104022-9

Court of Appeals Cause No. 59940-6-II

87063-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT L. STOLLER,

V.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, et. al.,

PETITION FOR REVIEW

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APPELLANT CASES:

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A. IDENTITY OF THE APPELLANT

I, Scott L. Stoller, Petitioner, pro se, asks the Court hold to less stringent rules under Haines v. Kerner, 404 U.S. 519, .92 S.Ct. 594 (1972) and review of the decision designated below.

B. DECISION

The ruling of Court of Appeals finding sound the exercise of discretion by trial court denying a new attorney a first continuance to prepare arguments to oppose summary judgment.

C. ISSUE PRESENTED FOR REVIEW

1. **The public wholesomely holds an exceptional public interest under RAP 13.4 in having a new appearing attorney provided proper time to prepare proper opposition arguments for an attorney's client before being required in trial court to provide oral argument at any type of a formal hearing, and especially at a summary judgment hearings which could foreclose the entire case if granted.**

D. STATEMENT OF THE CASE

The Mr. Stoller file the lawsuit through an attorney November 16, 2021 against the Washington State Department of Corrections and several State's employees for failing to protect Mr. Stoller while in criminal confinement. Mr. Stoller end up with damage to a lung due to a an assault resulting in

broken ribs puncturing the lung while in the care and custody of the Department of Corrections. CP at Index-6. The broken ribs are only one of multiple violent incidents of assault faced by Mr. Stoller during criminal confinement because of acts, actions or inaction by the agents and employees of the Washington Department of Corrections whom knew of multiple assaults, injuries, and safety violations suffered by Mr. Stoller like an assault resulting in partial hearing loss and vision impairment, the agents knew of their duty to protect Mr. Stoller yet each agent/employee of the State of Washington willfully and deliberately chose to act with deliberate indifference by leaving Mr. Stoller housed in general prison population in both of their level five maximum security prisons for a vast number of years while observing him getting assaulted multiple times, with several actual attempts made on his life in atleast fifteen different assaults without agents/employees taking reasonable steps to protect Stoller from harm. the minimum action required by the agents would be to place Mr. Stoller in administrative protective custody where he would be kept confined in a safe location of the facility stopping these many assaults prior to loss of his lung capacity resulting from a stabbing incident. The state agents/employees after seeing the injuries to Petitioner took no actions to protect Petitioner from future assaults or potential harms placing him immediately back into general

prison population where the assaults continued. The Petitioner hired an attorney *Dennis Clayton* whom filed Petitioner's lawsuit against the Respondents and handled the first portion of the case until Attorney Clayton's health deteriorated in January of 2023 where Mr. Clayton filed to withdraw. CP Index 25. The state's attorney had pending a motion for summary judgment filed November 17, 2022 prior to Mr. Clayton's withdrawal. CP index 19. The state attorney immediately scheduled a hearing for summary judgment once he discovered Petitioner was required to act "pro se" while Petitioner sought a replacement attorney to take the case. The Petitioner was then confined within the Department of Social and Health Services civil facility on McNeil Island which has no law library, no persons paid to assist with legal pleadings, paperwork or documentations to assist Petitioner Stoller in locating replacement counsel. The day prior to the summary judgment hearing an attorney William McCool agreed to take Petitioner's case then appeared to the court once he received payment from Petitioner and immediately filed for a necessary extension of time to allow him to prepare for summary judgment properly on Petitioner's behalf. CP index 37. The request for extension of time was denied outright by the trial court citing Petitioner's first contact with Attorney McCool some two months prior without giving weight to the fact Petitioner was confined by the

State of Washington who was required to send Petitioner's payment for Mr. McCool's services from their facility. The Petitioner filed a motion to reconsider on May 1, 2023 which required several corrections to include filing on specific forms sent Petitioner by the Thurston County Superior Court on November 20, 2023. CP Index 44. The motion to reconsider was denied November December 15 2023.

E. ARGUMENTS

1. **The public wholesomely holds an exceptional public interest under RAP 13.4 in having a new appearing attorney provided proper time to prepare opposition arguments for an attorney's client before being required in trial court to provide oral arguments at any hearing, and especially at a summary judgment hearing which could foreclose the entire case if granted.**

when the trial court chose to deny an licensed practicing attorney at law a simple continuance when the new licensed attorney who was in good standing with the Washington State Bar Association formally appeared to the trial court by a proper filed notice of appearance which was formally filed by this new attorney at law in the court clerk's office of the Superior Court the day prior to the hearing and of which said notice of appearance unknowingly to this new appearing attorney the court's own clerk refused to file formally in the case records

before the hearing without even contacting the new appearing legal counsel who the trial court treated manifestly unreasonable by then refusing the new hired attorney at law a simple short continuance through the alleged exercise of this trial courts limited discretionary powers as such denial of this continuance runs afoul of our very jurist prudence by being totally contrary to serving the actual end of justice in this particular case when summary judgment was heard less than twenty-four hours after the new attorney had formally appear to the court for the first time on court records. The day of the summary judgment hearing was held with an attorney unprepared to make proper legal arguments on his clients behalf in the case without having any proper opportunity to review witnesses because the trial court acted manifestly unreasonable in making this attorney the trial court understood had first appeared to this trial court only the day prior to the hearing filing his first pleading in the clerk's office in the case, which the judge admitted to blocking the trial court clerk from filing formally at the summary judgment hearing. The basis of our vast jurist prudence rest soundly for all citizens of out public domain to be ensure they will receive a full fair hearing in every trial court which includes being represented by an attorney who is provided adequate time to prepare oral arguments on a clients behalf before any hearing for which the

attorney is appearing which was denied to Mr. Stoller in this case showing the public holds the greater interest in the Washington Supreme Court reversing the denial of a simple continuance and the summary judgment order in this case remanding the case with instruction for attorney William McCool to be provided with atleast 15 days to prepare to make proper complete summary judgment physical pleadings and oral arguments in opposition on his client Mr. Stoller's behalf. The public at large hold the greatest interest in having a trial court provide a newly appearing attorney with the respect and dignity of their years of professional training by allowing the lawyer to make time to prepare for providing complete proper argument on a clients behalf.

> "No man in this country is so high that he is above the law, no officer of the law may set that law at defiance with impunity. All officer's of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." Schever v. Rhodes, 416 US 232, 239-240, 94 S.Ct. 1683 (1974)

The Superior Court denying newly appearing attorney McCool's preliminary request for an extension of time to review the pleadings, including the summary judgment motion filed in the case, to reasonably prepare for oral argument on the pending pleading is an clearly an unreasonable ruling when no prior extensions of time have been requested or granted in the

case to date. The simple extension of time would have cause none of the parties any undue hardship if granted to Mr. McCool, yet the denial cause prejudice to Appellant Stoller.

"Sixth amendment recognizes the right to the assistance of counsel, because it envisions counsel playing a role critical to the adversarial system to produce just results." The client is entitled to be assisted by an attorney, whether retained or appointed, who plays a role necessary to ensure the fairness." *State v. Boyd*, 160 Wn.2d 424, 153 P.3d 54 (2007).

Although the Sixth Amendment applies to criminal defendants the same protections are provided through the Fourteenth Amendment in civil lawsuit actions the Sixth Amendment cases remain informative in regards to the duties, obligations and expectation of all new appearing attorneys in all proceedings before all courts as no person should stand represented in a court with an attorney unprepared in the matters pending before the court as the ends of justice cannot be served by an unprepared attorney when such is knowing to either the opposing counsel or the seated Honorable Judge.

In the present case on appeal the trial court, who is an officer of the law choose to deny a reasonable continuance to an attorney appearing to the court merely twenty-four hours prior to the hearing which had the effect of denying the attorney the ability to effectively and competently represent Appellant Stoller at the critical stage of the trial court proceedings. Due to

medical issues the original attorney Dennis Clayton filed on February 8, 2023 a notice of withdrawal as counsel which required Appellant seek to locate new counsel. On February 28, 2023 the attorney for the Defendants filed their final motion for summary judgment with Appellant while knowing Appellant had not been able to locate a new attorney in so little time given his current incarcerated civil status. Appellant diligently contacted attorneys seeking representation in this pending action which was made more difficult given Appellant's making merely $2.50 an hour gratuity pay in his employment in the State of Washington DSHS civil confinement facility. The new attorney was located at the beginning of April of 2023 whom agreed to take Appellants action at reduced fees Appellant could afford to pay given his limited resources. The new attorney Bill McCool reviewed the pleadings and immediately filed a motion for a continuance in the action to allow him time to prepare a proper response to the Defendant's pending motion for summary judgment. Attorney McCool's notice of appearance was filed in Thurston County Superior Court on April 13, 2023 a day prior to the scheduled summary judgment hearing. Attorney McCool appeared via Zoom at the hearing to request a very reasonable continuance to allow preparation of a proper response to the summary judgment motion which was arbitrarily denied without cause shown for such an

unreasonable denial of a short continuance when the new appearing attorney in question had never before sought any type continuance in the case, nor was the continuance sought to cause any type unreasonable delay in the case. The trial court exercised discretionary powers in a fashion that failed to serve the actual ends of justice in this present instance thereby on untenable grounds as held in over twenty prior cases which Mr. Stoller sees no reason to recite to this reviewing court herein.

> A court abuses discretion when the decision is "manifestly unreasonable", or based on "untenable grounds" or "untenable reasons". In re Dependency of M.R., 166 Wn. App. 504, 517, 270 P.3d 607 (2012).
>
> A "reviewing court cannot find an abuse of discretion simply because it would have decided the case differently, it must be convinced that no reasonable person would take the view adopted by the trial court." Gilmore v. Jefferson County Pub. Transport Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018)(quoting State v. Salgado-Mendoza, 189 Wn.2d,420, 427. 403 P.3d 45(2017).
>
> A trial court's order is reversible only if the order is "manifestly unreasonable" or exercised on "untenable grounds" or for " untenable reasons. T.S. v. Boy Scouts of America, 157 Wn.2d 416, 138 P.3d 1053 (2005).
>
> A discretionary decision rests on "untenable grounds or is based on "untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if the

> court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638(2003)(quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141(1990)
>
> Questions of law are reviewed de novo. In Re Firestorm1991, 129 Wn.2d 130, 135, 916 P.2d 411 (1996). An appellant court will find an abuse of discretion only "on a clear showing that the court's exercise of discretion was 'manifestly unreasonable', or exercised on "untenable grounds", or for "untenable reasons." State ex rel. Caroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775(1971)

Because decisions to impose sanctions, grant an extension of time, or wave the court rules are within the trial court's discretion, the review of the order is for an abuse of discretion. A court abuses its discretion if its decision is "manifestly unreasonable" or exercised on "untenable grounds" or for "untenable reasons" like in the present case when denying new appearing attorney McCool's first request for a short extension of time as the newly appearing counsel of record. The record does not show even the prior attorney of record Dennis Clayton seeking any type of unreasonable multiple extensions of time for summary judgment response given that summary judgment was filed merely days after attorney Clayton withdrew as formal counsel in this case on February 2, 2023 due to his many medical and age related

conditions. The court is authorized to deny an extension of time and to sanction a party for late filing of pleadings which falls soundly within the discretionary powers of the trial court when necessary to stop undue delay in proceedings. But the trial court is also constitutionally required to liberally interpret the court rules to promote justice, and it has the authority to waive or alter any provisions of the rules in order to serve the ends of justice. This included the authority to waive or alter the rules allowing enlargement of time for filing pleadings, appearing for hearings, or to shorten the time within which an act must be done.

> The "court's rules are designed to allow flexibility so as to avoid harsh results." Weeks v. Chief of Wash. State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732(1982).

The denial of the motion for extension of time does not promote justice in the present case wherefore the attorney was required to argue facts unknown to the attorney having just appear the day prior to the hearing in this case. In the pursuit of damages in a civil lawsuit against the State of Washington a Appellant has the established right to seek effective private counsel for representation, which includes being granted extensions of time to locate replacement counsel when the counsel of record becomes ill, withdraws from the case for personal reasons, or is too elderly to continue representation of

the Appellant. The newly hired counsel cannot be effective when entering upon record in a case the day prior to an already pending scheduled hearing, seeks a proper first ever time extension at the scheduled hearing before the trial court which is denied without cause, therefore is actually denied access to file properly prepared opposition pleadings and properly prepared for oral arguments on behalf of the Appellant at summary judgment, then is forced by trial court to orally argue summary judgment without time to review case files, pleadings filed or the official records on a mere moments notice to the attorney resulting in an actual miscarriage of justice and substantial actual prejudice to the Appellant in the current civil action. The facts in the present case shows the exact kind of grounds that warrant exercise of the trial court's vast discretionary powers which allows a trial court to alter or waive the court's rules establishing a timeline for filing pleadings, appearing at hearings, and making oral arguments on behalf of a client wherefore the original counsel of record hired by the Appellant withdrew on February 2, 2023 due to his pending medical conditions, age, and mental health issues requiring his retirement. The opposing counsel for the State of Washington having learned of the withdrawal of Appellant's original attorney attempted to take advantage of the laymen of law Appellant in this action against the State of Washington or it's

agents immediately after the withdrawal of Appellant's counsel of record, filing for Defendant's summary judgment February 28, 2023 against Appellant, leaving Appellant no time to locate replacement counsel while this summary judgment motion is pending. The laymen of law Appellant is incarcerated in the State of Washington's mental health facility on McNeil Island at present time having employment that pays the Appellant merely $2.50 an hour gratuity wage with which to obtain replacement counsel, all facts which are all fully known to the opposing attorneys at the attorney general's office before they sought out summary judgment. Replacement counsel McCool did appear before the Honorable Trial Court on April 13, 2023 merely a few hours after agreeing to take Appellant's case at vastly reduced rate of fees due to Appellant's current incarcerated status in the State of Washington's Special Commitment Center. The $100.00 an hour Mr. McCool agreed to accept requires Appellant work 40 hours to pay off each hour McCool handles Appellant's case. The timeline of events in this case show clearly that Appellant more than diligently made the required timely effort to locate a new replacement attorney immediately upon withdrawal of the original counsel of record. The timeline shows the new attorney McCool appeared to the trial court for the first time April 13, 2023 in this action which is merely hours before the scheduled April 14, 2023 summary judgment

hearing. The timeline established that attorney McCool sought out a very reasonable extension of time to allow him to properly and fully review the files and pleadings filed by opposing counsel of record in this case before his filing a proper response pleading with the necessary professional declarations to address the Defendant's various claims in the pending summary judgment motion. The trial court's decision to deny the very reasonable request for a short first extension of time to newly hired attorney of record appearing for the first time in the case merely hours before the summary judgment hearing is scheduled is an abuse of discretionary powers as it resulted in a "manifest injustice" working against the Appellant in the action whereby trial court granted summary judgment in favor of opposing counsel in the case. The ends of justice would be served by the trial court's granting of the requested first short extension of time sought by attorney McCool to allow this attorney, whom is an agent of the court by virtue of the license issued by Washington State Bar Association to appear and act as a properly advised officer of the court to effectively represent the Appellant's claims before the court. An abuse of discretion is found when no other "reasonable person" would take the position the trial court takes. No reasonable person would have denied the short extension of time requested by the new attorney of record Mr. Bill McCool, no reasonable person

would have require oral arguments presented by attorney McCool whom appeared to the trial court on record for the first time April 13, 2023 seeking to continue the hearing scheduled on April 14, 2023 while knowing the attorney had no preparation time to make oral arguments in the controversy. Here the record demonstrates that McCool was prompt in communicating the constraints placed on him by his current caseload and in explaining why his extension of time request was necessary for the benefit of his client Appellant Stoller. The record does not show any malfeasance or lack of diligence on McCool's part having just appeared on trial court's record as counsel of record in the case the prior afternoon and, indeed, reveals McCool's concern is with his fulfilling his duty of effective representation. In light of these circumstances the trial court's denial of the request for a first extension of time in this case record by McCool or Mr. Clayton creates an "manifest injustice" and was not directed at or useful to deterring future dilatory conduct on McCool's part. Rather the ruling was contrary to the policies promoting effective representation of Appellant's rights in the civil action before the trial court. Under these circumstances, where counsel needs an extension of time to fulfill his obligations of representation, it is appropriate to grant an extension of time without imposition of any sanctions of any type. The denial of the newly appearing

attorney of record McCool's request for an extension of time to make reply to summary judgment is an abuse of discretion. The order was entered denying the extension of time based on "untenable reasons" resulting in a clear "manifest injustice" actually prejudicing the Appellant Stoller at summary judgment. The order denying the extension of time must be reversed, the extension of time granted to attorney McCool, with the order for summary judgment recalled and rescinded as it resulted from the abuse of discretion found with regards to the denial of the extension of time requested by attorney of record McCool whom just appeared to the trial court the prior afternoon on record.

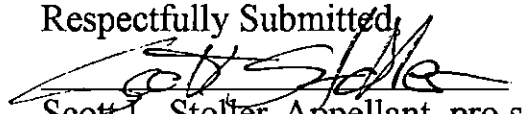
F. CONCLUSION

The public holds the greatest interest in having a trial court uphold a new appearing attorneys' right to prepare the best argument for a client as any member of the public at large could be the client at anytime. The sound discretion of a trial court, even within the four corners of a civil lawsuit, must be exercised at all time in a fashion that serves the best interest of justice or our jurist prudence as a whole shall fail if even one person is forced to be represented in a case before any trail court criminal or civil by an attorney trained in the law who is knowing to be unprepared to argue in their clients' best interest

as the basis of our legal system is the right to fairness at all hearing both criminal and civil in nature without fail. The Trial Courts' ruling denying a short continuance ruins contrary to our jurist prudence held by the public at large therefore is manifestly an unreasonable exercise of trial court discretion in denying a short continuance to a new appearing attorney in a case before the trial court for any reason.

DATED This 24th day of March, 2025.

Respectfully Submitted,



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Appellant certifies in compliance with RAP 18.17 this opening brief contains 3849 words by his signature below.

CERTIFICATE OF SERVICE

GR 3.1

Petitioner, Scott Stoller, does hereby certify that on this 24th day of March, 2025, a true and correct copy of the following documents were mailed in the SCC facility's mailroom with postage prepaid:

- Petition for Review
- Certificate of Service

Addressed to the following persons:

The Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Joshua Schaer, AAG
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DATED This 24th day of March, 2025

Respectfully Submitted,

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Legal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SCOTT L. STOLLER, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, a state agency; CHERYL STRANGE, Secretary of the Washington State Department of Corrections, Respondents.	No. 87063-7-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Scott Stoller sued the Department of Corrections (DOC) and its secretary for negligence and violations of his constitutional rights, claiming he was attacked in prison by a fellow inmate. DOC moved for summary judgment. Days before oral argument, Stoller's new attorney moved for a CR 56(f) continuance, which the court denied. The court granted summary judgment for DOC. Stoller, now pro se, challenges the denial of his motion to continue. We affirm the superior court's denial, as his counsel's motion did not comply with CR 56(f).

I. BACKGROUND

In 1997, a jury convicted Stoller of child rape and child molestation. Stoller v. Dep't of Corr., noted at 150 Wn. App. 1016, slip op. at 1 (2009). Stoller alleges

that inmates attacked him in 1999, 2017, and 2018. After the 2018 attack, Stoller filed, lost, and unsuccessfully appealed, a grievance with DOC, requesting administrative segregation. In short, DOC claimed its "segregation policy 320.200 require[d] that [Stoller] provide specific actions and individuals posing a threat which could not be found for the incidents given in [his] grievance" and "[n]o records of requests for protective custody were found."

In November 2021, Stoller, represented by counsel, sued both DOC and its secretary. The complaint alleged DOC negligently breached its duty to protect him from harm by other inmates and that this failure also violated "his constitutional right to be free from cruel and unusual punishment."

In November 2022, DOC moved for summary judgment, arguing "no documentation reflects that he articulated a specific fear for his safety before" the alleged assault and a failure to establish proximate cause. (Citing Winston v. Dep't of Corr., 130 Wn. App. 61, 64, 121 P.3d 1201 (2005) ("to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of prison officials that such an injury will be inflicted, or good reason to anticipate such.")). The summary judgment motion identified the inmate who assaulted Stoller in 2018 and at least one of the officers who responded to the assault. The court set oral argument for January 27, 2023.

On January 25, 2023, Stoller's first attorney withdrew, citing health issues. On Stoller's oral motion, the court continued the scheduled hearing to give Stoller time to obtain new counsel, and "recommended" he do so "as soon as possible."

On April 14, 2023, the superior court held the hearing. A new attorney

appeared on behalf of Stoller and informed the court that, two days prior, he had mailed a notice of appearance, a CR 56(f) motion for a continuance, and a CR 6(b) motion to shorten DOC's time to respond to that motion. The court stated it did not see these documents in its file. Nonetheless, the court first heard argument on the motion to continue.[1] Ultimately, and as we will discuss further below, the court denied the continuance. The same day, the court granted summary judgment for DOC, after hearing argument from both parties on that dispositive motion.

In November 2023, Stoller, now proceeding pro se, moved for reconsideration. On December 15, 2023, the court denied the motion after holding a second hearing. Stoller appeals pro se.

II. ANALYSIS

Importantly, Stoller was represented by counsel for his CR 56(f) motion, which is the primary subject of this appeal. As to those time periods he was not represented, we have long held that pro se litigants are bound by the same rules of procedure and substantive law as licensed attorneys. Holder v. City of Vancouver, 136 Wn. App. 104, 106, 147 P.3d 641 (2006). A pro se appellant's failure to "identify any specific legal issues . . . cite any authority" or comply with procedural rules may still preclude appellate review. State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999); In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (courts are "under no obligation to grant special favors to . . . a pro se litigant."). That said, we liberally interpret *our* Rules of Appellate

[1] During this portion of the hearing, Stoller's attorney acknowledged he likely mailed his notice of appearance and the motions to the wrong address.

Procedure "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a).

Here, we address only the denial of Stoller's motion for a continuance. Stoller's notice of appeal indicates he seeks review of the order of December 15, 2023 "denying [his] Motion for Reconsideration of the orders entered April 14, 2023, especially the order denying" his motion for a continuance. Further, Stoller's brief assigns error only to, and presents substantive argument only on, the denial of his continuance. Stoller chose not to assign error to, or present any argument on, the order granting summary judgment. Thus, we will only consider the superior court's denial of the continuance. Clark County v. Growth Mgmt. Hr'gs Bd., 177 Wn.2d 136, 144, 298 P.3d 704 (2013) ("The scope of a given appeal is determined," not only by the notice of appeal, but by "the assignments of error, and the substantive argumentation of the parties."); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

Here, Stoller's counsel moved for a continuance of DOC's motion for summary judgment expressly pursuant to CR 56(f). That rule provides that if a "party cannot present by affidavit facts essential to justify the party's opposition, the court . . . *may* order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." CR 56(f) (emphasis added). A "party *does not have an absolute right to a continuance*, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion." Willapa Trading Co.,

Inc. v. Muscanto, Inc., 45 Wn. App. 779, 785, 727 P.2d 687 (1986) (emphasis added). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." Kozol v. Dep't of Corr., 192 Wn. App. 1, 6, 366 P.3d 933 (2015). "A decision is manifestly unreasonable if the trial court takes a view that *no reasonable person* would take." Clipse v. Commercial Driver Servs., Inc., 189 Wn. App. 776, 787, 358 P.3d 464 (2015) (emphasis added).

This court has held a "court may deny [a CR 56(f)] motion where (1) the requesting party fails to offer a good reason for the delay, (2) *the requesting party does not state what evidence is desired*, or (3) the desired evidence will not raise a genuine issue of material fact." Kozol, 192 Wn. App. at 6 (emphasis added). In other words, a court can deny a CR 56(f) continuance if a party fails to identify what "desired" evidence will raise a genuine issue of material fact. "Mere speculation cannot support or defeat a motion for summary judgment." Umpqua Bank v. Gunzel, 19 Wn. App. 2d 16, 34, 501 P.3d 177 (2021). Stated positively, a continuance may be justified when "a party who knows of the existence of a material witness and shows good reason why he cannot obtain the affidavit of the witness in time for the summary judgment proceeding." Lewis v. Bell, 45 Wn. App. 192, 196, 724 P.2d 425 (1986).

Much of Stoller's briefing is devoted to (a) defending his own diligence after his first counsel withdrew and before his second lawyer appeared; (b) explaining the effect of his attorney's late appearance; and (c) citing generalized legal principles, including the purportedly analogous Sixth Amendment's right to counsel, the generalized abuse of discretion standard, and the purpose of our court

rules. (Quoting Weeks v. Chief of State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982); U.S. CONT. amend. VI.[2])

On its face, Stoller does nothing to address Kozol's holding that a court may deny a CR 56(f) motion when "the requesting party does not state what evidence is desired" such that it will raise a genuine issue of material fact. 192 Wn. App. at 6. The closest Stoller comes to addressing these questions is in his reply brief, when he summarily states the "evidence would have c[o]me to light had the trial court provided the continuance." Stoller acknowledges the absence of current evidence, explaining that his second attorney "would have discovered that the laymen of the law had failed to challenge summary judgment, failed to seek discovery documents, failed to take any reasonable actions to proceed in the lawsuit."

In short, Stoller fails to identify any "desired" evidence which will raise a genuine issue of material fact, admitting that neither he nor either of his lawyers pursued such evidence. Kozol, 192 Wn. App. at 6. These are grounds alone for affirming the court. Cf. Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (emphasis added) (where the party "identif[ied] the evidence he sought and explain[ed] that the declarations would rebut the defense expert testimony.").

[2] Stoller also summarily invokes the Fourteenth Amendment of the United States Constitution in his reply brief. We need not consider this argument. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 14, 721 P.2d 1 (1986) ("'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'") (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)).

Even if we were to look past Stoller's briefing to the underlying CR 56(f) motion, Stoller's second attorney does not identify "facts essential to justify [his client's] opposition]." CR 56(f). Instead, other than giving a general recounting of his claims, his declaration substantively states only that Stoller "will need time" (1) "to receive discovery responses from [DOC] regarding any procedures they may have followed to try to keep [him] from being injured," and (2) "to procure the specific names of staff at Clallam Bay to whom he gave specific information about specific inmates."

As to the former, while internal procedures may be relevant evidence and proper discovery, it does not address the thrust of the State's motion for summary judgment, namely, that "Stoller lacks objective proof that he informed prison officials of either individuals or expected events that would support keeping him separate from the general inmate population."

As to the latter, Stoller's attorney's declaration ignores the fact that the summary judgment motion identified by name the inmate who attacked him and, in a supporting declaration, the names of the officers who responded to the assault and a plethora of other documents related to the assault, including seven incident reports. Perhaps most importantly, Stoller's attorney's declaration also ignores the fact that Stoller's 2018 grievance identified at least three officers by name to whom he claims he voiced concerns after his 2017 alleged assault. In this context, it is unclear to us what information was "desired" but lacking at the time of the summary judgment hearing, which would create a genuine issue of material fact. Kozol, 192 Wn. App. at 6.

Given the information in his possession, we hold that it is not an abuse of discretion for the court to have found that Stoller failed to provide "a good reason" to explain why he did not proffer *any* evidence in response to DOC's motion for summary judgment, even considering his pro se status following his first attorney's withdrawal. Id. (good reason); Holder, 136 Wn. App. at 106 (pro se).

Stoller had a similar amount of time to adduce evidence in response to DOC's summary judgment motion as the plaintiff in Willapa. 45 Wn. App. at 784-85 (finding movant knew of their counsel's withdrawal over two months before trial). Stoller's counsel withdrew in late January 2023 and Stoller's hearing was held in mid-April 2023, i.e. approximately two months. At a minimum, nothing prevented Stoller from filing his own testimonial affidavit simply (re-)identifying DOC staff he believed had knowledge about specific threats. Cottringer v. Emp't Sec. Dep't, 162 Wn. App. 782, 787-88, 257 P.3d 667 (2011) (a pro se party, if acting solely on their own behalf, can act in any court as their own attorney).

As a final note, Stoller claims his "request for extension of time was denied outright without reason given for such a denial." This assertion is contrary to the record. The court provided a lengthy explanation to Stoller's then attorney for denying the continuance, including:

> I don't think the equities justify [an extension]. And I'll say why. One is, Mr. Stoller contacted you some two months ago. If you told him you couldn't assist him, *he needed to either find other counsel – and two-plus months is longer than a four-week continuance if you will –* or he needed to file his own response, as we see many individuals in custody do that if they haven't found counsel.
>
> *I was quite clear that he needed to move quickly.* Apparently some time between two months ago and this week, you've decided you have time. As a lawyer, you understand that there are deadlines for

> summary judgment and can look at the file and see that. And even had things arrived yesterday, *that would be putting all of your eggs in the basket of hoping the court would continue the hearing on late request for a motion to continue*. . . .
>
> You attempted to get it filed yesterday which is *very untimely* even if it had been successful. It wasn't successful.

(Emphasis added.)[3]

In short, Stoller failed to establish the court's decision was one "no reasonable person would take," Clipse, 189 Wn. App. at 787, when viewed on any of the factors enumerated in Kozol, 192 Wn. App. at 6. Thus, we hold the superior court did not abuse its discretion when it denied his motion for a continuance.

III. CONCLUSION

We affirm.

Díaz, J.

WE CONCUR:

Birk, J.

Bowman, J.

[3] Stoller also claims the "record shows no previous extensions of time requested by any party to the proceedings." This statement is also not consistent with the record. The court explained that the "[p]laintiff asked for more time orally" after the "withdrawal of formal counsel had occurred," which the court granted.