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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28912-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ESTHER KLOEHN and JAY KLOEHN,

Appellants,

v.

DR. DAVID MORRISON and DR. LEANDRO CABANILLA,

Respondents.

BRIEF OF RESPONDENTS

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Daniel W. Ferm, WSBA #11466
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I. COUNTERSTATEMENT OF ISSUES PRESENTED
FOR REVIEW

A. Issues Pertaining to the Kloehns' Appeal from the Summary Judgment Order Dismissing their October 24, 2009 Complaint and from the Order Denying Reconsideration of that Dismissal Order.

1. Did the trial court properly dismiss the Kloehns' 2009 complaint because they failed to present evidence of what the letters that they claimed were sent to Drs. Morrison and Cabanilla in August 2007 said, such that there was no basis upon which the court could have ruled that the Kloehns made a "good faith request for mediation" within the meaning of RCW 7.70.110 before the three-year statute of limitations ran in February 2009 so as to toll the limitations period for one year?

2. Were the Craig Mason and Lori Mason declarations that the Kloehns submitted in response to defendants' summary judgment motions to dismiss their 2009 complaint "regular in form" and/or in substantial compliance with the requirements of CR 5(b)(2)(B) for purposes of proving that any letters were mailed to Dr. Morrison and/or Dr. Cabanilla in August 2007?

3. Did the trial court properly exercise its discretion in denying the Kloehns' motion to reconsider the dismissal of their 2009 complaint based on CR 59(a)(4)?

B. Issues Pertaining to the Kloehns' Appeal from the Summary Judgment Order Dismissing their March 4, 2010 Complaint and from the Order Denying Reconsideration of that Dismissal Order.

1. Did the trial court properly dismiss the Kloehns' March 4, 2010 complaint because the offer-of-mediation letters that the Kloehns served on defendants in December 2009 were served too late to toll the statute of limitations and/or were not "good faith requests for mediation"?

2. Can a statute of limitations that has already run be "tolled"?

3. Were the letters that the Kloehns served on Drs. Morrison and Cabanilla on December 1 and 2, 2009, "good faith requests for mediation" within the meaning of RCW 7.70.110?

4. Have the Kloehns failed to show that denial of their motion for reconsideration of the dismissal of their 2010 complaint was an abuse of the trial court's discretion?

5. If it was not error for the trial court to dismiss the Kloehns' 2009 complaint, was the order dismissing the 2009 complaint *res judicata* for purposes of the claims that the Kloehns' 2010 complaint re-asserted against the same defendants?

II. COUNTERSTATEMENT OF THE CASE

A. Nature of the Case.

Esther Cortez-Kloehn alleges that she was injured as a result of health care that Dr. David Morrison and Dr. Leandro Cabanilla provided

to her on or before February 1, 2006,¹ and that they are liable to her under RCW 7.70.030(1), (2) and (3). *CP 4-6*. Jay Kloehn asserts a claim solely for loss of spousal consortium. *CP 5-6*.

B. Proceedings Below.

Represented by attorney Craig Mason, formerly an attorney with Ochoa Law Group, the Kloehns filed suit in Benton County on October 14, 2009. *CP 1*.² On December 1-2, 2009, they served the defendants with letters, *CP 17-23*, that cited RCW 7.70.110 and asserted that their purpose was to give “required notice under RCW 7.70.100 of the pending (re) filing of a lawsuit against you by Esther Cortez-Kloehn, and a good faith offer of mediation under RCW 7.70.110,” *CP 20*. RCW 7.70.110 provides:

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.

On December 30, 2009, the defendants moved for summary judgment, *CP 100-09, 130-36*, seeking dismissal of the complaint based on the applicable statute of limitations, which the Kloehns acknowledge is RCW

¹ *CP 4*; see also *CP 14 (lines 17-18)* (“the surgeries at issue occurred on or about December 5, 2005, January 27, 2006, and February 1, 2006”) and *CP 80 (lines 17-18)* (same).

² Ms. Kloehn consulted Ochoa Law Group about making claims against Drs. Morrison and Cabanilla sometime before August 2007. *CP 13; App. Br. at 4*.

4.16.350, *App. Br. at 8*. In their summary judgment memoranda, defendants noted that their counsel had been served in late November 2009 with a document purporting to be an affidavit of service showing that counsel for the Kloehns had mailed mediation request letters to Drs. Morrison and Cabanilla in August 2007. *CP 103-04 and CP 136 (referring to the Lori Mason affidavit, CP 8-9)*. Defendants cited *Breuer v. Douglas D. Presta, D.P.M.*, 148 Wn. App. 470, 475-76, 200 P.3d 724 (2009), *rev. denied*, 169 Wn.2d 1029 (2010), for the proposition that the words that are written determine whether a letter qualifies as a “good faith request” for mediation, and argued that, because the Kloehns had not presented any copy of a 2007 mediation-request letter, the court could not find that they had made a “written good faith request” for mediation even if the court accepted their evidence that their counsel had mailed something in 2007. *CP 105-06, 135*. Defendants also argued that the Kloehns’ evidence of mailing in 2007 was insufficient. *CP 104-06, 136*.

In response to the summary judgment motions, the Kloehns argued (1) that serving the December 1-2, 2009 letters offering to mediate had given them a four-year limitations period for their claims, making their October 2009 complaint not time-barred, *CP 10-11*, and (2) that the October 2009 complaint was timely filed because the statute of limitations had been tolled from August 2007 to August 2008 by mailing, sometime

in August 2007, of mediation “notices” to Drs. Morrison and Cabanilla by Ochoa Law Group staff under Craig Mason’s direction, *CP 11-13*. In support of the second argument, Mr. Mason declared that, while he was practicing law with Ochoa Law Group in 2007, he had “double-checked with staff to be absolutely certain that RCW 7.70. . . . 110 notices had been mailed to both defendants in this case” because he “wanted to make certain that I protected Ms. Kloehn’s [sic] with a four-year statute of limitations before I left the firm [in October 2007],” and that “reliable staff . . . told me they mailed them.” *CP 13*. He acknowledged that “no hard copy exists of this [2007] correspondence” and asserted that Ms. Ochoa had no additional files, but did have “drafts of the notices.” *CP 13*.³

The Kloehns also cited a declaration (titled Affidavit of Service) signed by Lori Mason, stating that, “on or about August 6, 2007,” while employed as a paralegal at Ochoa Law Group, *CP 8*, she had sent mediation “notices” to the defendants at unspecified addresses by certified and regular mail and that the letters had been “confirmed as sent” before mid-October 2007, *CP 9* (¶¶ 4- 5). Ms. Mason stated that Craig Mason, who drafted the “notices,” “wanted to have a full four year statute of limitations available to Ms. Kloehn for filing her suit.” *CP 9* (¶ 2). Ms.

³ At no time did the Kloehns ask for a continuance to depose or subpoena documents or computer records from Ms. Ochoa.

Mason did not say what the “notices” said and did not offer copies of the “notices” or contemporaneous records of their mailing.

The Kloehns also made an argument, not well developed, that because their December 2009 mediation offer letters had been combined with notices of intent to sue under RCW 7.70.100(1), they could not re-file a complaint based on those letters until more than 90 (but fewer than 96) days after serving the 2009 mediation offer letters, and thus during the “window” period of March 4-9, 2010, but that requiring them to re-file their lawsuit “seems to be a waste of judicial resources.” *CP 14*.

The Kloehns did not request a CR 56(f) continuance of the hearing on defendants’ summary judgment motions to obtain more or better evidence, from Ms. Ochoa or any other source, that mediation “notices” had been mailed in 2007.

The trial court granted defendants’ summary judgment motions by order entered February 5, 2010. *CP 58-59*. On February 10, the Kloehns filed a motion for reconsideration, *CP 24-28*, and a Declaration of Brian Anderson, *CP 29-30*, to which were attached draft letters to Drs. Morrison and Cabanilla, unsigned and bearing dates of August 6, 2007, *CP 33-36*.

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The draft letters contain this language:

This is an excellent case for mediation, and *we offer to attend such mediation* in good faith, and in hopes of an amicable solution. The statute reads: [then quoting RCW 7.70.110].

Conclusion

Ms. Cortez-Kloehn wishes to have her suffering recognized, and believes that the objective, outside input of a mediator will help her get perspective on her suffering, _____, and on her anger.

I hope you can promptly respond, and we can facilitate an amicable solution.

CP 34, 36 (bold italics added). Mr. Anderson asserted that the documents were among “electronic files that remain from [his colleague Gloria] Ochoa’s prior law firm.” *CP 29*. Mr. Anderson did not claim to be a custodian of Ms. Ochoa’s records, and did not explain how he had obtained the draft letters or how the documents had been maintained electronically. Nor did Mr. Anderson swear that the draft letters had been created in August 2007, had not been edited since, or had ever been mailed.

In their motion for reconsideration, the Kloehns, citing CR 59(a)(4), asserted that the attachments to the Anderson declaration “could not have been produced sooner, given the difficulties of locating Ms. Ochoa and garnering a response from her.” *CP 25*. No sworn testimony supported that assertion. Mr. Mason did not attempt to reconcile his

February 10 assertion that the purported draft letters could not have been produced in response to the defendants' summary judgment motions, *CP 25*, with his January sworn statement that Ms. Ochoa "did have drafts of the notices I recalled sending," *CP 13 (lines 17-18)*.⁴

In response to the motion for reconsideration, Dr. Cabanilla argued that the Anderson declaration failed the tests for "newly discovered evidence" under CR 59(a)(4). *CP 155-56*. Dr. Cabanilla also argued that, under *Breuer*, 148 Wn. App. at 475-76, the language in the draft letters attached to the Anderson declaration would not qualify as "good faith requests" for mediation even if plaintiffs could prove that letters containing the draft language had been finalized, signed, and mailed to the defendants, *CP 159-60*. Counsel for Dr. Cabanilla submitted a declaration, *CP 162-79*, that included copies of December 2009 emails suggesting to Mr. Mason that plaintiffs subpoena Ms. Ochoa's records to determine whether those records include proof of mailing of finalized, signed letters that included good faith requests for mediation, which plaintiffs had not done. *CP 165*.

On March 4, 2010, the Kloehns filed another complaint against Drs. Morrison and Cabanilla. *CP 61-68*. That complaint included

⁴ No testimony was ever offered to explain why, if mediation request letters were mailed to Drs. Morrison and Cabanilla in August 2007, no record of that mailing exists, and why nothing except drafts of letters exist even in electronic form.

statements that notices and requests for mediation had been “provided [to the defendants] in late summer of 2007” and that “second” requests for mediation had been “delivered” on December 1-2, 2009. *CP 62* (¶ 2.3).

On March 4, 2010 (the same day that the Kloehns filed their second complaint), the trial court denied the Kloehns’ motion for reconsideration. *CP 55*. The Kloehns filed a notice of appeal. *CP 56-60*. *See Court of Appeals Case No. 29044-1*.

On March 23, defendants moved in the 2010 lawsuit for summary judgment based on the statute of limitations and the doctrine of “abatement.” *CP 182-88*. Abatement was argued instead of a *res judicata* because defendants did not know, as of March 23, that the court had denied the Kloehns’ motion for reconsideration in the 2009 lawsuit, and believed two lawsuits were pending at the same time. *See CP 185-86*. The Kloehns responded with arguments they make on appeal. *CP 75-81*. The trial court granted defendants’ motions, *CP 84-85*, and denied reconsideration, *CP 89-94*. The Kloehns re-appealed. *CP 95-99*. The two appeals have been consolidated under Court of Appeals Case No. 28912-5.

III. STANDARD OF REVIEW

Orders granting summary judgment are reviewed *de novo*. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010). Orders denying motions for reconsideration of orders

granting summary judgment or dismissal are reviewed for abuse of discretion. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, *rev. denied*, 133 Wn.2d 1012 (1997). New evidence may be considered on a motion for reconsideration of a summary judgment order, CR 59(a)(4), but only if the evidence was not available in time to submit it in response to the original summary judgment motion. *Id.* An appellate court may affirm a trial court ruling on any ground supported by the record, whether or not the trial court based its ruling on that ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

IV. ARGUMENT

A. When the Kloehns Filed their First Complaint on October 14, 2009, the Statute of Limitations Had Already Run Because It Had Not Been Tolloed in August 2007.

The Kloehns argue that Ochoa Law Group staff mailed mediation “notice” letters to Dr. Morrison and Dr. Cabanilla in August 2007, tolling the three-year limitations period for one year and giving them until February 2010 to sue. *E.g., App. Br. at 6, 12.* That argument fails unless the Kloehns’ evidence of mailing in 2007 was admissible and sufficient to show that letters containing “good faith request[s] for mediation” within the meaning of RCW 7.70.110 were mailed in August 2007.

1. Because the Kloehns' witnesses failed to offer copies of, or quote from, the letters they claim were mailed in 2007, the trial court could not have found that the Kloehns made "good faith requests for mediation" in 2007.

What a letter says matters for purposes of tolling under RCW 7.70.110. Unless the Kloehns' counsel sent Drs. Morrison and Cabanilla letters that *requested* mediation – not letters that merely expressed a willingness to mediate – tolling of the statute of limitations did not occur. *Breuer*, 148 Wn. App. at 475-76. In seeking to avoid dismissal of their 2009 lawsuit, the Kloehns offered testimony that staff their counsel's former law firm had mailed mediation "notices" to the defendants in August 2007, but the Kloehns did not present copies of, or quotations from, any such letters. The trial court thus could not have ruled that the Kloehns made good faith requests for mediation in 2007, and had to grant summary judgment and dismiss the Kloehns' 2009 complaint.

2. The Kloehns did not present admissible evidence sufficient to trigger any rebuttable presumption that Ochoa Law Group staff mailed *any* letters to the defendant physicians in August 2007.

Even if one ignores the Kloehns' failure to show what the letters they claim were mailed to the defendants in August 2007 *said*, their evidence was insufficient to prove *mailing*.

As sources of legal standards for proof of mailing, the Kloehns cite *Lee v. Western Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638

(1983), for the proposition that “[a]n affidavit of service that is regular in form is presumptively correct,” and RCW 7.70.100(1), for its provision that “[p]roof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail.” *App. Br. at 10*. The Craig and Lori Mason declarations, however, were not “regular in form” and did not satisfy the essential requirements of CR 5(b)(2)(B).

a. The Mason declarations were not “regular in form”.

Lee and subsequent Washington decisions that recite the “regular in form” rule⁵ never explain what “regular” means. Dictionaries say it means “steady or uniform in course, practice or occurrence: not subject to unexplained or irrational variation,” or “undeviating in conformance with a standard set,” and its synonyms include “normal, typical, natural,” and it “may imply conformity to a prescribed rule, standard, or established pattern.” *Webster’s Third New Int’l Dictionary*, p. 1913; *see also American Heritage Dictionary (2d ed. 1985)*, p. 1041 (regular means customary, usual, or indicates normal conformity to set procedure, principle, or discipline; methodical, well-ordered). “Regular” does not mean idiosyncratic, unusual, or *sui generis*.

⁵ *E.g., In re Dependency of A.G.*, 93 Wn. App. 268, 277, 968 P.2d 424 (1998) (citing *Lee*); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991), *rev. denied*, 118 Wn.2d 1022 (1992) (citing *Lee*); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 176, 744 P.2d 1032 (1987) (citing *Lee*). Several unpublished Court of Appeals decisions also recite the rule.

Respondents would agree that completing, as a matter of standard routine, an affidavit or declaration of service based on personal knowledge that says when a mailing was done, that postage was prepaid and – most importantly – what document was mailed and to whom at what address, would qualify as proof of mailing that is “regular in form.” Respondents do not agree that declaring 28 months afterward that one meant to, and believes one’s staff did, mail, to unspecified addresses, documents that one cannot produce and does not quote (and in which one fails to assert that postage was prepaid), can be proof of mailing that is “regular in form.” The Kloehns offered the second, irregular, type of evidence of mailing.

- b. The Mason declarations did not comply with the proof-of-mailing requirements of CR 5(b)(2)(B).

The Kloehns propose that the Court look to “the . . . manner . . . prescribed by court rule or statute for proof of service by mail,” *App. Br. at 10*, but fail to cite any pertinent court rule or statute. Respondents’ counsel has found no proof-of-mailing statute that could apply here, but there is a court rule, CR 5(b)(2)(b), entitled “Proof of service by mail.” It provides:

Proof of service of all papers permitted to be mailed may be by . . . affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing _____ to (John Smith), (plaintiff's) attorney, at (office address or residence), and to (Joseph Doe), an additional (defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).

(John Brown)

Attorney for (Defendant) William Noe

Thus, under CR 5(b)(2)(B), proof of service by mail requires at least (a) personal knowledge, (b) of mailing with postage prepaid, (c) to a named person at a certain address, (d) of a specific (*e.g.*, “foregoing”) document. In this case, no one certified or testified that he or she mailed a copy of a particular document, postage prepaid, to any specific address(es). The testimony before the trial court was that Mr. Mason *meant* for mailing of letters containing mediation “notices” to occur back in 2007, and that he believes mailing did occur then because he “double-checked with staff.” *CP 13*. The trial court was not presented, however, with testimony or other evidence that Craig or Lori Mason mailed any specifically worded document to any particular address on a particular day with postage prepaid. Thus, proof of mailing was insufficient under CR 5(b)(2)(B).

Because the Kloehns did not present proof of mailing that was “regular in form,” or that complied with CR 5(b)(2)(B), no burden shifted

to Drs. Morrison and Cabanilla to prove that they did *not* receive letters requesting mediation in 2007.⁶

- c. The Mason declarations were not admissible or sufficient to prove mailing under generally applicable rules of evidence.

Mr. Mason's declaration testimony was he had "double-checked with staff to be absolutely certain that RCW 7.70. . . . 110 notices had been mailed" and that "reliable staff . . . told me they mailed them." *CP 13*. Mailing of a document, even when it is known what the document was, may not be proven by sworn testimony recounting the hearsay statement of someone else. *Johanson v. United Truck Lines*, 62 Wn.2d 437, 442, 383 P.2d 512 (1963). Lori Mason's declaration testimony at least purported to reflect her personal knowledge, but what she asserted was insufficient to show that mediation "notices" were mailed to either defendant at a particular address.

The Kloehns cite *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994), for the proposition that, absent a finding by clear evidence that service did not occur, summary judgment cannot be granted based on failure to serve process. *App. Br. at 11*. But, even assuming that rule applies to service of RCW 7.70.110 mediation requests as well as to

⁶ Nonetheless, both defendants denied receiving letters requesting mediation in 2007. *See CP 103, 132*.

service of process, it is implicit in the rule that there is admissible and sufficient evidence that service of process *was* effected. Because the evidence of mailing in 2007 that the Kloehns offered was inadmissible and insufficient for the reasons already explained, no issue of fact needs to be resolved.

B. The Trial Court Did Not Abuse Its Discretion In Denying the Kloehns' CR 59(a)(4) Motion for Reconsideration of the Order Dismissing their 2009 Complaint.

1. The evidence on which the Kloehns based their motion for reconsideration was not "newly discovered".

Motions for reconsideration of orders granting summary judgment or dismissal are reviewed for abuse of discretion. *Morinaga*, 85 Wn. App. at 831. CR 59(a)(4) allows a trial court to consider new evidence on a motion for reconsideration of an order granting summary judgment, but only if the evidence was not available to the nonprevailing party in time to submit it in response to the original summary judgment motion. *Morinaga*, 85 Wn. App. at 831.⁷ Even if the Brian Anderson declaration had been admissible and sufficient to prove that particular letters were

⁷ CR 59(a)(4) allows reconsideration because of "[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Washington decisions recognize that CR 59(a)(4) applies to motions for reconsideration after grants of summary judgment *E.g.*, *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 497, 176 P.3d 510 (2008).

mailed to Drs. Morrison and Cabanilla in August 2007 – which it was not for reasons explained below – the Kloehns submitted it too late.

In the Kloehns’ response to defendants’ summary judgment motions, Craig Mason advised the trial court that “no hard copy exists” of the letters he professed to believe had been mailed to Drs. Morrison and Cabanilla while he was affiliated with Ochoa Law Group in 2007, and that Ms. Ochoa had no additional files, but did have “drafts of the notices.” *CP 13*. The Kloehns did not request a CR 56(f) continuance of the summary judgment hearing in order to obtain copies of such “drafts of the notices.” “The realization that [a] first declaration was insufficient does not qualify [a] second declaration as newly discovered evidence” that entitles a litigant who lost on summary judgment to reconsideration. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).⁸ The Kloehns did not explain how the exhibits to Mr. Anderson’s subsequent declaration could be “newly discovered” evidence even though they seem to be copies of the draft letters that Mr. Mason earlier had professed to know existed, and why they are not properly treated as evidence submitted after the Kloehns’ counsel realized that what he had

⁸ See also *Wagner Dev., Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999) (the summary judgment schedule and hearing provided for in CR 56(c) affords litigants ample opportunity to present evidence, and “[i]f [certain] evidence was available but not offered until after that opportunity passe[d], the parties are not entitled to another opportunity to [it]”).

submitted in response to the defendants' summary judgment motions was insufficient.

2. Mr. Anderson's testimony was inadmissible and insufficient to prove mailing in 2007.

Mr. Anderson's testimony was inadmissible and insufficient to constitute proof of mailing in 2007 because his declaration did not qualify him even to authenticate business records, because there are no business records of mailing in any event, and because he professed no personal knowledge of any mailing. Mr. Anderson declared that certain statements of fact "are true to the best of my ability" – not because he claims personal knowledge of them – including that he had reviewed "the electronic files that remain from Mrs. Ochoa's prior law firm" and found drafts of letters to Drs. Morrison and Cabanilla. *CP 29, 32-36*. Mr. Anderson did not profess to have had custody of the electronic files since August 2007, or to know when the letters were created, whether other drafts or versions of letters were created, whether the letters or other versions of them were ever finalized, or whether the letters were mailed and if so when and to what address(es). Mr. Anderson's testimony fell short of creating any presumption that letters worded in a particular way were mailed in 2007, postage prepaid, to specific addresses.

3. The mediation language in the draft letters did not communicate “good faith requests for mediation”.

The draft letters attached to the Anderson declaration were “offer[s] to attend” a mediation. *CP 34, 36*. They were not “good faith requests” to mediate or do anything except attend a mediation. *Breuer*, 148 Wn. App. at 475-76. Nor were the letters attached to the Anderson declaration *good faith* offers or requests *to mediate*, because Mr. Mason had already declared that his reason for drafting letters in 2007 was “to make certain that I protected Ms. Kloehn’s [sic] with a four-year statute of limitations before I left the firm [in October 2007],” *CP 13*, not to settle and avoid suing. And Lori Mason had testified, *CP 9* (¶ 2), that Mr. Mason “knew he would be leaving [Ochoa Law Group] and wanted to have a full four year statute of limitations available to Ms. Kloehn for filing her suit,” not for mediation and then, if necessary, litigation. Neither witness testified that Mr. Mason and/or the Kloehns actually wanted to mediate, and the draft letters included notice of intent to sue.

C. The Trial Court Properly Dismissed the Kloehns' March 2010 Complaint Because the Offer-of-Mediation Letters that the Kloehns Served on Defendants in December 2009 Were Served Too Late to Toll the Statute of Limitations and Were Not "Good Faith Requests for Mediation".

1. RCW 7.70.110 is a tolling statute that operates to stop the running of, not to restart, the statute of limitations.

The Kloehns argue that RCW 7.70.110's plain language provides that "[f]iling the RCW 7.70.110 notice creates a four year statute of limitations." *App. Br. at 8*. The statute says no such thing. It says:

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. [Emphases added.]

RCW 7.70.110 is a *tolling* statute. A tolling statute is "a law that *interrupts* the running of a statute of limitations in certain situations, as when the defendant cannot be served with process in the forum jurisdiction [italics supplied]," and toll means "to stop the running of."⁹ Once a statute of limitations has run, it can no longer be tolled.¹⁰

The Kloehns argue that the "clear language" of RCW 7.70.110 "means that a four year statute of limitation is created by filing an RCW

⁹ B. Garner, *Black's Law Dictionary* (7th ed.), p. 1495.

¹⁰ *Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 200 P.3d 261 (2009), *rev denied*, 170 Wn.2d 1008 (2010), implicitly recognizes this point, because the court there held that the plaintiff's "timely" mailing of a RCW 7.70.110 mediation request tolled the statute of limitations, *id.* at 776, explaining that "the defendant [sic, plaintiff] made a request for mediation *within the original statutory time limits* and thus is entitled to the one-year tolling of the statute of limitations," *id.* at 774 (italics added).

7.70.110 notice of a good faith request to mediate, at any point prior to the four years running.” *App. Br. at 9*. Thus, according to the Kloehns’ theory, the three-year limitations period becomes a four-year period even if a mediation “notice” is “filed” more than three years but less than four years after the cause of action accrued.

The Kloehns are wrong, because the statute uses the verb “tolls” to describe the effect of making a mediation request on the statute of limitations “prior to filing a cause of action” and thus during the three-year limitations period. There is no four-year period until and unless the *three-year* limitations period is tolled, and tolling can occur only while, and if, that *three-year* period is still running. The letters that the Kloehns served on defendants in December 2009, *CP 20-23*, were served ten months after the three-year statute of limitations had expired and too late to toll that statute.

The Kloehns assert that “statute of limitation defenses are not favored.” *App. Br. at 13*.¹¹ They cite no authority for that assertion. “Where no authorities are cited in support of a proposition, the [appellate] court . . . may assume that counsel, after diligent search, has found none.” *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 883, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008) (quoting *State v. Logan*, 102

¹¹ Not the page numbered 13 that is part of the appendix to the Kloehns’ brief.

Wn. App. 907, 911 n. 11, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).¹² And, even if statute of limitations defenses are disfavored, that did not relieve the Kloehns of an obligation to make a timely [before the statute of limitations had run] good faith request for mediation under RCW 7.70.110 in order to have the benefit of a four-year period in which to sue.

2. The December 2009 letters were not “good faith requests for mediation”.

Even if service of a “good faith request for mediation” after the statute of limitations has expired could give a medical malpractice claimant a fourth year in which to sue, the letters that the Kloehns served on Drs. Morrison and Cabanilla in December 2009, *CP 20-23*, did not amount to good faith requests for mediation for two reasons.

First, they were not *requests* for mediation. In *Breuer*, 148 Wn. App. at 475-76, the court held that an expression of willingness to

¹² *And see Paul v. Kohler & Chase*, 82 Wash. 257, 261-62, 144 P. 64 (1914) (“the plea of the statute of limitation is not now regarded by the courts with the disfavor with which it was once regarded. . .”); and *St. Michelle v. Robinson*, 52 Wn. App. 309, 311, 759 P.2d 467 (1988) (noting but not addressing a party’s “assert[ion] that the statute of limitations defense is disfavored by courts and should be narrowly construed.” In *1000 Virginia L.P. v. Vertecs Corp.*, 127 Wn. App. 899, 914, 112 P.3d 1276 (2005), the court stated that “precedent clearly disfavors the *retroactive application of a change* in the limitations period” applicable to a claim [italics supplied],” but did not suggest that courts disfavor nonretroactive limits on the time within which a claim may be asserted. The Kloehns do not argue that RCW 4.16.350 imposed a three-year limitations period on their claims retroactively, nor could they so argue because a three-year limitations period has applied to claims against health care providers since 1971, *see Bixler v. Bowman*, 94 Wn.2d 146, 148, 614 P.2d 1290 (1980) (quoting the pertinent language of *Laws of 1971, ch. 80, § 1*), and the Kloehns’ claims did not accrue until after the year 2004.

consider mediation is not a “good faith *request*” to mediate. The December 2009 letters that Mr. Mason had served on Drs. Morrison and Cabanilla, *CP 20-23*, *offered* to mediate but did not *request* mediation. Second, the 2009 letters were not *good faith* offers to mediate, because their author, Mr. Mason, was not genuinely seeking to mediate rather than litigate; he had *already filed suit*, and the letters were devices meant only to keep his clients’ lawsuit from being dismissed as time-barred.

3. Even if the 2009 mediation-offer letters had been effective to give the Kloehns a fourth year in which to sue, they had only until February 1, 2010, to sue, and their 2010 complaint was not filed until March 4, 2010.

The Kloehns do not contend that their malpractice claims accrued later than February 1, 2006. Thus, even if it were true that a malpractice claimant can obtain a four-year limitations period by serving a physician with a letter such as the ones the Kloehns served on December 1-2, 2009, the four-year limitations period that the Kloehns would have given themselves expired in February 2010. Their second complaint was not filed until March 4, 2010, which was too late.

The Kloehns allude, *App. Br. at 6, 11-12*, to the “more than 90 days, but fewer than 95 days” or “window” period provided for in RCW 7.70.100(1) regarding notices of intent to sue,¹³ and assert that Ms. Kloehn

¹³ The “window” provision is in the sixth sentence of RCW 7.70.100(1), and provides that “[i]f the notice is served within ninety days of the expiration of the applicable statute

has “relied upon” statutory language and “should be entitled to equitable tolling,” citing *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439, rev. granted, 169 Wn.2d 1006 (2010). Because the Kloehns did not cite *Mellish* or argue “equitable tolling” below, such an argument should not be considered. RAP 2.5(a).

Although it is far from clear, the Kloehns seem to be suggesting that this Court accept a multi-proposition “equitable tolling” argument according to which fairness requires that their second complaint be deemed timely, (a) because their 2009 letters to Drs. Morrison and Cabanilla combined RCW 7.70.110 offers to mediate with RCW 7.70.100(1) notices of intent to sue; (b) because RCW 7.70.100(1) forbade the Kloehns to sue until 90 days after service of the notice of intent to sue; (c) because the Supreme Court, as of December 2009, had not yet held the notice-of-intent-to-sue requirement unconstitutional (as it ultimately did in *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010)); and (d) because they filed their second complaint during the five-day “window” period following expiration of the RCW 7.70.100(1) waiting period in “reliance” on section 100(1).

of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.”

If that is indeed what the Kloehns mean to argue, they are wrong for at least two separate reasons. First, the Kloehns are asking the Court to fallaciously conflate the mandatory notice-of-intent-to-sue requirement under RCW 7.70.100(1) with the non-mandatory option of requesting mediation under RCW 7.70.110, which neither statute requires or suggests be done at the same time or in the same document.¹⁴

Second, even if combining RCW 7.70.110 requests to mediate with RCW 7.70.100(1) notices of intent to sue allows a plaintiff to file suit four years and five weeks after her claim accrued as long as she files more than 90 and fewer than 96 days after serving the combined notice/request, the use of a combined notice would do so only if the mediation request was effective to toll the three-year limitations period. The 2009 notices of intent to sue were not served “within ninety days of the expiration of the applicable statute of limitations” as required by RCW 7.70.100(1), so the Kloehns did not have the right, under *that* statute, to sue during a five-day

¹⁴ The “window” provision in RCW 7.70.100(1) existed because giving notice of intent to sue did not toll the statute of limitations but a plaintiff was both required to give notice of intent to sue before filing suit and forbidden to sue for 90 days after giving notice of intent to sue. The “window” provision gave a plaintiff at least five days in which to sue if the required notice of intent to sue was served fewer than 90 days before the expiration of the three-year limitations period, such that the three-year limitations period would have run during the 90-day waiting period. Because a claimant’s election to make a non-mandatory request for mediation under RCW 7.70.110 *tolls* the statute of limitations and does not impose a waiting period for filing suit after making a mediation request, section .110 does not afford a claimant even more time, after expiration of the limitations period, in which to sue. As long as a mediation request is made “x” days before the limitations period runs, the claimant who chooses to request mediation always has one year plus “x” days in which to sue, and no “window” period is necessary.

“window” period following the 90th day after service of the belated notices of intent to sue. As explained above, the letters that the Kloehns served on December 1-2, 2009, were not effective to toll the three-year limitations period under RCW 7.70.110, because the limitations period had *already* run and was no longer tollable. Thus, the Kloehns never gave themselves a fourth year in which to sue. Their 2009 notices of intent to sue were meaningless because they gave notice only of the intent to bring a time-barred lawsuit.

The Kloehns also fail to explain how *Mellish* supports their new “equitable tolling” argument. That decision held equitable tolling inapplicable because there was no evidence that the plaintiff had relied on the defendant’s deception or false assurances. *Mellish*, 154 Wn. App. at 405-06. As the *Mellish* court explained:

A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. [Citations omitted.] “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” [Citations omitted.] The party asserting that equitable tolling should apply bears the burden of proof. [Citations omitted.]

Id. The Kloehns do not claim they filed their 2010 complaint (or their 2009 complaint) when they did in reliance on any deception or false assurances by Drs. Morrison and Cabanilla. Equitable tolling does not

apply even if the Kloehns are entitled to have an argument based on it considered on appeal despite their failure to raise such an argument below.

D. If the Kloehns' 2009 Complaint Was Properly Dismissed, Their 2010 Complaint Was Barred by *Res Judicata*.

The Kloehns' 2010 complaint asserted claims that are barred by *res judicata* if their 2009 complaint was properly dismissed. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *rev. denied*, 168 Wn.2d 1028 (2010) (summary judgment in a prior lawsuit qualifies as a “final judgment on the merits” and is a valid basis for applying *re judicata* to bar a second lawsuit against the same defendant on the same claim).

E. The Trial Court Did Not Abuse Its Discretion In Denying the Kloehns' Motion for Reconsideration of the Order Dismissing Their 2010 Complaint.

Because the Kloehns offer no argument that it was an abuse of the trial court's discretion to deny their motion for reconsideration of the dismissal of their 2010 complaint, which relied on legal arguments they had made before, there is nothing for Dr. Morrison and Dr. Cabanilla to respond to or any basis upon which this Court could rule that the denial of reconsideration was an abuse of discretion.

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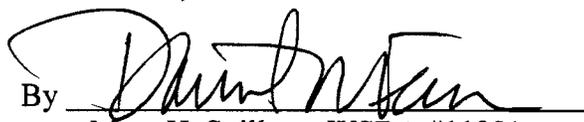
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V. CONCLUSION

For the foregoing reasons, both of the Kloehns' complaints were properly dismissed. This Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of November, 2010, I caused a true and correct copy of the foregoing document, "Brief of Respondent(s)," to be delivered in the manner indicated below to the following counsel of record:

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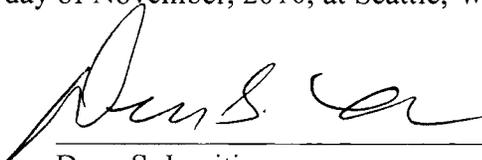
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Dena S. Levitin