer v. Davis*, 161 Wn. App. 420, 430, 250 P.3d 138 (2011).

Discretion is abused when it is based on untenable grounds or is manifestly unreasonable. *In re Det. of Schuoler,* 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). A court does not abuse its discretion in denying a continuance under CR 56(f) where "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

For the first time on appeal (and, notably, pro se) Mr. Bear argues that had the trial court awaited appointment of a guardian of his person, he could have raised the defenses of statutory tolling of the limitations period under RCW 4.16.190 or equitable tolling. But critically, he did not point out these potential defenses in the trial court nor did he identify evidence supporting the defenses and explain why only a guardian of his person would be able to gather and present such evidence.

Because Mr. Bear's motion in the trial court fell far short of the showing required to support a continuance under CR 56(f), the trial court did not abuse its discretion in implicitly refusing to continue the summary judgment hearing.

(1) Dismissal of the complaint where no guardian or GAL had been appointed.

Mr. Bear's second assignment of error is to dismissal of his complaint where no guardian or GAL had been appointed. Having already concluded that the court committed no error by failing to appoint a GAL or await appointment of a limited guardian of Mr. Bear's person, the only remaining issue is whether the trial court erred by dismissing the complaint.

We review summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). The court views "the facts and the inferences from the facts in a light most

favorable to the nonmoving party." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Mr. Underwood presented prima facie evidence of a statute of limitations defense to the malpractice claim. Mr. Bear presented no affidavits or other proper evidence demonstrating that the facts supporting the time bar were genuinely disputed. Summary judgment was therefore proper.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Lawrence-Berrey, J.