

FILED

NOV 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305376

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

KEITH L. DIXON and REBECCA L. DIXON, husband and wife,

Appellants,

v.

YAKIMA HMA, LLC d/b/a YAKIMA REGIONAL HOSPITAL, a for-
profit limited liability company; EDUARDO MEIRELLES, MD and
JANE DOE MEIRELLES, husband and wife,

Respondents.

RESPONDENTS' JOINT RESPONSE BRIEF

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Yakima Regional Hospital

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ORIGINAL

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I. INTRODUCTION

Summary judgment serves an important purpose and expeditiously and economically disposes of cases when trial is unnecessary. Trial is unnecessary in this case because plaintiffs' case is forever time barred and the trial court's ruling should be affirmed.

The crucial issues before this Court concern the medical malpractice statute of limitations. It is undisputed that the three-year statute of limitations on plaintiffs' medical negligence claims against defendants expired on May 31, 2011. The issues before this court are whether plaintiffs triggered the one-year tolling provision under RCW 7.70.110 or the 90-day tolling provision under RCW 4.16.170. They did not and do not dispute this.

Instead, plaintiffs erroneously argue that RCW 7.70.110 and RCW 4.16.170 are at odds and create ambiguity in Washington's medical malpractice laws. Washington's medical negligence laws are not ambiguous and these statutes each address a separate and distinct way plaintiffs could have, but elected not to, temporarily toll the medical negligence limitations period.

Plaintiffs did not trigger the one-year tolling provision under RCW 7.70.110 because they filed a lawsuit in Yakima County Superior Court before serving their purported written request for mediation upon

defendants. Plaintiffs' mediation request was also ineffective to trigger RCW 7.70.110's one-year tolling provision because it did not "request" mediation in "good faith" as the statute requires.

Plaintiffs also failed to trigger the 90-day tolling provision under RCW 4.16.170 because they did not serve any defendant within 90 days of filing their lawsuit.

II. RESTATEMENT OF ISSUES

1. Did plaintiffs comply with RCW 7.70.110 by filing a lawsuit in Yakima County Superior Court before providing defendants with their purported request for mediation?

2. Did plaintiffs "request" mediation in "good faith" under RCW 7.70.110 by inviting defendants to engage in mediation under RCW 7.70.100 after they filed their lawsuit?

3. Under Washington's 90-day tolling statute, was plaintiffs' filed summons and complaint *per se* void or voidable when they failed to serve any defendant within 90 days of filing?

III. RESTATEMENT OF THE CASE

The following procedural facts are undisputed. Plaintiffs Keith and Rebecca Dixon alleged that defendants Eduardo Meirelles, M.D. and Yakima Regional Hospital ("Regional") were negligent in their care and

treatment of Mr. Dixon during his back surgery on May 29, 2008. CP 1 – 14.

On May 25, 2011, plaintiffs filed this medical negligence lawsuit against defendants in Yakima County Superior Court. CP 1 – 14.

On May 31, 2011, Regional received a letter from plaintiffs' counsel dated May 26, 2011, a day after they filed their lawsuit that stated in pertinent part, "my clients intend to prosecute this action for medical negligence, by filing an action in the Yakima County Superior Court, after you have had ninety days to consider these claims..." CP 27 – 33. Plaintiffs' counsel's letter also stated, "I invite you to engage in meaningful mediation with my clients, to resolve these matters, pursuant to RCW 7.70.100(3)". Id.

On May 31, 2011, plaintiffs' three year limitations period for their medical negligence claim expired. CP 53.

On August 23, 2011, 90 days expired since plaintiffs filed their summons and complaint in this action in Yakima County Superior Court. Id.

On August 25, 2011, plaintiffs served Regional with a copy of the summons and complaint. Id. On October 3, 2011, plaintiffs served Dr. Meirelles with a copy of the summons and complaint. CP 37.

Defendants jointly moved the trial court to summarily dismiss plaintiffs’ medical negligence claims as time barred. CP 43 – 47. On December 20, 2011 the trial court granted defendants’ motion for summary judgment of dismissal because plaintiffs’ “request for mediation was made after the complaint was filed.” *Id.* Plaintiffs subsequently sought this Court’s review. CP 67 – 68.

The following chronology sets forth the uncontested relevant dates in this action:

Date	Relevant Event
May 29, 2008:	Date of plaintiff’s surgery and claimed negligent act or omission.
May 25, 2011:	Plaintiffs file this action in Yakima County Superior Court.
May 26, 2011	Plaintiffs mail letter containing notice of claim.
May 31, 2011	RCW 4.16.350 statute of limitations expires three years from the date of plaintiff’s surgery (Note: May 29, 2011 was a Sunday and May 30, 2011 was a legal holiday).
August 23, 2011	90 days after plaintiffs filed their complaint.
August 25, 2011	Plaintiffs serve Regional.
October 3, 2011	Plaintiffs serve Dr. Meirelles.

IV. ARGUMENT

A. Standard of Review.

This Court reviews a trial court's summary judgment order de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where summary judgment is predicated on an issue of statutory interpretation, appellate courts review the trial court's interpretation of the statute and its application to a particular set of facts de novo. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453-454, 266 P.3d 881 (2011).

The Appellate Court may also affirm the lower court on any grounds established by the pleadings and supported by the record. *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

B. RCW 7.70.110 unambiguously states that written mediation requests must be made before filing.

This Court should affirm the trial court's dismissal of plaintiffs' medical malpractice claims as time barred¹ because they failed to comply

¹ The three-year statute of limitations applies to an action based on medical negligence. RCW 4.16.350(3). Actions can only be commenced within the time periods specified in Chapter 4.16 RCW "after the cause of action has accrued." RCW 4.16.005. A cause of action accrues when the plaintiff has a right to seek relief in the court. *Janicki Logging v. Schwabe, Williamson, & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001). The purpose of statutes of limitations is to shield defendants and

with the plainly stated statutory requirements necessary to trigger the statute's one-year tolling provision². RCW 7.70.110 states:

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. (emphasis added).

Statutes are construed in accordance with well settled principles.

Cortez-Kloehn v. Morrison, 162 Wn. App. 166, 170, 252 P.3d 909 (2011).

The purpose of statutory construction is to give effect to the meaning of legislation. *Id.* (quoting *Roberts v. Johnson*, 137 Wn.2d 84, 91, 969 P.2d 446 (1999)). In any question of statutory construction, Washington courts strive to ascertain the intention of the Legislature by first examining a statute's plain meaning. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 113, 257 P.3d 631 (2011) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). If the statute's meaning is plain on its

the judicial system from stale claims. *Burns v. McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630 (2006). When plaintiffs sleep on their rights, evidence may be lost and memories may fade. *Burns*, 135 Wn. App. at 293.

² A plaintiff carries the burden of proof if he or she alleges that the statute was tolled and does not bar the claim. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). Plaintiffs admit that they failed to comply with the statute's requirements by delivering their "mediation demand one day after the action was filed, instead of before the action was filed." Plaintiff-Appellants' Opening Br. at 1.

face, then courts give effect to that meaning as an expression of Legislative intent. *Id.* Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provisions are found, related provisions, and the statutory scheme as a whole. *Id.* (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). Statutes that are clear and unambiguous do not need interpretation. *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 170, 252 P.3d 909 (2011).

RCW 7.70.110 is a tolling statute. *See Cortez-Kloehn*, 162 Wn. App. at 171. Under the plain terms of the statute, plaintiffs must make a “written...good faith...request for mediation...prior to filing a cause of action” to trigger the statute’s one year tolling provision. *See* RCW 7.70.110; *See also Unruh v. Cacchiotti*, 172 Wn.2d 98, 114, 257 P.3d 631 (2011). If a plaintiff does not complete any of these statutorily mandated procedural requirements then the statute’s one-year tolling provision is not triggered. Plaintiffs failed to trigger the statute’s tolling provision because they elected to file a lawsuit in Yakima County Superior Court before they attempted to request mediation.

Washington courts have similarly interpreted RCW 7.70.110 based on its plain meaning. For example, plaintiffs must “request” mediation as is plainly stated in RCW 7.70.110 or any attempt to trigger the statute’s

one year tolling provision is ineffective. *See Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009) (holding a willingness to mediation is not a “request” as is required under RCW 7.70.110). A written mediation request under RCW 7.70.110 must also be made in “good faith” as is plainly stated in the statute. *See Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 777 – 78, 200 P.3d 261 (2009) (holding that plaintiffs must act with honesty and lawfulness of purpose to comply with RCW 7.70.110’s “good faith” requirement).

RCW 7.70.110’s requirement that a plaintiff must make a written request to mediate in good faith “prior to filing a cause of action” does not require judicial interpretation because it means what it plainly states. Plaintiffs did not comply with this statute and this Court should affirm the trial court’s dismissal of plaintiffs’ medical malpractice claims as time barred.

C. The Legislature intended medical malpractice claimants to try to resolve claims before filing lawsuits.

The Court should also consider and give effect to the Legislative intent when it construes statutes. *State v. Cooper*, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006); *See also Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004).

The Legislature clearly intended for patients and physicians to try to resolve medical malpractice claims before plaintiffs filed lawsuits. The unstated but apparent purpose of RCW 7.70.110 is to facilitate settlement of disputes through pre-suit mediation. *Unruh*, 172 Wn.2d at 114. RCW 7.70.110 does not have a specifically stated Legislative intent but RCW 7.70.100, a companion medical malpractice statute to RCW 7.70.110, cites to RCW 5.64.010 for its Legislative intent. The stated Legislative intent following RCW 5.64.010 states in pertinent part:

“It is also the legislature’s intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trial for those for whom settlement negotiations do not work.” RCW 5.64.010.

The Legislature intended to encourage parties to resolve medical malpractice claims before claimants filed lawsuits and RCW 7.70.110 is an effort to achieve that stated goal.

D. Plaintiffs did not request mediation under RCW 7.70.110.

Plaintiffs’ letter dated May 26, 2011 is not a request for mediation as is required under RCW 7.70.110. Plaintiffs’ letter states in pertinent part:

“Please understand that my clients intend to prosecute this action for medical negligence, by filing an action in Yakima County Superior Court after you have had ninety days to consider these claims...If you fail or refuse to agree to reasonable compensation for my clients, I invite you to

engage in meaningful mediation with my clients, to resolve these matters, pursuant to R.C.W. 7.70.100(3).” CP 29.

Plaintiffs do not cite to RCW 7.70.110 in their letter, instead, they cite to RCW 7.70.100(3) and threaten suit within 90 days³. RCW 7.70.100 is a different statute than RCW 7.70.110 that outlines specific procedures for serving a 90-day notice of intent to sue. On its face, plaintiffs’ letter is not a request to mediate under RCW 7.70.110.

Plaintiffs’ invitation to mediate under threat of suit within 90 days is also insufficient for purposes of triggering mediation under RCW 7.70.110. Plaintiffs have a duty to clearly request mediation, not just invite it, under RCW 7.70.110. *Breuer v. Presta*, 148 Wn. App. 470, 200 P.3d 724 (2009) (holding that a willingness to mediate is insufficient to amount to a “request” to mediate under RCW 7.70.110); *See also Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 252 P.3d 909 (2011) (holding an offer to attend mediation is not a “request” for mediation). Plaintiffs’ letter is not a request to mediate as is required by RCW 7.70.110.

E. Plaintiffs did not request mediation in good faith.

Plaintiffs did not toll the statute of limitations under RCW 7.70.110 because any claimed request for mediation was not made with

³ Plaintiffs threaten suit in their May 26, 2011 letter even though they filed their lawsuit in Yakima County Superior Court the day before plaintiffs’ counsel drafted this letter. CP 1 – 14.

good faith. RCW 7.70.110 requires that requests for mediation be “written” and be made in “good faith.” RCW 7.70.110. Good faith is an “honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.” *Morris v. Swedish Health Servs.*, 148 Wn. App. 771, 777, 200 P.3d 261 (2009). Good faith is examined by considering all of the relevant circumstances. *Morris*, 148 Wn. App. at 778.

Plaintiffs could not have requested mediation in good faith because they knew at the time of their purported request that they had already filed a lawsuit in Yakima County Superior Court. *See* CP 1 – 14. Furthermore, there is no evidence on this record that they made any attempt to request mediation prior to filing their lawsuit on May 25, 2011.

F. RCW 4.16.170 did not nullify plaintiffs’ filing after 90 days expired without service upon any defendant.

Plaintiffs erroneously argue that their filing was *per se* void because they failed to serve any defendant within 90 days of filing, but their lawsuit was voidable, not *per se* void⁴. *See e.g., Barks v. The Superior Court for Skamania County*, 144 Wn. 44, 45, 257 P. 837 (1927)

⁴ Plaintiffs’ argument is moot even assuming *arguendo* that it is correct, that their filing was *per se* void after 90 days expired and that they complied with RCW 7.70.110, because plaintiffs concede that they did not timely file their lawsuit before RCW 7.70.110’s one-year tolling period expired. Even under plaintiffs’ argument this action is forever time barred.

(holding that service of summons and complaint on the first day of the week was voidable). Had either defendant waived the statute of limitations defense⁵ plaintiffs certainly would not have had to re-file their complaint to pursue their lawsuit even though 90 days expired since filing without service. *See e.g., Dyson v. King County*, 61 Wn. App. 243, 809 P.2d 769 (1991) (holding that plaintiff's filed complaint was valid even though he failed to comply with mandated pre-suit notice requirements before filing because defendants waived their statute of limitations defense).

Plaintiffs also do not cite any authority to support their argument that their filing was *per se* void after 90 days without service. Instead, plaintiffs' argument is based on an erroneous presumption – that the terms “file” and “commencement” are synonymous under RCW 7.70.110, RCW 4.16.170 and applicable Court Rules.

⁵ The statute of limitations is an affirmative defense that could have been waived by either defendant. CR 8(c) states that the statute of limitations is an affirmative defense and that parties are required to plead such affirmative defenses in their answer to a pleading. If an affirmative defense like the statute of limitations is not affirmatively pleaded, asserted in a motion, or tried by the express or implied consent of the parties, then the defense is deemed waived. *See Wesche v. Martin*, 64 Wn. App. 1, 6 – 7, 822 P.2d 812 (1992); *see also Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504-05, 694 P.2d 7 (1985); *see also Rainier National Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

1. **“Filing” under RCW 7.70.110 means the act of filing the complaint with the court clerk for placement into the official record.**

The term “file” or “filing” means “To deliver a legal document to the court clerk or record custodian for placement into the official record”. Black’s Law Dictionary 712 (7th ed. 1999). RCW 7.70.110 uses the terms “filing a cause of action” with respect to the delivery of a copy of the summons and complaint to the court clerk for filing.

On May 25, 2011, plaintiffs filed this cause of action in conformity with how the term “filing” is used in RCW 7.70.110. CP 1 – 14.

2. **“Commencement” under CR 3 means the act of filing the complaint with the court clerk to initiate the proceeding.**

The term “commencement” is a legal term of art found in several Court Rules and State statutes. CR 3 states that a civil action is “commenced by service of a copy of a summons together with a copy of a complaint...or by filing a complaint.” CR 3(a). Under CR 3(a) the act of filing a complaint with the court clerk “commences” the proceeding⁶.

The current version of the Superior Court Rules continues to defer to the statutory provisions for tolling statutes of limitations. *Martin v.*

⁶ Black’s Law Dictionary 1241 (8th ed. 2004) defines “proceeding” as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. *In re Det. Of Kistenmacher*, 163 Wn.2d 166, 178, 178 P.3d 949 (2008).

Triol, 121 Wn.2d 135, 147, 847 P.2d 471 (1993). CR 3(a) states “An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170.” CR 3(b) is entitled “Tolling statute”, is reserved and refers to RCW 4.16.170.

So under CR 3, the term “commenced” is used twice, each time with separate meanings; the first time for purposes of “commencing” the proceeding under the Court Rules and the second for purposes of any statutory tolling of the applicable limitations period under RCW 4.16.170.

Under CR 3, plaintiffs commenced this proceeding when they filed their complaint on May 25, 2011. CP 1 – 14.

3. “Commencement” under RCW 4.16.170 means the filing or service of the complaint for purposes of tolling the statute of limitations.

RCW 4.16.170 is a 90-day tolling statute. *Sterling v. County of Spokane*, 31 Wn. App. 467, 642 P.2d 1255 (1982). RCW 4.16.170 states in pertinent part:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally...within ninety days from the date of filing the complaint.

Thus, RCW 4.16.170 requires a plaintiff to either file a complaint or serve the summons upon the defendant and then the statute of

limitations is tolled 90-days as long as the remaining act of filing or service is completed within this 90-day time period. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 819 – 21, 792 P.2d 500 (1990). In effect, the statute provides a 90-day “catch up” or grace period within which a plaintiff can comply with all of RCW 4.16.170’s requirements. *Nearing*, 114 Wn.2d at 822. But by the terms of the statute, the sanction for failing to comply with the statute and serve the complaint within 90 days of filing is that the action shall be deemed not to have been commenced for the limited purpose of tolling the statute of limitations. *Nearing*, 114 Wn.2d at 823.

Plaintiffs’ filing was not *per se* void under RCW 4.16.170 after 90 days expired without service because RCW 4.16.170 only tolls the statute of limitations. As long as the statute of limitations has not expired, it is immaterial under RCW 4.16.170 that the service and filing were not accomplished within 90 days of each other. The earlier action, in this case filing, is valid for the “commencement” of the proceeding under CR 3 even if more than 90 days expire between the time of filing and service. *See Kramer v. J.I. Case Mfg.Co.*, 62 Wn. App. 544, 548, 815 P.2d 798 (1991). *See also Hansen v. Watson*, 16 Wn. App. 891, 892-93, 559 P.2d 1375 (1977); *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 418-19, 628 P.2d 855 (1981).

Plaintiffs commenced the proceedings under CR 3 by filing their complaint, but failed to take advantage of RCW 4.16.170's 90 day tolling period. The trial court's dismissal of plaintiffs' medical negligence cause of action should be affirmed because this action is time barred.

V. CONCLUSION

This Court should affirm the trial court's dismissal of plaintiffs' cause of action because it is undisputed that the three year statute of limitations expired on their medical negligence claim. Plaintiffs failed to toll the running of the medical negligence limitations period under RCW 7.70.110 or RCW 4.16.170.

Plaintiffs did not trigger the one-year tolling provision under RCW 7.70.110 because they filed a lawsuit in Yakima County Superior Court before serving their purported written request for mediation upon defendants. Plaintiffs also failed to "request" mediation in "good faith" as the statute plainly requires.

Plaintiffs also failed to benefit from the 90-day tolling provision under RCW 4.16.170 because they did not serve any respondent within 90 days of filing their lawsuit.

RESPECTFULLY SUBMITTED this 20th day of November,
2012.

Fain Anderson VanDerhoef, PLLC

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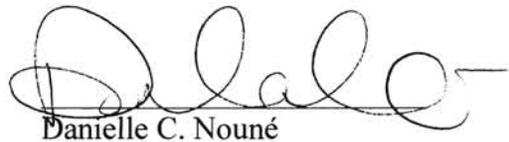
DECLARATION OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing *Respondents' Joint Response Brief* to be served this date, in the manner indicated, to the parties listed below:

- | | | |
|--|-------------------------------------|------------------|
| Office of the Clerk
Court of Appeals – Division III
500 N. Cedar St
Spokane, WA 99201 | <input type="checkbox"/> | Legal Messenger |
| | <input type="checkbox"/> | Hand Delivered |
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Prosser, WA 99350 | <input type="checkbox"/> | Legal Messenger |
| | <input checked="" type="checkbox"/> | Email |
| | <input type="checkbox"/> | Facsimile |
| | <input checked="" type="checkbox"/> | First Class Mail |
| | <input type="checkbox"/> | Federal Express |
| Mr. Jerome Aiken
Meyer, Fluegge & Tenney
230 S. Second Street
P. O. Box 22680
Yakima, WA 98907 | <input type="checkbox"/> | Legal Messenger |
| | <input checked="" type="checkbox"/> | Email |
| | <input type="checkbox"/> | Facsimile |
| | <input checked="" type="checkbox"/> | First Class Mail |
| | <input type="checkbox"/> | Federal Express |

DATED this 20th day of November, 2012 at Seattle, Washington.


Danielle C. Nouné