No. 102079-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID M. FRALEY,

Respondent,

v.

PROLIANCE SURGEONS, INC., P.S.; JOHN BLAIR, JR., M.D., Individually,

Petitioners.

MEMORANDUM OF *AMICI CURIAE* WSMA AND WSHA IN SUPPORT OF GRANTING REVIEW

Gregory M. Miller, WSBA No. 14459
Isaac C. Prevost, WSBA No. 55629

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

Attorneys for Amici Curiae Washington State Medical Association and Washington State Hospital Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Court Rules

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are the Washington State Medical Association ("WSMA") and the Washington State Hospital Association ("WSHA"), further identified in their accompanying motion. They have a continuing interest in cases affecting their members, patients, the health care system and its costs. At issue is the service or delivery requirement for RCW 7.70.110 mediation letters on a health care defendant to trigger the one-year tolling of the normal three-year statute of limitations under RCW 4.16.350 for an injury due to health care.

WSMA and WSHA appear because the decision in *Fraley v. Proliance Surgeons & John Blair, M.D.,* __ Wn.App.2d ___, 528 P.3d 1283 (2023) ("Decision"), holds that an RCW 7.70.110 mediation letter naming Dr. Blair but addressed and mailed to St. Joseph's hospital address, which is not his office, his agent, or his employer, and received after the statute of limitations expired, nevertheless tolled the statute of limitations. The

Decision is contrary to the statute's text and policy and to *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011).

Unruh holds that, to be effective, the mediation letter must be "made on" the defendant or its agent. Division II nevertheless ruled that the letter tolled the statute of limitations even though it was not directed to Fraley's provider Dr. Blair or his agent, nor to Dr. Blair's employer Proliance, and thus was not "made on" any of them. Moreover, on this record it necessarily was received after the letter's text stated the normal three-year statute of limitations expired.[1]

Nothing in the statute or *Unruh* states or implies that an RCW 7.70.110 mediation letter naming a defendant is effective when it is mailed to a third party, much less when that

[1] The text of the letter states that it tolled the three-year statute for one year and that "it will now run on September 21, 2021," CP 68, so that the three-year statute would run September 21, 2020. It is undisputed that the letter was not put in the U.S. mail to Dr. Blair by the St. Joseph hospital clerk until no earlier than September 22, 2020, when the envelope was postmarked (*see* CP 71, 185), meaning that normal mail delivery would not result in receipt by Dr. Blair for days after September 22, 2020, after the original date that the limitation would run.

misdirected letter fortuitously finds its way to the defendant ***after*** the statute has run. But this is what Division II's Decision permitted. As a published decision, it will continue to permit that construction of the statute.

The Decision's novel interpretation of RCW 7.70.110 is a substantial change in the law as crafted by the legislature and interpreted by this Court in *Unruh*. It is inconsistent with the underlying policy of encouraging early mediation of claims. More important for purposes of whether to grant review, it is a statewide change of substantial impact which, if allowed, must be from this Court, if not the legislature. Review is appropriate per RAP 13.4(b)(1) and 13.4(b)(4), at minimum.

WSMA and WSHA know first-hand that, if not corrected, the Decision will permit an unregulated expansion of untimely claims which will harm the health care system, patients, and *Amici's* members, while increasing the cost of care by needlessly extending litigation contrary to the legislative directives for

filing timely claims. Either the statutes and their rules have meaning, or there are no rules.

WSMA and WSHA participate and ask the Court to accept review because, by mis-stating the basis for what constitutes a "making" of a mediation letter, the Division II Decision transformed the tolling provision into an open-ended vehicle for extending claims beyond the legislature's determination of when the statute of limitations would end. This is a major state-wide policy change.

WSMA and WSHA ask the Court to grant review and confirm its *Unruh* decision's requirements for service of mediation letters, and also confirm that the statute, construed in the context of Ch. 7.70 RCW, means mediation letters must be sent to and received by the defendant or its agent within the initial statute of limitations to permit tolling. Sending such an important dispute-resolution notice to a third party with the hope and prayer it will be correctly forwarded on to the defendant and

received before the statute runs is not adequate, effective, nor consistent with the statute.

The purpose of the statute is to promote early resolution of claims to avoid litigation, not to serve as a last-gasp lifeline for a plaintiff who cannot find counsel to take their case. Division II's Decision promotes a "lifeline policy" that is not part of the statute because such does not promote early resolution of claims. Rather than resolution, it promotes increased litigation, ***contrary*** to the intent of the statute. The Court should accept review to confirm the state-wide policy and application of this important statute and its purpose of encouraging early resolution of disputes rather than extended litigation.

II. ISSUE OF CONCERN TO MEDICAL *AMICI*

Whether review should be granted to confirm the requirement in RCW 7.70.110 and *Unruh v. Cacchiotti* that to "make" a mediation letter sufficient to toll the statute of limitations, the letter must be directed to and received by the defendant or its agent prior to expiration of the statute of

limitations and to vacate the Division II Decision which leaves no clear guidance for how tolling mediation letters are served?

III. STATEMENT OF THE CASE

Medical Amici rely on the facts as stated by Petitioners with the additions in the discussion.

IV. LEGAL DISCUSSION

A. The Governing Statutes: RCW 7.70.110 and 7.70.010.

The legislature preempted the field of injuries from health care in 1976 as part of enacting substantial tort reforms. RCW 7.70.010; *Anaya Gomez v. Sauerwein,* 180 Wn.2d 610, 617 ¶15, 331 P.3d 19 (2014). In 1993, the legislature enacted RCW 7.70.110 which provides for tolling the three-year statute of limitations if a mediation letter is sent:

> The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

RCW 7.170.110.

The mediation statute was a part of comprehensive health care reforms, the findings and intent for which are stated at https://app.leg.wa.gov/RCW/default.aspx?cite=43.20.050 (last visited Aug. 7, 2023). Those findings do not specifically address the mediation provisions. However, those reforms promoted alternatives to litigation, as is self-evident from RCW 7.70.110. It is also evident from the statute, as well as the cases, that to be effective in precluding litigation before expiration of the statute of limitation, a mediation request must reach the potential defendant or agent before the statute runs. Otherwise, no pre-emptive conversation can occur. Why would a defendant engage in mediation when sent an RCW 7.70.110 mediation requests ***after*** the statute of limitations had run and the claim had expired? To promote the underlying policy of avoiding litigation, any such letter must be received by the defendant before expiration of the statute of limitations, ideally long before its expiration. This important point should be, and can be, clarified if review is granted.

B. Review Should Be Granted Because Division II's Analysis Is At Odds With The Purpose Of RCW 7.70.110 To Avoid Costly Litigation By Extending The Statute Of Limitations Beyond The Tolling Permitted By the Legislature.

1. Division II's Analysis.

Division II's Ruling Granting Review ("Comm. Ruling") noted the case addressed "the effect of a mediation request ***not directed to a party or their authorized agent.***" Comm Ruling at 9 (emphasis added). Review was granted on "the issue of what service is necessary for a mediation request to toll the statute of limitations in a [medical] malpractice suit". Comm. Ruling at 9. Thus, as accepted at the Court of Appeals, the case was about where the letter was directed and on whom it was served.

After briefing on the merits and oral argument, the Division II panel held that Mr. Fraley's letter addressed to St. Joseph Hospital, which was not Dr. Blair's agent or employer, "was sufficient to toll the statute of limitations for one year under RCW 7.70.110." Decision at 1-2. Specifically, it held that under a crabbed, literal interpretation of the statute, it was "the

'making' of the mediation letter, not the defendant's 'receipt,' that triggers the one-year tolling provision in RCW 7.70.110." Decision at 10, fn. 3. *See* Decision at 10-11. Division II then quoted *Unruh* out of context for the proposition that the statute requires only that the request for mediation be 'written' and be made in good faith," citing *Unruh,* 172 Wn.2d at 114. *Id.* at 11. There was no requirement the letter reached the health care provider, much less that it reach the provider before the statute of limitations which was to be tolled had expired. This is an absurd interpretation of RCW 7.70.110.

2. The Division II analysis is at odds with the purpose of the statute and *Unruh.*

Nowhere does the Division II analysis recognize that the "making" of a "request" by an RCW 7.70.110 mediation letter necessarily requires the letter be sent to the defendant or its agent in order for the "request" to be "made" ***on that defendant***. And that the mediation letter's fulsome "making" must occur – be received – before the statute of limitations expires, even if formal

service is not required. Only this serves the purpose of the statute to foreclose litigation by mediation.

If the purpose of the statute is to encourage settlement of disputes by early mediation – which it is – then it is not consistent with the statute to allow tail-end-Charlie claims misdirected to a third party as a Hail Mary effort to preserve a potential case that has been rejected by multiple attorneys. Review should be granted because the Division II decision frustrates the purpose of the statute by allowing continuation of stale claims beyond the time permitted by the legislature in a manner contrary to a commonsense application of the statute, and contrary to this Court's decision in *Unruh.* RAP 13.4(b)(1) and 13.4(b)(4).

Moreover, the interpretation adopted by Division II is unworkable. Under its vague framework, it permits an extreme application where a plaintiff could write the name of a health provider on an envelope, put in the mediation letter, fold it into a paper airplane, and launch it off the Space Needle, or an office building and, if it eventually gets picked up and a Good Deed

Doer who looks up the address for the defendant, pops it into an envelope, stamps it, and sends it to the defendant (as the hospital clerk eventually did here), the statute is tolled, even if the health care provider only receives it after the statute of limitations has expired. There is no time frame for receipt. That is an absurd result, but it is what occurs under the statutory analysis of Division II.

Review should be granted to re-establish a reasonable interpretation of the mediation letter tolling statute that is consistent with its language and purpose: to give a defendant notice, before expiration of the statute of limitations, of a desire to mediate the claimed dispute, and so the opportunity to avoid expensive litigation.

3. The Decision Improperly Expands The Basis For Delivery Or Service Of Mediation Letters Beyond *Unruh's* Requirement Of Delivery Directed To The Health Care Provider Or Agent.

As noted *supra,* the Decision transformed the tolling provision into an open-ended vehicle for extending claims

beyond the legislature's determination of what the statute of limitations would be by an absurd, overly literal interpretation. It is basic that the courts will avoid interpreting statutes in ways that result in unlikely, absurd, or strained results. *See, e.g., Five Corners Fam. Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011).

The Decision abandons a common-sense and necessary interpretation of RCW 7.70.110 for triggering a mediation letter's tolling provision explained in *Unruh*, which held that tolling arises only when the letter is "made on" a defendant – by being sent to and received by the provider or the provider's agent ***before*** the statute of limitations expires. Logically and physically, one cannot "make" a good faith request for mediation without conveying it to the health care provider. The provider cannot respond if it is not received. And the provider has no good reason to respond if it is received after the statute of limitations has already expired.

But under Division II's Decision, a "written" mediation letter is just as effective if it is attached to the proverbial tree that falls in the middle of the woods where no one can hear it make a sound. Not only is this analysis absurd, it is inconsistent with *Unruh* and RCW 7.70.110 and its underlying policy, meriting review under RAP 13.4(b)(1) and 13.4(b)(4).

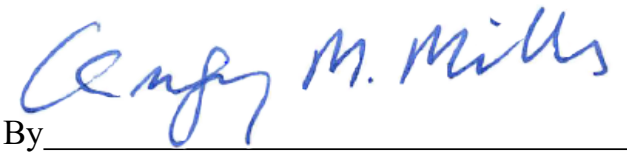
V. CONCLUSION

Amici Curiae WSMA and the WSHA respectfully ask the Court to accept review and either reverse *per curiam* per *Unruh*, or schedule argument at the earliest opportunity.

I certify that this document contains 2162 words in compliance with RAP 18.17, exclusive of words in exempted parts of the document.

Dated this 7th day of August, 2023.

CARNEY BADLEY SPELLMAN, P.S.



By_____
Gregory M. Miller, WSBA No. 14450
Isaac C. Prevost, WSBA No. 55629
Attorneys for Amici Curiae Washington State Medical Association and Washington State Hospital Association

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Via court e-filing website/Portal, which sends notification of such filing to the following:

Brennen J. Johnson
Johnson, Graffe, Keay, Moniz, & Wick
2115 N 30th St Ste 101
Tacoma, WA 98403-3396
brennenj@jgkmw.com

Brian P. Waters
Johnson Graffe Keay Moniz & Wick LLP
925 4th Ave Ste 2300
Seattle, WA 98104-1145
Brian@jgkmw.com

Lauren Eileen Coates
The Tinker Law Firm
149 Finch Pl Sw Ste 1
Bainbridge Island, WA 98110-2577
lauren@tinkerlawfirm.com

Heather S. Moore Paradis
The Tinker Law Firm, PLLC
149 Finch Pl Sw Ste 1
Bainbridge Island, WA 98110-2577
heather@tinkerlawfirm.com

Todd Douglas Tinker
The Tinker Law Firm
149 Finch Pl Sw Ste 1
Bainbridge Island, WA 98110-2577
todd@tinkerlawfirm.com

Michelle M Garzon
Fain Anderson, Et Al
1301 A St Ste 900
Tacoma, WA 98402-4299
Shelly@FAVROS.com

Amanda Kathleen Thorsvig
Fain Anderson, Et Al
1301 A St Ste 900
Tacoma, WA 98402-4299
amanda@favros.com

Elizabeth Anne Unterbrink
Attorney at Law
1301 A St Ste 900
Tacoma, WA 98402-4299
elizabethu@favros.com

DATED this 7th day of August, 2023.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, Legal Assistant

CARNEY BADLEY SPELLMAN

August 07, 2023 - 2:55 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,079-1
Appellate Court Case Title:	David M. Fraley v. Commonspirit Health, et al.
Superior Court Case Number:	21-2-05265-9

The following documents have been uploaded:

- 1020791_Briefs_20230807144358SC754443_9279.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Memorandum in Support of Granting Review FINAL.pdf
- 1020791_Motion_20230807144358SC754443_1632.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion of WSMA and WSHA to File Amicus Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- Brian@jgkmw.com
- Shelly@FAVROS.com
- amanda@favros.com
- ann@favros.com
- brennenj@jgkmw.com
- carrie@favros.com
- elizabethu@favros.com
- fuhrmann@carneylaw.com
- heather@tinkerlawfirm.com
- keihn@carneylaw.com
- lauren@tinkerlawfirm.com
- miller@carneylaw.com
- prevost@carneylaw.com
- todd@tinkerlawfirm.com
- watersb@jgkmw.com

Comments:

Sender Name: Elizabeth Fuhrmann - Email: fuhrmann@carneylaw.com
Filing on Behalf of: Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20230807144358SC754443