NO. 101763-4

SUPREME COURT OF THE STATE OF WASHINGTON

LENA LYONS, individual,

Petitioner,

v.

IRINE VAIMAN, M.D.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Respondent Irine Vaiman, M.D., submits this Answer to Leena Lyons's Petition for Review.

II. COURT OF APPEALS DECISION

In an unpublished January 30, 2023 opinion, Court of Appeals Division I affirmed the trial court's order dismissing Lyons's untimely medical malpractice lawsuit because she failed to toll the statute of limitations under RCW 7.70.110. *Slip Op. at 1, 4.*[1]

To toll the three-year statute of limitations in a medical malpractice action for one year, RCW 7.70.110 requires "[t]he making of a written, good faith request for mediation." *Slip Op. at 3* (quoting RCW 7.70.110). Here, Lyons's attorney wrote a letter to Dr. Vaiman asking Dr. Vaiman to "[p]lease place me in touch with your professional liability carrier." *Slip Op. at 2*

[1] Because Lyons did not do so, Dr. Vaiman attaches the slip opinion as an appendix to her answer.

(quoting language from CP 443). Division I correctly concluded this was not a "request for mediation."

Appreciating that the legislature means what it says and that Washington courts strictly construe tolling provisions, Division I—consistent with all Washington appellate decisions interpreting RCW 7.70.110—found that statements such as Lyons's do not constitute a written "request for mediation" to toll the statute of limitations. *Slip Op. at 4-7.* It reasoned:

> Here, not only does the word 'mediation' not appear in the letter, but there is not even a generalized desire to discuss any sort of third-party settlement discussions. The expressed desire to become connected with an insurance agent is not the same as the specific expressed desire to settle the matter, let alone through a specific form of alternative dispute resolution.

Slip Op. at 6.

Division I thus properly affirmed the trial court's dismissal of Lyons's medical malpractice lawsuit as time-barred because she failed to trigger RCW 7.70.110's tolling provision. No RAP 13.4(b) consideration applies under which this Court should accept review.

III. COUNTERSTATEMENT OF ISSUE

Did the trial court properly grant Dr. Vaiman summary judgment, dismissing Lyons's medical malpractice lawsuit because she did not bring it within three years from the date of the act or omission alleged to have caused her injury or assert the one-year discovery rule, RCW 4.16.350, and did not make "a written, good faith request for mediation" so as to toll the statute of limitations for one year, RCW 7.70.110?

IV. COUNTERSTATEMENT OF THE CASE

A. Lyons Sees Dr. Vaiman between May 23, 2017, and May 30, 2018.

Dr. Vaiman, a primary care physician, treated Lyons for approximately one year, from May 23, 2017, until May 30, 2018. CP 261-303. Lyons also saw numerous specialists, including neurology, rheumatology, orthopedics, neurosurgery, podiatry, psychology, psychiatry, and neuropsychology, *see* CP 47-252, for her many general health complaints, CP 302-03. Lyons's last encounter with Dr. Vaiman occurred on May 30, 2018. CP 261-303.

B. July and August 2020 Pre-Suit Communications.

Lyons subsequently retained counsel, David Williams, who wrote Dr. Vaiman a letter on July 27, 2020, stating:

> I represent Lena Lyons relative to her claim for damages stemming from the continuous negligent failure to appreciate and refer her for work-up of her aortic claudication, beginning in July of 2017, and continuing through at least May of 2018. Please place me in touch with your professional liability carrier.

CP 482.

Dr. Vaiman provided this letter to her professional liability insurance carrier, Physicians Insurance. CP 21. Physicians Insurance assigned Beth Cooper, a Senior Claims Representative, to manage the claim. CP 20-21.

On August 12, 2020, Cooper responded to Williams's July 27, 2020 letter with a template letter that Physicians Insurance sends to patients or their counsel after receiving notification of a malpractice claim against an insured. CP 21, 24-26. It requested information from Williams to allow Physicians Insurance to investigate the claim, including Lyons's liability theory, asserted

damages, medical records, and any expert reports. CP 21, 24-26. The letter also stated that "[s]hould settlement negotiations take place … there are certain terms and conditions" Physicians Insurance requires in any potential settlement agreement, and it addressed the claimant's obligation to repay any Medicare lien in the event of settlement. CP 25-26. The letter did not mention mediation. *See id.* Contrary to Lyons's assertion, *Pet. at 6*, the letter did not state that Cooper somehow acknowledged Williams's July 27, 2020 letter as a written request for mediation or in any way treated it as such. CP 25-26.

Williams did not provide Cooper with the requested information or otherwise respond in writing. CP 21.

Williams and Cooper spoke by phone shortly after he received her August 12, 2020 letter. CP 475. They primarily discussed Lyons's liability theory and damages, and Cooper indicated that she would need more medical information to evaluate the claim. CP 475-76. Williams contends that near the conversation's end, the following exchange occurred:

> I raised the issue of the mediation letter and half-jokingly asked "Do I need to send you another letter with three more words" ["We request mediation"]? Ms. Cooper literally laughed out loud and indicated that I would not. I won't claim to remember her exact words, but I do remember her laughing.

CP 476. Cooper denies that she told Williams she would accept his July 27, 2020 letter to Dr. Vaiman as a request for mediation:

> That is not something that I would have done or would ever do. I also unequivocally deny that I would have ever accepted a verbal request for mediation, that I told Mr. Williams that a written request for mediation was not required, and that I would have ever given any kind of verbal authority to extend the statute of limitations for this or any other case. I am fully aware that RCW 7.70.110 requires the "making of a written, good faith request for mediation …" and that is what I need for my file. Plaintiff did not make any such written request.

CP 21-22; *see also* CP 33-34.

Despite Cooper's request for more information to evaluate the claim, Williams did not communicate with Cooper for the next nine months. *See* CP 21, 476-77.

C. May 2021 Pre-Suit Communications.

In May 2021, Williams contacted Cooper by phone. CP 476-77. Cooper responded by email to offer her availability for a phone call. CP 488. She further stated:

> When we last spoke about the Lyons matter, I think I explained that I do not have enough information about her care and ultimate diagnosis to understand the medical issue here and have it reviewed. I thought you were going to provide additional information/records. This person is a very medically complex patient who receives care from what appears to be a large number of providers, including during the time she was seeing Dr. Vaiman.

CP 488. Williams responded with his availability for a phone call but did not otherwise address Lyons's claim. CP 490. No phone call occurred. CP 477.

Because Williams never provided Cooper with the requested information, she closed her file. CP 21, 492-93.

D. Lyons Files Her Complaint on June 8, 2021.

Lyons filed a complaint on June 8, 2021, claiming that Dr. Vaiman provided negligent medical care to her. CP 1-2. It is undisputed that, if Lyons did not toll the statute of limitations

under RCW 7.70.110, she would have failed to timely sue within RCW 4.16.350's three-year limitations period. *See Pet. at 8, ¶2.*

E. Post-filing Communications Regarding Statute of Limitations.

Cooper was unaware that Lyons had filed suit until Williams contacted her on Monday, August 30, 2021. CP 21, 492-93. After counsel Caitlyn Spencer appeared for Dr. Vaiman, CP 28, Spencer wrote Williams on October 13, 2021, to discuss the statute of limitations, and they spoke by phone. CP 37, 445. Spencer explained that Lyons had filed her lawsuit more than three years after Dr. Vaiman's last encounter with Lyons. CP 37. Williams stated he was certain he sent a written request for mediation to Dr. Vaiman in July or August 2020 so as to toll the statute of limitations for one year. *Id.* Spencer informed Mr. Williams that she had not seen a written request for mediation in the file that Cooper had provided her, and neither Dr. Vaiman nor Cooper was aware of one. *Id*. Spencer asked Williams to forward her a copy, and he agreed to do so. *Id.*

Williams then sent Spencer Cooper's August 12, 2020 template letter, stating: "Caitlyn, here's Beth's August 12th, 2020 letter acknowledging my mediation letter, which Dr. Vaiman had forwarded her." CP 447-48. He did not send a copy of any written request for mediation from July or August 2020. *Id.* Spencer responded:

> Thanks Dave. I don't see that Beth acknowledged a mediation letter in that correspondence. I spoke with Beth and the attached letter is the only correspondence she has from you in her file. Is there a separate letter that requested mediation?

CP 447. In reply, Williams stated:

> That's the only letter I sent and having reviewed this aspect of the file for the first time in a year or more, I now remember <u>exactly</u> what happened. I called Beth Cooper in response to her August 12th letter and among other issues we discussed, I asked if she needed me to formally "demand mediation" to extend the statute. In what I considered a routine gesture of good will, she assured me that she'd take my letter to Dr. Vaiman as that "demand".
>
> Perhaps Beth doesn't remember that conversation, but I have at least one email from her discussing the claim after the SOL would have expired, but for the demand for mediation.

CP 447 (underlining original).

Cooper subsequently explained to Williams that she never told him she would accept his July 27, 2020 letter, which did not include a request for mediation, as a request for mediation. CP 34. Nor would she have told him that she would accept a verbal request for mediation, as she is fully aware that RCW 7.70.110 requires a written request for mediation, and that is what she needed for her file. CP 33-34. Williams never made such a request. CP 34.[2]

F. Trial Court Grants Dr. Vaiman Summary Judgment and Dismisses Lyons's Lawsuit as Untimely.

Dr. Vaiman moved for summary judgment on the statute of limitations, CP 4-38, which the trial court granted, CP 502-05,

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[2] Dr. Vaiman includes this full factual background only to address Lyons's incomplete "Statement of the Case," *see Pet. at 7-14*. However, Williams's experience with Physicians Insurance and speculating about Cooper's state of mind, *Pet. at 10-11*, are not relevant, and Lyons offers no argument or authority that they are. RCW 7.70.110 does not analyze how the defendant or her insurer interpret written correspondence from a plaintiff to determine whether the plaintiff tolled the statute of limitations. Moreover, Williams's assertions about his conversation with Cooper are vague, and he previously acknowledged he did not recall Cooper's exact words. CP 476.

finding that the "plaintiff has failed to meet the requirements of RCW 7.70.110," RP 38. Lyons appealed. CP 513.

G. Division I Affirms.

Division I affirmed summary judgment dismissal. Highlighting both RCW 7.70.110's clear requirement for a "written request for mediation," and case law that even expressing a desire or willingness to mediate does not satisfy this requirement, it rejected Lyons's argument that Williams's July 27, 2020 correspondence "amounted to" a request for mediation. *Slip Op. at 4-7.* It further found that Lyons offered no authority supporting her contention that courts should consider insurers' customary practices or the recipient's state of mind in evaluating tolling under RCW 7.70.110. *Slip Op. at 7.*

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. This Court Should Decline Review Because Lyons Has Failed to Cite Authority Supporting Her Petition.

RAP 13.4(b) allows this Court to accept review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court need not consider arguments unsupported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (arguments not supported by adequate, cogent argument and briefing).

Lyons has not meaningfully engaged with RAP 13.4(b)'s considerations, much less provided pertinent authority or cogent analysis establishing that Division I's decision warrants this Court's review. Her argument consists of one paragraph without

citations to any authorities, *Pet. at 15*. This Court should decline to accept review of her unsupported petition.

B. This Court Should Decline to Accept Review Because No RAP 13.4(b) Consideration Applies.

Division I correctly concluded that Lyons failed to satisfy RCW 7.70.110's requirements to toll the statute of limitations. Division I's decision is not in conflict with any decision of this Court or of the Courts of Appeals so as to warrant this Court's review under RAP 13.4(b)(1) or (2), nor, contrary to Lyons's cursory assertion, *Pet. at 15*, does her petition involve an issue of substantial public interest so as to warrant this Court's review under RAP 13.4(b)(4).

1. Division I's Decision is Not in Conflict with Any Decision of This Court or Any Published Decision of the Court of Appeals so as to Warrant Review Under RAP 13.4(b)(1) or (2).

Consistent with Division I's decision, no Washington appellate court has ever held that a plaintiff need not actually "request mediation" to trigger RCW 7.70.110's tolling provision, but can instead substitute some other request that the plaintiff or

her counsel believes conveys a desire for mediation, as Lyons contends.

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.

RCW 7.70.110 is unambiguous in its requirement for a written "request for mediation" to toll the statute of limitations. When "a statute is not ambiguous, only a plain language analysis of a statute is appropriate." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

The only written request that Williams made in his July 27, 2020 letter was for Dr. Vaiman to "place me in touch with your professional liability carrier." CP 443. The letter does not mention alternative dispute resolution generally or mediation specifically. Lyons does not dispute that she did not make a written request for mediation. Instead, she claims, *Pet. at 15*, that no such "magic words" are or should be required.

But, as this Court has recognized, "the right words" indeed matter because, "[t]o paraphrase Mark Twain, the want of the right word makes lightning from lightning bugs." *Reyes v. Yakima Health Dist*., 191 Wn.2d 79, 83, 419 P.3d 819 (2018). Here, the legislature chose the words "request for mediation" in RCW 7.70.110, and courts "should assume that the legislature means exactly what it says." *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (citations and internal quotation marks omitted). If the legislature intended that a request to speak with an insurance carrier could toll the statute of limitations, it would have said so. It did not. RCW 7.70.110 requires plaintiffs to make a written "request for mediation." Lyons did not.

Division I's opinion is thus consistent with all Washington decisions interpreting RCW 7.70.110. *See, e.g., Breuer v. Presta,* 148 Wn. App. 470, 475-76, 200 P.3d 724 (2009), *rev. denied,* 169 Wn.2d 1029 (2010) (pre-suit letters expressing willingness to consider mediation did not amount to a "request

for mediation" under RCW 7.70.110); *see also Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 176, 252 P.3d 909 (2011), *rev. denied*, 173 Wn.2d 1002 (2011) (offer to attend mediation not a "request for mediation" under RCW 7.70.110).

Williams's assertion that his request to "place me in touch with your professional liability carrier" obviously meant a desire to resolve the claim pre-suit, *Pet. at* 8, which obviously meant "mediation," is unavailing. That is not the test, as *Breuer* and *Cortez-Kloehn* underscore. And Williams did even less than the plaintiffs' lawyers in *Breuer* and *Cortez-Kloehn*, whose letters at least used the word "mediation" and expressed a willingness to mediate. Williams's letter does not mention mediation, settlement, or a demand. No Washington decision supports the notion that a request to "place me in touch with your liability carrier" satisfies RCW 7.70.110's requirement to make a written "request for mediation."

2. Lyons's Petition Does Not Involve an Issue of Substantial Public Interest so as to Warrant Review under RAP 13.4(b)(4).

Ignoring that Division I followed well-settled authorities in affirming dismissal of her untimely lawsuit, Lyons contends that her petition presents "an issue of substantial public interest that should be determined by the Supreme Court, i.e. the Right to One's Day in Court," *Pet. at 15.* Beyond its lack of authority or cogent argument, Lyons's contention is substantively insufficient to justify this Court's review.

Lyons does not explain how her failure to comply with RCW 7.70.110's unambiguous requirements means that she was somehow improperly denied her "day in court." Lyons and her counsel had ample opportunity to bring her medical malpractice lawsuit, either within the three-year limitations period or by sending a written request for mediation so as to toll the statute of limitations for one additional year.

By Lyons's reasoning, the dismissal of any lawsuit on statute of limitations grounds would unconstitutionally deny

"one's day in court." But an "individual does not have an absolute and unlimited constitutional right of access to the court system." *Yurtis v. Phipps*, 143 Wn. App. 680, 694, 181 P.3d 849 (2008), *rev. denied*, 164 Wn.2d 1037 (2008) (citations omitted). One such limit is the statute of limitations. Any "Right to One's Day in Court," *Pet. at 15*, does not include a right to ignore the statute of limitations and bring untimely claims. As this Court has long held:

> There is nothing inherently unjust about a statute of limitations. Limitations on the time in which one may sue also limit the time in which another may be sued. If one cannot bring an action, by the same token he cannot compel another to defend it. Statutes of limitation … contemplate that a qualified freedom from unending harassment of judicial process is one of the hallmarks of justice…
>
> …
>
> While it has been a long cherished ambition of the common law to provide a legal remedy for every genuine wrong, it is also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong. After all, when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts. Consequently, as a matter of basic justice, the courts usually have a cogent

> reason to give limitation statutes a literal and rigid reading… .

Ruth v. Dight, 75 Wn.2d 660, 664-665, 453 P.2d 631 (1969), *superseded by statute*, Act of March 23, 1971, LAWS OF 1971, ch. 80, § 1 (codified as RCW 4.16.350), *as recognized in Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 861, 953 P.2d 1162 (1998).

It is also well-settled that, like statutes of limitations themselves, exceptions to statutes of limitations such as RCW 7.70.110's tolling provision are strictly construed, even in the face of purported hardship. *See O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997) ("exceptions to statutes of limitations are strictly construed, and cannot be enlarged from considerations of apparent hardship or inconvenience.") (internal quotations and citations omitted); *see also Young v. Savidge*, 155 Wn. App. 806, 818-19, 230 P.3d 222 (2010) (affirming summary judgment in favor of defendant doctor where plaintiff filed suit just two days after the statute of limitations ran because it requires "strict compliance").

Consistent with precedent, Division I construing RCW 7.70.110 strictly to dismiss Lyons's lawsuit as untimely when she failed to make a written "request for mediation" does not impermissibly bar Lyons's "day in court." Inasmuch as Lyons fails to cite any authority suggesting that statutes of limitation are generally unconstitutional or that Division I's application of RCW 7.70.110 to her lawsuit was improper, she has failed to make the case for this Court to accept review on an issue of substantial public interest.[3]

VI. CONCLUSION

This Court should decline to accept review because no RAP 13.4(b) consideration applies. RCW 7.70.110 unambiguously requires "[t]he making of a written, good faith request for mediation" to toll the statute of limitations for one year. Lyons never made such a request. The trial court properly

[3] Lyons has not offered any considered argument or authority that Division I's opinion improperly infringes on her "day in court." *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties raising constitutional issues must present considered arguments to this court").

dismissed her lawsuit as untimely, and Division I correctly affirmed.

I declare that this document contains 3,539 words. RESPECTFULLY SUBMITTED this 28th day of April, 2023.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEENA LYONS, Appellant, v. IRINE VAIMAN, Respondent.	No. 83736-2-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Following the dismissal of her medical malpractice claim for failure to meet the statute of limitations, Leena Lyons (Lyons) argues that, pursuant to RCW 7.70.110, the deadline for filing her complaint was extended by one year because her counsel wrote her doctor's office asking to be put in touch with their professional liability carrier. Her doctor disagrees because Lyons did not specifically request mediation, which she asserts is required by the statute. We affirm the dismissal.

I. FACTS

Dr. Irine Vaiman (Vaiman) provided Lyons with primary care beginning in May, 2017. Their last visit was on May 18, 2018, and the last prescription refill was on May 30, 2018.

Lyons retained counsel, David Williams (Williams). Williams subsequently wrote Vaiman a letter on July 27, 2020, stating:

> I represent Lena Lyons relative to her claim for damages stemming from the continuous negligent failure to appreciate and refer her for work-up of her aortic claudication, beginning in July of 2017 and continuing through at least May of 2018. Please place me in touch with your professional liability carrier.

That was the only written correspondence from Lyons prior to the lawsuit she brought against Vaiman on June 8, 2021, over three years from the last contact she had with Vaiman or her office.

Vaiman moved for summary judgment on statute of limitations grounds. The trial court granted Vaiman's motion for summary judgment, finding that Lyons failed to comply with RCW 7.70.110 because the correspondence did not contain a specific request to mediate, as is required to toll the deadline to file her complaint.

II. ANALYSIS

A. Law

We review a trial court's decision on a summary judgment motion de novo. Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We may affirm summary judgment on any basis supported by the record regardless of whether the argument was made below. Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

The statute of limitations for a medical negligence claim is three years from the date of the act or omission alleged to have caused the injury, or one year from the time the patient discovered or reasonably should have discovered that the injury was caused

by the act or omission, whichever is later. RCW 4.16.350(3). "Dismissal of a claim based on statute of limitations is appropriate where there is 'no genuine issue of material fact as to when the statutory period commenced.'" Williams v. Gillies, 19 Wn. App. 2d 314, 317, 495 P.3d 862 (2021) (quoting Young Soo Kim v. Choong-Hyun Lee, 174 Wn. App. 319, 325, 300 P.3d 431 (2013)).

Under RCW 7.70.110, however:

> 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.

Courts "strive to ascertain the intention of the legislature by first examining the statute's plain meaning." Unruh v. Cacchiotti, 172 Wn.2d 98, 113, 257 P.3d 631 (2011) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). When "a statute is not ambiguous, only a plain language analysis of a statute is appropriate." Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) ("'Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.'") (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). Courts "assume that the legislature means exactly what it says." Davis v. State ex rel Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (citations and internal quotation marks omitted).

Like statutes of limitations, exceptions thereto, such as RCW 7.70.110's tolling provision, are strictly construed. O'Neil v. Estate of Murtha, 89 Wn. App. 67, 73, 947 P.2d 1252 (1997) ("[E]xceptions to statutes of limitations are strictly construed, and cannot be enlarged from considerations of apparent hardship or inconvenience.") (internal

quotations and citations omitted); see also Young v. Savidge, 155 Wn. App. 806, 818-19, 230 P.3d 222 (2010) (affirming summary judgment in favor of defendant doctor where plaintiff filed suit just two days after the statute of limitations ran because it requires "strict compliance").

While statute of limitations is an affirmative defense that must be proved by the defendant, it is the burden of a plaintiff asserting an exception to a statute of limitations to prove that a tolling provision applies. Cortez-Kloehn v. Morrison, 162 Wn. App. 166, 172, 252 P.3d 909 (2011) (citation omitted).

In short, "the essential question is whether the writings here requested mediation. RCW 7.70.110 requires 'a written, good faith request for mediation.' Either the writings here satisfy that statutory requirement for a good faith request, as a matter of law, or they do not, as a matter of law. So our review is de novo." Breuer v. Presta, 148 Wn. App. 470, 475, 200 P.3d 724 (2009).

We find that Lyons has not met her burden of proof to show that the July 27, 2020 correspondence met the strict statutory requirement sufficient to toll the statute of limitations.

B. Application of Law to Facts

It is uncontested that Lyons's lawsuit is time-barred unless Lyons demonstrates that RCW 7.70.110 applies. Lyons makes three arguments as to why the tolling provision applies.

First, Lyons argues that RCW 7.70.110 applies because it is "procedurally informal" and requires only an effective written communication of plaintiff's desire to seek mediated settlement. Br. of Appellant at 3-4 (citing Unruh, 172 Wn.2nd at 113). Second,

she argues that "in the real world of medical malpractice claims, 'settlement negotiations' equals 'mediation," and that the insurer/physician would typically request mediation. In other words, it is the customary practice of insurers and their insured to understand such correspondence as a request for mediation. Third, Lyons argues Vaiman and her representative treated the correspondence like a request to mediate, when that representative advised Lyons's counsel that another letter requesting mediation was not necessary. In short, Lyons argues the letter of July 27, 2020 "amounted to" a request for mediation, in practice and effect. Reply Br. of Appellant at 6 (citing Breuer, 148 Wn. App. at 473).

Vaiman also relies on Breuer, 148 Wn. App. at 473, and on Cortez-Kloehn, 162 Wn. App. at 176 to argue that even explicitly stating an intent, desire, or willingness to mediate fails to satisfy RCW 7.70.110's demand for a "written request for mediation," if it does not also contain an express request to mediate. Vaiman additionally argues that a defendant's actions or subjective understanding cannot transform a letter bereft of a written request for mediation into one.

In Breuer, the court provided a plain and ordinary definition of the term "request," as "1: the act of asking for something . . . [or] . . . 2a: an instance of asking for something: an expressed desire." Breuer, 148 Wn. App. at 475 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1993)). The court then distinguished between a "willingness to consider mediation," found in the correspondence there, and a "request," holding that the former is "[a]t best . . . an invitation for the defendant physician to request mediation" and does not "amount[] to a request for mediation as a matter of law." Id. at 476.

Unsurprisingly, there is no authority that has considered the exact language used in the July 27, 2020 letter. The letter in question contains three provisions, only the last of which is in any sense an interrogative sentence: it contains a notice of appearance, a claim of negligence, and a request for Vaiman's representative to "place [Lyons's counsel] in touch with [Vaiman's] professional liability carrier."

Lyons claims that request is sufficient and, otherwise, posits a false dichotomy: either nearly any written correspondence between a lawyer and a defendant "amounts to" a request for mediation or this court is simply requiring "magic words." We believe this is a false choice based on the facts of this case.

Here, not only does the word "mediation" not appear in the letter, but there is not even a generalized desire to discuss any sort of third-party settlement discussions. The expressed desire to become connected with an insurance agent is not the same as the specific expressed desire to settle the matter, let alone through a specific form of alternate dispute resolution. It is the latter which supports the legislature's intent in the broader statute. Fast v. Kennewick Pub. Hosp. Dist., 187 Wn.2d 27, 36-37, 384 P.3d 232 (2016) ("One of the stated legislative intents for this policy change was an attempt to 'stabilize health services costs.' Mediation provides an opportunity to settle cases before resorting to litigation, which has the potential to decrease health care costs.") (citations omitted).

Finally, Lyons's assertion that the Supreme Court's interpretation of RCW 7.70.110 in Unruh as "procedurally informal" excuses her failure to expressly request mediation is incorrect. The pertinent issue in Unruh was "whether a request for mediation can toll the statute of limitations when it is not served directly on the defendant." Unruh, 172 Wn.2d at 114. In considering that question, the Supreme Court recognized that RCW 7.70.110

does not contain detailed service procedures, unlike a former companion provision, which outlined specific procedures. Id. It was in that context that our Supreme Court called the statute procedurally informal; it did not alter the required content of the written request. Id.

Lyons otherwise provides no authority to support the contention that this court should explore and consider (a) the customary practice of insurers and their insured, or (b) the state of mind of the recipient, to interpret the meaning of an alleged request for mediation. Where a party fails to provide citation to support a legal argument, we assume counsel, like the court, has found none. State v. Loos, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) (citing State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)).

III. CONCLUSION

Lyons's correspondence was insufficient.

We affirm.

Díaz, J.

WE CONCUR:

Coburn, J.

Bowman, J.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 28th day of April, 2023, I caused a true and correct copy of the foregoing document, "Respondent's Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellant:	SENT VIA:
David A. Williams, WSBA #12010 LAW OFFICE OF DAVID A. WILLIAMS 9 Lake Bellevue Dr., Suite 104 Bellevue, WA 98005-2454 Ph: 425.646.7767 Email: daw@bellevue-law.com	☐ Fax ☐ ABC Legal Services ☐ Express Mail ☐ Regular U.S. Mail ☑ E-file / E-mail

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Caitlyn Spencer, WSBA #51437 FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC 701 Fifth Avenue, Suite 4750 Seattle, WA 98104 Ph: 206.749.0094 Email: caitlyn@favros.com	☐ Fax ☐ ABC Legal Services ☐ Express Mail ☐ Regular U.S. Mail ☑ E-file / E-mail

DATED this 28th day of April, 2023, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

April 28, 2023 - 12:41 PM

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