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NO. 102079-1

SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID M. FRALEY

Respondent,

v.

PROLIANCE SURGEONS, INC., P.S. a Washington
Professional Service Corporation d/b/a PROLIANCE PUGET
SOUND ORTHOPAEDICS; JOHN BLAIR, JR., MD,
Individually,

Petitioners,

and

COMMONSPIRIT HEALTH, a Colorado corporation d/b/a
CATHOLIC HEALTH INITIATIVES; FRANCISCAN
HEALTH SYSTEM, a Washington corporation d/b/a ST.
JOSEPH MEDICAL CENTER; UNKNOWN JOHN DOES,
and JOHN DOE CLINICS,

Defendants.

PETITION FOR DISCRETIONARY REVIEW

Brennen Johnson, WSBA
#51665
Attorney for Proliance
Surgeons, Inc., P.S. a
Washington Professional
Service Corporation d/b/a
Proliance Puget Sound
Orthopaedics and John Blair,
Jr., MD
JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770
brennenj@jgkmw.com

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I. IDENTITY OF PETITIONER

Petitioners Proliance Surgeons, Inc., P.S. a Washington Professional Service Corporation D/B/A Proliance Puget Sound Orthopaedics (“Proliance”) and John Blair, Jr., MD, (collectively “Petitioners”) respectfully request that the Supreme Court accept review of the decision below.

II. COURT OF APPEALS DECISION

On May 9, 2023, the Court of Appeals of the State of Washington, Division II, entered its published decision terminating review of this matter. *Fraley v. Commonspirit Health*, 528 P.3d 1283, 1286 (Wash. Ct. App. 2023). A copy of the decision is included in the Appendix. App. 1–15.

III. ISSUES PRESENTED FOR REVIEW

Whether the three-year statute of limitations under RCW 4.16.350 is tolled an additional year by the provisions of RCW 7.70.110 when (1) a plaintiff fails to send his request for mediation to the defendant or the defendant’s authorized agent,

and (2) the defendant does not receive any notice of a mediation request before the statute of limitations has expired? **No.**

Whether Respondent's claims against Petitioners, filed over three years and six months after the date of medical treatment at issue, are barred by the three-year statute of limitations under RCW 4.16.350? **Yes.**

IV. STATEMENT OF THE CASE

This matter arises out of a medical procedure that Petitioner underwent on September 21, 2017. The following provides a brief statement of the factual and procedural background relevant to this motion.

A. Factual Background

On July 14, 2017, Mr. Fraley presented to Dr. Blair at Puget Sound Orthopedics, a division of Proliance Surgeons ("Proliance"), for evaluation of neck and arm pain due to a whiplash injury. *See* CP at 73. Mr. Fraley had treated with Dr. Blair ten years previously in 2007, when he had undergone surgery for cervical fusion at MultiCare Tacoma General

Hospital—one of multiple hospitals where Dr. Blair has surgical privileges. *Id.* At this July 2017 visit, it was determined that further testing was necessary to evaluate Mr. Fraley. Subsequently, on August 18, 2017, Mr. Fraley was again seen by Dr. Blair at Proliance to review the test results. *See id.* Because of weakness in Mr. Fraley’s left arm, Mr. Fraley and Dr. Blair decided to proceed with spinal surgery, specifically a C4–T1 laminectomy with posterior spinal fusion and placement of an instrumentation system to extend the prior fusion. *See id.* A plan was made for a pre-operative visit a month later. On September 14, 2017, Mr. Fraley again returned to Dr. Blair at Proliance for preoperative counseling. *Id.* The procedure was scheduled to occur on September 21, 2017 at St. Joseph Medical Center (“St. Joseph”), where Dr. Blair has privileges. *See id.*

On September 21, 2017, Mr. Fraley presented to St. Joseph where he met with Dr. Blair for the planned procedure. *See CP at 4, 73.* Dr. Blair performed the surgery as scheduled

that morning, with no noted complications occurring that day. CP at 5. In the afternoon of September 22, 2017, while still admitted for postoperative observation, Mr. Fraley awoke from sleeping and noted that he could not move his legs. CP at 6. Mr. Fraley began to experience increased urologic conditions that evening, and Dr. Blair was called by hospital nursing staff about these symptoms at approximately 10:47 pm. CP at 135. In the early morning of September 23, 2017, Mr. Fraley was returned to the operating room where Dr. Blair performed an evacuation of a cervical epidural hematoma. CP at 139.

Subsequently, Mr. Fraley received physical therapy and rehabilitation. CP at 10–11. He also experienced subsequent drainage from his incision site and post operative wound infection in October 2017. CP at 11. Mr. Fraley alleges that he has since suffered temporary paraplegia and impairment of gait, neurogenic bladder with urinary retention, temperature sensitivity, a “pins and needles” sensation below his waist,

impairment of sexual function, and lower extremity weakness.
CP at 12.

Only “a few months” after surgery, Mr. and Mrs. Fraley contacted an unspecified attorney to pursue a case. CP at 167. That attorney declined to take the case. *Id.* Mr. and Mrs. Fraley were aware that a statute of limitations may apply to their case. *Id.*

Nearly three years later, in August 2020, Mr. and Mrs. Fraley contacted an attorney at the law firm Pfau Cochran Vertetis Amala (“PCVA”) seeking representation. CP at 167. On August 24, 2020, Mr. and Mrs. Fraley received an email informing them that PCVA could not take their case. *Id.* According to Plaintiffs, they were told that staff at PCVA would send Mr. and Mrs. Fraley “a letter that would pause the statute of limitations for one year,” as well as a referral to a different law firm. *Id.*

Mr. and Mrs. Fraley received Word copy drafts of two nearly identical letters from PCVA. CP at 168. Although the

named addressee on one letter was “St. Joseph’s Medical Center” and on the other “Dr. John Blair, M.D.,” both letters were specifically addressed to St. Joseph’s mailing address as follows: “Attn: Risk Management, 1717 South J St, Tacoma WA 98405.” CP at 268, 172–76. Mr. and Mrs. Fraley also received hard copies of these drafted letters by mail. App. 168–69. The letters drafted by PCVA were predicated on Mr. and Mrs. Fraley’s explanation of the case to these attorneys, including the details of “where Dave’s surgery was, who the surgeon was, when the surgery was, what [they] felt was wrong.” CP at 168. Mr. and Mrs. Fraley completed the hard copies that were mailed to them by handwriting in Mr. Fraley’s name and date of birth and then mailing them to the addresses on the draft letters. CP at 169. Although prior to sending, Mr. and Mrs. Fraley specifically “noticed that the letter to Dr. Blair was addressed to St. Joseph . . . [i]t did not occur to [them] that that was going to be a problem or that [they] were sending the letter to the wrong place.” *Id.* (emphasis added).

Proliance and its Puget Sound Orthopaedics clinic, where Mr. Fraley repeatedly received treatment and established care with Dr. Blair before and after the treatment at issue, is located at 1724 W. Union Ave., Tacoma, WA 98405. App. 50. Proliance's principal address and registered agent contact information, located at "805 Madison St Ste 901, Seattle, WA, 98104," is easily determinable through its public listing with the Secretary of State. CP at 65, 70–71. As evident from the facts of this case, the correct address is also easily determinable through even the most cursory online review, including a simple Google search.

The letters sent by Plaintiffs were received by St. Joseph on September 14, 2020. CP at 163. Because Dr. Blair is not employed by or at St. Joseph, nor receives mail there, and has no agency relationship with St. Joseph, the letter was not opened. CP at 217–18. Unlike entities that actually staff St. Joseph with personnel and receive mail or written communication at the hospital (e.g., "Kaiser, TRA, Sound

Physicians”), Proliance does not have a mailbox or receive any communications at St. Joseph. CP at 221. Upon reviewing the unopened letter, St. Joseph staff decided “to just Google Dr. Blair, Tacoma” and forwarded the letter to the address found online. CP at 222. On September 22, 2020, St. Joseph staff mailed the unopened letter in another envelope to “Dr. John Blair, Attn Risk Management or Claims, 1724 W. Union Ave, Tacoma, WA 98405.” CP at 67. St. Joseph made no contact with Dr. Blair or Proliance regarding this matter prior to forwarding the unopened letter from Mr. and Mrs. Fraley. CP at 64–65, 74, 219–20.

B. Procedural Background

On March 29, 2021, after retaining an attorney at the firm Holman Law, Respondent filed a complaint against multiple defendants, including Proliance. CP at 1. On April 2, 2021, he filed an amended complaint adding Dr. Blair as a defendant. CP at 16–30. On August 12, 2021, Petitioners moved for summary judgment based on the statute of limitations. CP at 51–61. On

January 10, 2022, Respondent filed his response. CP at 179–95. On January 21, 2022, Petitioners filed their reply. CP at 197–207.

The motion for summary judgment was heard by Pierce County Superior Court on January 21, 2022. RP 1–2. The court below stated that it would deny the motion, but also sua sponte volunteered to certify the issue for discretionary review to the Court of Appeals. RP at 19. In doing so, the court stated: “I think it’s a darn interesting question, because you have a [tolling] statute that tends to be less formal. And yet there’s some formality to it; otherwise, it would make no sense at all. It has to have some foundation.” RP at 18–19. On February 1, 2022, the court below entered its order denying the motion and certifying that the order “involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the Order will materially advance the ultimate termination of the litigation.” CP at 19.

Petitioners sought discretionary review by the Court of Appeals and review was granted. *See* App. 1. Oral argument on the merits took place on January 26, 2023. On May 9, 2023, the Court of Appeals entered its decision affirming the trial court’s denial of summary judgment and terminating review. App. 1–15. This petition to the Supreme Court for discretionary review follows.

V. ARGUMENT

The Supreme Court should grant discretionary review of this matter where (1) the decision by the Court of Appeals is in conflict with the decision of the Supreme Court in *Unruh v. Cacchiotti*, 172 Wn.2d 98, 113, 257 P.3d 631 (2011), and (2) public policy weighs in favor of the Court establishing a clear interpretation of notice requirements under RCW 7.70.110 for attempted mediation requests to health care providers. *See* RAP 13.4(b)(1), (4).

A. The Decision of the Court of Appeals Conflicts with the Supreme Court’s Decision in *Unruh*

The Court should grant discretionary review in this matter where the Court of Appeals’ decision runs afoul of the Supreme Court’s prior decision in *Unruh*, 172 Wn.2d 98. RAP 13.4(b)(1). In *Unruh*, the Supreme Court determined that a mediation request not made directly to a defendant was still effective for the purposes of tolling the special health care statute of limitations as long as it was made to the defendant’s “authorized agent.” *Id.* In contrast, the Court of Appeals’ decision in this matter has erroneously determined that the request need not even be sent to an authorized agent of the defendant. Instead, as long as the request is sent to *anyone* and it ultimately reaches the defendant—even if only by chance and after the statute of limitations has already expired—it will still be deemed effective.

Claims predicated on injuries arising from health care are subject to a three-year limitations period as set forth in the special health care statute of limitations. RCW 4.16.350 (applying to “[a]ny civil action for damages for injury occurring

as a result of health care”). This special statute of limitations requires that claims predicated on injuries arising from health care be brought “within [1] three years of the act or omission alleged to have caused the injury or condition, or [2] one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission.” RCW 4.16.350(3). The parties do not dispute that this action was commenced more than three years after the medical care at issue and more than one year after the time when Respondent was aware of his cause of action. Mr. Fraley underwent spine surgery on September 21, 2017, developed additional symptoms over the course of September 22, 2017, and was returned to the operating room for further surgical intervention on September 23, 2017. He began seeking an attorney for the purpose of bringing a claim predicated on his surgery only a few months later. Respondent did not file his complaint until March 29, 2021.

The parties' dispute as to the statute of limitations turns on whether the Fraleys' complaint is saved by the one-year tolling provision of RCW 7.70.110. That statute, entitled "Mandatory mediation of health care claims—Tolling statute of limitations" 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.

The Supreme Court has previously addressed the question of "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 113. In that matter, the written mediation request was not served directly on the defendant provider, but instead upon the defendant's "authorized agent." In determining that the informality of RCW 7.70.110 did not require service to

the defendant personally, the Court offered the following rule and clear guidance:

We construe RCW 7.70.110 to toll the statute of limitations when a request for mediation is made on the defendant or the defendant's authorized agent. Under this interpretation, the defendant will receive notice that the plaintiff has requested mediation under RCW 7.70.110 and will have an opportunity to assent to the request.

Id. at 114 (emphasis added).

In this matter, although Mr. and Mrs. Fraley placed Dr. Blair's name on a mediation request, they only sent that request to St. Joseph. Indisputably, there is no agency relationship between St. Joseph and Petitioners—even the Court of Appeals' decision appears to recognize the lack of any such agency relationship. App. 5. (“St. Joseph's and CHI are not the registered agents for Proliance or Dr. Blair.”). Under the simple undisputed facts of the case, Mr. and Mrs. Fraley never sent such a request to Dr. Blair or to his authorized agent.

Moreover, there is no genuine dispute of the facts that Mr. and Mrs. Fraley were specifically cognizant of the fact that

they were not actually sending the letter to Dr. Blair or Proliance. They were also well aware of Dr. Blair's actual place of business at Proliance, where Mr. Fraley had repeatedly received his medical treatment from Dr. Blair both before and after the surgery at issue. Despite actual knowledge of Dr. Blair's and Proliance's proper address and their pre-existing and subsequent patient-provider relationship at that location, Respondents failed to ever make a written request for mediation to Dr. Blair or Proliance.

The decision of the Court of Appeals clearly turns on the outcome that eventually, *after expiration of the statute of limitations*, Dr. Blair ultimately obtained the letter requesting mediation. App. 12 (“The record shows that occurred here because Proliance and Dr. Blair did in fact receive the letter.”). However, it is undisputed that Dr. Blair's eventual receipt of a letter that was not mailed to his address, or to anywhere that he receives mail or correspondence, was a function of pure chance. Indeed, Dr. Blair did not actually receive the letter at St. Joseph,

where the letter was sent. Dr. Blair did not even obtain notice of the letter having been received by anyone at St. Joseph. Instead, staff at St. Joseph decided to look up Dr. Blair's address on Google and forward the letter by mail—a simple act that Mr. and Mrs. Fraley (or the attorneys that previously advised them) were capable of doing from the outset, even had they not possessed personal knowledge of Dr. Blair's correct place of business already.

Despite this, the Court of Appeals' decision emphatically states that as long as a defendant *eventually* obtains a mediation request, it does not matter if the Plaintiff actually sent the request to the Defendant as opposed to anywhere else:

[Petitioners'] argument would require us to add words and requirements to RCW 7.70.110 that do not exist. *Under our interpretation of the statute, the making of the request is the point, not whether it was correctly addressed.*

App. 14 (emphasis added). This interpretation of the statute is error.

The Court of Appeals' rationale leads to a wrong decision in this case, and would lead to even more absurd results in other cases. Under this ruling, as long as a letter is sent to *someone* other than the defendant by a plaintiff but *eventually* reaches the defendant, even after the expiration of the statute of limitations, the letter would be effective under RCW 7.70.110. As plainly emphasized in *Unruh*, the apparent purpose of RCW 7.70.110 rests in promoting the efficient resolution of disputes outside the courtroom through mediation, and “[i]mplicit in this purpose is the notion that the defendant receives notice of the request for mediation.” 172 Wn.2d at 114. Indeed, in explaining its decision that RCW 7.70.110 is satisfied by service on a defendant or the defendant’s authorized agent, the Supreme Court stated: “Under this interpretation, the defendant will receive notice that the plaintiff has requested mediation under RCW 7.70.110 and will have an opportunity to assent to the request.” *Id.* (emphasis added).

Moreover, the Court of Appeals’ decision fails to conduct any analysis on the facts that the Fraleys had a significant and well-established relationship with Dr. Blair at his actual place of business—both before and after the surgery at issue—and expressly recognized that the attorneys they had consulted with had failed to properly address the mediation request to Dr. Blair. *See* App. 9–15. While the Court should not read into RCW 7.70.110 strict statutory requirements that are not present, the Supreme Court has already recognized in *Unruh* that some key elements of the statute—such as the “notion that the defendant receives notice of the request for mediation”—must be implicit. *See* 172 Wn.2d at 114. Even the Court of Appeals’ decision tacitly acknowledges that this notion implies some duty of “due diligence” on the part of claimants to properly send a mediation request to the party with whom mediation is sought. *See* App. 12 (“If St. Joseph’s returned the mediation letter to Fraley, then he would have had to exercise his due diligence to find a different mailing address (or other method)”).

sufficient to notify Dr. Blair.”) (emphasis added). Nonetheless, the Court of Appeals failed to engage in any analysis on the required due diligence of the Fraleys to send their request to Dr. Blair or an authorized agent from the outset of making their claim. Under the undisputed facts here, where the Fraleys had all the information to properly send a mediation request to Dr. Blair—and even specifically recognized that the letters drafted on their behalf were not properly addressed to Dr. Blair at his place of business—it was error to determine that the act of mailing a mediation request to a non-agent entity constituted the effective “making” of a good faith mediation request.

B. Public Policy Weighs in Favor of Granting Discretionary Review

Discretionary review should be granted where a decision will not just advance the proper result in this litigation, but will also clarify the law on an important issue related to the pre-litigation notice requirements for health care mediation requests under RCW 7.70.110. RAP 13.4(b)(4). As noted by the Court in

Unruh, “[t]he unstated but apparent purpose of RCW 7.70.110 is to facilitate settlement of disputes through mediation.” 172 Wn.2d at 114. Patients seeking to mediate health care claims, and the attorneys who represent them, deserve notice and instruction on what satisfies notice requirements for a request for mediation under the ambiguous language of RCW 7.70.110. Health care providers deserve guidance on their obligations to consider and participate in mediation on requests neither addressed to them nor their agents that are received only after the expiration of the statute of limitations.

Although the Supreme Court has previously given seemingly clear guidance that such requests should be made to the defendant or its “authorized agent,” such guidance was apparently insufficient to instruct the decisions of the lower court and the Court of Appeals in this matter. Such ambiguity and seemingly conflicting instruction could be resolved through a clear and reasonable interpretation of RCW 7.70.110’s implied notice requirements. For instance, the Court could

articulate a common-sense rule, such that a mediation request is deemed “made” if sent by the Plaintiff to the defendant or an authorized agent within the statute of limitations, or if the Defendant or an authorized agent actually receive the letter before the statute of limitations expires. Expressly ruling on this issue would offer clear guidance and certainty to all parties, and therefore promote pre-litigation mediation on the underlying merits of a claim instead of disputes over whether the request has effectively tolled the statute of limitations.

VI. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court grant discretionary review. The decision by the Court of Appeals plainly contradicts the Supreme Court’s ruling in *Unruh* that mediation requests under RCW 7.70.110 must be made to a defendant or a defendant’s authorized agent. Further, public policy weighs strongly in favor of discretionary review where the resolution of ambiguous terms in RCW 7.70.110 is necessary to guide patients and health care entities

in their pre-litigation rights and obligations under Washington’s
“Mandatory mediation of health care claims” framework.

The undersigned certifies this document contains 3,561
words in compliance with RAP 18.17(b) and RAP 18.17(c)(11).

DATED this 8th day of June, 2023, at Tacoma,
Washington.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

s/ Brennen Johnson

Brennen Johnson, WSBA #51665
Attorney for Proliance Surgeons, Inc., P.S. a
Washington Professional Service Corporation
d/b/a Proliance Puget Sound Orthopaedics
and John Blair, Jr., MD
2115 N 30th St., Ste. 101
Tacoma, WA 98403
(253) 572-5323
brennenj@jgkmw.com

VII. CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the date signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, PETITION FOR DISCRETIONARY REVIEW, by the method indicated below and addressed to the following:

<p><i>Counsel for Respondents</i> Todd D. Tinker Tinker Law Firm, PLLC 149 Finch Pl SW Ste 1 Bainbridge Island WA 98110 todd@tinkerlawfirm.com lauren@tinkerlawfirm.com; heather@tinkerlawfirm.com; ericka@tinkerlawfirm.com; elaine@tinkerlawfirm.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile Overnight <input checked="" type="checkbox"/> E-mail/E-Service <input type="checkbox"/> Messenger</p>
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<p><i>Counsel for Defendants</i> Michelle M. Garzon Fain Anderson VanDerhoef Rosendahl O'Halloran Spillane, PLLC 1301 A St Ste 900 Tacoma WA 98402 shelly@favros.com elizabethu@favros.com; cindy@favros.com; erinh@favros.com; alex@favros.com; ann@favros.com; erinh@favros.com; cindy@favros.com</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile Overnight <input checked="" type="checkbox"/> E-mail/E-Service <input type="checkbox"/> Messenger</p>
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Signed this 8th day of June, 2023 at Phoenix, Arizona.

/s/ Sandra Cameron
Sandra Cameron, Legal
Assistant

NO. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID M. FRALEY

Respondent,

v.

PROLIANCE SURGEONS, INC., P.S. a Washington
Professional Service Corporation d/b/a PROLIANCE
PUGET SOUND ORTHOPAEDICS; JOHN BLAIR, JR.,
MD, Individually,

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and

COMMONSPIRIT HEALTH, a Colorado corporation d/b/a
CATHOLIC HEALTH INITIATIVES; FRANCISCAN
HEALTH SYSTEM, a Washington corporation d/b/a ST.
JOSEPH MEDICAL CENTER; UNKNOWN JOHN DOES,
and JOHN DOE CLINICS,

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PETITION FOR DISCRETIONARY REVIEW, APPENDIX

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May 9, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID M. FRALEY,

Respondent,

v.

COMMONSPIRIT HEALTH, a Colorado corporation d/b/a CATHOLIC HEALTH INITIATIVES; FRANCISCAN HEALTH SYSTEM, a Washington corporation d/b/a ST. JOSEPH MEDICAL CENTER; PROLIANCE SURGEONS, INC., P.S., a Washington professional Service Corporation d/b/a PROLIANCE PUGET SOUND ORTHOPAEDICS; JOHN BLAIR, JR., MD, individually; UNKNOWN JOHN DOES, and JOHN DOE CLINICS,

Petitioners.

No. 56697-4-II

PUBLISHED OPINION

VELJACIC, J. — This is a petition for discretionary review of the trial court’s order denying Proliance Surgeons, Inc., P.S. and Dr. John Blair Jr.’s motion for summary judgment. Proliance and Dr. Blair argue that the trial court erred in denying their motion because David Fraley’s complaint for medical malpractice was barred by the three-year statute of limitations in RCW 4.16.350(3). More specifically, Proliance and Dr. Blair argue the trial court erred in concluding that Fraley’s mediation letter was sufficient to toll the statute of limitations for one year under RCW 7.70.110.

On the facts of this case, we hold that the trial court did not err in denying Proliance and Dr. Blair’s motion for summary judgment because Fraley’s mediation letter was sufficient to toll

the statute of limitations for one year under RCW 7.70.110. Therefore, Fraley's complaint for medical malpractice was timely filed. Accordingly, we affirm the trial court's order denying Proliance and Dr. Blair's motion for summary judgment and remand for further proceedings.

FACTS

I. FRALEY'S SPINAL SURGERY

On September 21, 2017, Dr. Blair performed spinal surgery on Fraley at St. Joseph's Hospital in Tacoma. On September 22, at about 3:00 P.M., Fraley awoke from a nap and could not move his legs. His wife, Stacey Fraley, alerted the nurses. Around 7:00 P.M., she told one of the nurses that Fraley was not urinating and she was afraid something was wrong. As the night progressed, Fraley's condition did not improve. Fraley still could not move his legs and he could no longer accurately perceive the temperature of the hospital room.

At about 10:45 P.M., the nurses conducted a bladder scan, found 1,000 ml of urine in Fraley's bladder, and placed a catheter. At 10:47 P.M., the nurse informed Dr. Blair about Fraley's complaint of paralysis in his legs. According to the medical records, Dr. Blair stated he would check on Fraley in the morning.

On September 23, at about 5:00 A.M., hospital staff and Dr. Blair told Stacey¹ that Fraley needed to be taken back into surgery to treat an epidural hematoma. Dr. Blair told her that her husband "would probably be paralyzed when he got out of surgery." Clerk's Papers (CP) at 165.

Post-surgery, Fraley was transferred to the St. Joseph Rehabilitation Unit, where he underwent intensive physical therapy and learned to walk again. However, he continued to

¹ We use Stacey's first name for clarity because she shares the same last name as the respondent. No disrespect is intended.

experience “constant terrible pain in his trunk and legs,” bowel and bladder trouble, and impaired sexual function. CP at 166.

II. MEDIATION LETTER

A few months after the surgeries, the Fraleys contacted a law firm to pursue a medical malpractice action, but the Fraleys were told it was too early to file a claim. Nearly three years later, in August 2020, the Fraleys contacted another law firm. An attorney informed them that the firm could not take the case due to a conflict. However, the firm sent the Fraleys a letter to send to certain medical providers to request mediation, which would toll the statute of limitations for one year. It also recommended another law firm to the Fraleys.

The Fraleys received two electronic versions of the letter to toll the statute of limitations. One of the letters was titled “2020-08-24-Tolling Letter Draft- General St. Joseph’s.docx” and was addressed to “St. Joseph’s Medical Center, Attn: Risk Management, 1717 South J St, Tacoma, WA 98405.” CP at 168. The second electronic letter was titled “2020-08-24 - Tolling Letter Draft - Dr. Blair.docx” and was addressed to “Dr. John Blair, M.D, St. Joseph’s Medical Center, Attn: Risk Management, 1717 South J St, Tacoma, WA 98405.” CP at 168.

The Fraleys sent hard copies of the letters to St. Joseph’s and Catholic Health Initiatives (CHI) Franciscan Risk Management Department via certified mail, with Fraley handwriting his name and date of birth on the letter, but otherwise making no other change.² The envelope enclosing Fraley’s mediation letter to Dr. Blair is postmarked September 11, 2020. The letter addressed to Dr. Blair stated,

Prior to filing a cause of action, I am writing to request mediation of my claims against you for medical negligence surrounding my care after surgery on

² Stacey’s name was not included in the mediation request letters sent, resulting in the dismissal of her claims due to the statute of limitations having run. She does not seek review of this dismissal.

September 21st, 2017. Pursuant to RCW 7.70.110, the making of a good faith request for mediation tolls the statute of limitations for one year. RCW 4.16.350 provides a three-year statute of limitations for claims relating to health care. The statute of limitations will now run on September 21st, 2021.

Please have your attorney or insurance carrier contact me to discuss the best time to schedule mediation in this matter. Thank you.

CP at 68. In her declaration, Stacey stated that,

Everything [Fraley] and I knew about the letters that would pause the statute of limitations was told to us by [the law firm]. We did no independent research into what was required. They told us they would provide us with the letters necessary to pause the statute of limitations on our claim and we believed that what they provided us would, in fact, pause the statute of limitations on our claim. I did notice that the letter to Dr. Blair was addressed to St. Joseph. It did not occur to me that that was going to be a problem or that we were sending the letter to the wrong place. It made sense to me that the letters to both St. Joseph and to Dr. Blair would be sent to St. Joseph because that's where all the care we were concerned about occurred and also because we knew Dr. Blair worked at St. Joseph and I expected Dr. Blair to get mail that was sent there for him.

CP at 169. In his declaration, Fraley stated that,

I understood that, in addition to pausing the statute of limitations, part of the purpose of the letters was to request mediation of our claims against St. Joseph and Dr. Blair. . . Before we were told about the letters, we didn't know requesting mediation was something we could even do, and we were glad that was a possibility. I genuinely would have preferred to mediate our claims instead of filing a lawsuit. Had St. Joseph Medical Center, Dr. Blair, and/or Proliance agreed to mediate our claims, I would have happily participated.

CP at 178.

There was no separate letter for Fraley to send to Proliance, Dr. Blair's actual employer.

Neither was there a letter for Fraley to send to Proliance's business address.

Dr. Blair's primary clinic is Puget Sound Orthopaedics, which is a division of Proliance, and is located at 1724 W. Union Avenue, Tacoma, Washington 98405. Dr. Blair is an employee and shareholder at Proliance and has been a partner at Puget Sound Orthopaedics since 2008.

Dr. Blair has surgical privileges at St. Joseph's and MultiCare Tacoma General Hospital.

Dr. Blair has seen and treated Fraley at both of these hospitals. Additionally, Fraley had visited

Dr. Blair's clinic (Puget Sound Orthopaedics, a division of Proliance) on several occasions since 2017. Dr. Blair is not employed by either of these hospitals or CHI. St. Joseph's and CHI are not the registered agents for Proliance or Dr. Blair.

On September 14, 2020, St. Joseph's received both letters, but due to Dr. Blair not being employed by the hospital, it did not open the letter addressed to him. St. Joseph's/CHI's protocol for letters addressed to nonemployee physicians is to either return the mail to the sender or forward it to the correct address. This decision rests with the mail clerk or whomever the mail is addressed to.

On September 22, 2020, a staff member of St. Joseph's risk management office forwarded the unopened letter to Dr. Blair at Proliance after doing an online search for his contact information. St. Joseph's had no other contact with Dr. Blair or Proliance about Fraley's mediation request. Proliance and Dr. Blair eventually received the mediation letter, however, there is no evidence as to when that occurred.

Dr. Blair did not become personally aware of the mediation request until late September or early October 2020. Proliance and Dr. Blair did not respond to Fraley's mediation request believing that his claims were time barred when it was received.

III. PROCEDURAL HISTORY

On May 29, 2021, Fraley filed a complaint alleging medical malpractice against Commonsprit Health (d/b/a CHI), St. Joseph's Medical Center, Proliance, and certain unknown individuals and clinics. Fraley amended his complaint to include Dr. Blair four days later.

On August 12, Proliance and Dr. Blair filed a motion for summary judgment seeking dismissal of all claims against them based on the statute of limitations. Proliance and Dr. Blair argued that Fraley failed to sufficiently invoke the tolling provision set out in RCW 7.70.110 to

make his complaint timely because his mediation letter was sent to the wrong address and was not made in good faith. Proliance and Dr. Blair also argued that the tolling provision did not apply because, under CR 5, they did not receive the mediation letter until after the statute of limitations had expired.

In response, Fraley argued that his complaint was timely filed because RCW 7.70.110 is procedurally informal and only requires a request to be made in writing and good faith. In essence, Fraley contended that mailing the letter to St. Joseph's was made in good faith and was sufficient to notify Dr. Blair of his mediation request because that is where the alleged negligent acts or omissions occurred. Fraley also asked the trial court to reject Proliance and Dr. Blair's date-of-receipt argument because "RCW 7.70.110 does not say the limitations period is tolled upon defendant's *receipt* of a request for mediation—it says it is tolled upon the *making* of a request for mediation." CP at 190.

The trial court denied Proliance and Dr. Blair's motion for summary judgment. It the certified the matter for discretionary review.

On May 24, 2022, we granted Proliance and Dr. Blair's petition for discretionary review under RAP 2.3(b)(4).

At oral argument, we inquired of Dr. Blair and Proliance's counsel as to whether or not Dr. Blair is an agent of Proliance, to which counsel replied: "Yes. Dr. Blair is an agent and employee of Proliance." Wash. Court of Appeals oral argument, *Fraley v. Commonspirit Health*, No. 56697-4-II (Jan. 26, 2023), at 10 min., 18 sec. to 10 min., 25 sec., <https://tw.org/video/division-2-court-of-appeals-2023011381/>. We then asked counsel how exactly Dr. Blair is an agent of Proliance. Wash. Court of Appeals oral argument, *supra*, at 10 min., 26 sec. to 10 min., 36 sec. Counsel explained that "a partner or owner of a business acting in the course of that business, or as well as

an employee of business acting in the course of that business is essentially the most traditional notion of an agent.” Wash. Court of Appeals oral argument, *supra*, at 10 min., 50 sec. to 11 min., 1 sec.

ANALYSIS

Proliance and Dr. Blair argue that the trial court erred in denying its motion for summary judgment because Fraley’s complaint for medical malpractice was barred by the applicable statute of limitations. We disagree.

I. STANDARD OF REVIEW

“We review a summary judgment order de novo, engaging in the same inquiry as the trial court.” *City of Seattle v. Long*, 198 Wn.2d 136, 145, 493 P.3d 94 (2021). Summary judgment is appropriate if the pleadings, affidavits, and depositions show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018); CR 56(c). We consider the facts and reasonable inferences in the light most favorable to the nonmoving party. *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). Summary judgment is proper if, given the evidence, reasonable persons could reach only one conclusion. *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014).

The meaning of a statute is a question of law that we also review de novo. *Long*, 198 Wn.2d at 147. “The court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *Id.* at 148 (internal quotation marks omitted) (*quoting Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010)). “If a statute’s meaning is plain on its face, we must follow that plain meaning.” *Id.* “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that

provision is found, related provisions, and the statutory scheme as a whole.” *Unruh v. Cacchiotti*, 172 Wn.2d 98, 113, 257 P.3d 631 (2011) (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). “We may use dictionaries to discern the plain meaning of terms with ‘well-accepted, ordinary’ meanings.” *Winters v. Ingersoll*, 11 Wn. App. 2d 935, 947, 456 P.3d 862 (2020) (quoting *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008)). When the plain language is clear, we may not add words where the legislature chose not to include them. *Nelson v. Dep’t of Labor & Indus.*, 198 Wn. App. 101, 110, 392 P.3d 1138 (2017).

II. LEGAL PRINCIPLES

The statute of limitations for a medical malpractice claim is three years. *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166, 171, 252 P.3d 909 (2011); RCW 4.16.350(3). “The three-year limitations period commences at the time of the last act or omission that allegedly caused the injury.” *Unruh*, 172 Wn.2d at 107. However, RCW 7.70.110 provides that “[t]he 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 a tolling provision. *Cortez-Kloehn*, 162 Wn. App. at 171. “The unstated but apparent purpose of RCW 7.70.110 is to facilitate [the] settlement of disputes through mediation. Implicit in this purpose is the notion that the defendant receives notice of the request for mediation.” *Unruh*, 172 Wn.2d at 114. To give effect to this purpose, our Supreme Court has “construe[d] RCW 7.70.110 to toll the statute of limitations when a request for mediation is made on the defendant or the defendant’s authorized agent.” *Id.* The court reasoned that, “[u]nder this interpretation, the defendant will receive notice that the plaintiff has requested mediation under RCW 7.70.110 and will have an opportunity to assent to the request.” *Id.*

RCW 7.70.110 is procedurally informal. *Id.* “Nothing in the plain language of the statute restricts the method of giving notice to personally serving a request for mediation on the prospective defendant.” *Id.* “RCW 7.70.110 does not contain detailed service procedures. It requires only that the request for mediation be ‘written’ and be made in ‘good faith.’” *Id.* (quoting RCW 7.70.110). In fact, as the *Unruh* court observed, the legislature did not include specific service requirements in RCW 7.70.110, as it did in the companion statute, former RCW 7.70.100, which governed the procedures for serving the 90-day notice of intent to sue. 172 Wn.2d at 114; LAWS OF 2013, ch. 82 § 1.

Generally, “[t]he statute of limitations is an affirmative defense that must be proved by the defendant.” *Cortez-Kloehn*, 162 Wn. App. at 172. However, “[a] plaintiff asserting an exception to the statute of limitations [] bears the burden of proving that a tolling provision applies.” *Id.*

III. THE TRIAL COURT DID NOT ERR IN DENYING PROLIANCE AND DR. BLAIR’S MOTION

As an initial matter, although they are separate parties, we will address Proliance and Dr. Blair together because they have conceded that Dr. Blair was acting as an agent for Proliance. Wash. Court of Appeals oral argument, *supra*, at 10 min., 16 sec. to 11 min., 1 sec. Accordingly, the request for mediation to Dr. Blair is effective as to Proliance. *Deep Water Brewing, LLC, v. Fairway Resources Ltd.*, 152 Wn. App. 229, 268, 215 P.3d 990 (2009) (“Generally, a principal is chargeable with notice of facts known to its agent. This follows the duty of an agent to communicate his knowledge to the principal.”).

The parties agree that Fraley filed his complaint more than three years after the date of the alleged negligence.³ Accordingly, Fraley's complaint is barred by the statute of limitations unless he can show that RCW 7.70.110 applies. Thus, the matter before us is whether Fraley's mediation letter was sufficient to toll the statute of limitations for one year under RCW 7.70.110.

Here, Fraley sufficiently invoked the one-year tolling provision to render his complaint timely because his mediation letter addressed to Dr. Blair met the requirements of RCW 7.70.110. The letter was clearly a written request for mediation and was made prior to filing his complaint, which Proliance and Dr. Blair do not dispute.

Additionally, the letter was made in good faith. The term "good faith" has been interpreted to mean "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage." *Breuer v. Douglas D. Presta, D.P.M.*, 148 Wn. App. 470, 475, 200 P.3d 724 (2009) (internal quotation marks omitted) (quoting *Sattler v. Nw. Tissue Ctr.*, 110 Wn. App. 689, 695, 42 P.3d 440 (2002)). In his declaration, Fraley explained that he understood the letter would toll the statute of limitations, but stated that part of the purpose was to mediate his medical malpractice claims against Dr. Blair. Fraley also stated that, until August 2020, he did not know that mediation was a possibility and that he would have preferred to mediate his claims rather than initiate a lawsuit. Although Fraley sent the mediation letter close to expiration of the statute of limitations (about two weeks prior), there is no evidence that Fraley sent the letter to the

³ The parties do, however, disagree regarding the commencement date of the statute of limitations. Proliance and Dr. Blair contend that September 21, 2017, is the correct commencement date because that is the date Fraley stipulated to in his mediation letter. Fraley contends that September 23, 2017, is the correct date because that is the date of the last negligent act or omission that caused his injuries. But, as explained below, it is the "making" of the mediation request, not the defendant's "receipt," that triggers the one-year tolling provision in RCW 7.70.110. Because Fraley made his mediation request a few days before either of these dates, we need not decide when the statute of limitations commenced.

wrong mailing address to seek an unconscionable advantage in doing so. Rather, viewing the evidence in light most favorable to Fraley, Fraley had a good faith belief that St. Joseph's was an appropriate place to send the request for mediation because that was the address where Dr. Blair actually performed the surgeries that gave rise to his claim.

“[RCW 7.70.110] requires only that the request for mediation be ‘written’ and be made in ‘good faith.’” *Unruh*, 172 Wn.2d at 114 (quoting RCW 7.70.110). Because Fraley's mediation letter met both of these requirements, we hold that Fraley sufficiently invoked the one-year tolling provision in RCW 7.70.110 to render his complaint timely filed. Accordingly, the trial court did not err in denying Proliance and Dr. Blair's motion for summary judgment based on the statute of limitations.

Proliance and Dr. Blair argue that Fraley's mediation letter failed to meet the requirements of RCW 7.70.110 because Fraley sent it to the wrong address. More specifically, Proliance and Dr. Blair argues that, in order for a request for mediation to be made on the defendant or the defendant's registered agent, as *Unruh* requires, Fraley had to send the mediation letter directly to Dr. Blair's actual place of employment (his clinic). We disagree.

Here, Fraley's mediation letter was made “on the defendant,” as *Unruh* requires, because it was specifically addressed to Dr. Blair at a place where Dr. Blair performed the surgeries that gave rise to Fraley's claims. Proliance and Dr. Blair takes issue with the fact that Fraley sent the letter to St. Joseph's Medical Center, which is neither Dr. Blair's actual employer nor Proliance's registered agent. However, in *Unruh*, the Supreme Court explained that RCW 7.70.110 is procedurally informal and does not contain detailed service provisions. 172 Wn.2d at 114. Neither RCW 7.70.110 nor *Unruh* make any mention of exactly where or how the written request should

be sent.⁴ By requiring a prospective plaintiff to mail a mediation letter to a specified business address, Proliance and Dr. Blair essentially asks us to stray from the principles of statutory construction and read words into RCW 7.70.110 that do not exist. *Unruh*, 172 Wn.2d at 114; *Nelson*, 198 Wn. App. at 110. We decline to do so.

Further, under *Unruh*, the statute requires only a request for mediation be made on the defendant or their authorized agent. Implicit in the purpose of the statute “is the notion that the defendant receives notice of the request for mediation.” 172 Wn.2d at 114. The record shows that occurred here because Proliance and Dr. Blair did in fact receive the letter. St. Joseph’s could have returned the mediation letter addressed to Dr. Blair, but choose to forward the letter to Proliance and Dr. Blair (which they eventually received). If St. Joseph’s returned the mediation letter to Fraley, then he would have had to exercise his due diligence to find a different mailing address (or other method) sufficient to notify Dr. Blair. Accordingly, this argument fails.

Next, Proliance and Dr. Blair argue that Fraley’s mediation letter failed to invoke the tolling provision of RCW 7.70.110 because, under CR 5, they *received* the letter *after* the statute of limitations had expired. They contend that CR 5’s provisions should apply because RCW 7.70.110 remains silent as to the form of service required. We disagree.

As discussed above, RCW 7.70.110 provides that “[t]he 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.” Nowhere in this statute did the legislature say that a medical provider’s “receipt” of a written mediation request triggers the tolling provision. Rather, the

⁴ Indeed, this makes sense. As Stacey’s declaration demonstrates, from a patient’s perspective, it is difficult to ascertain where a doctor or other medical provider’s specific mailing address would be given the multiple locations where treatment and provider visits can occur.

statute’s plain language provides that the “making” of the request “prior to filing a cause of action” triggers the tolling provision. RCW 7.70.110.

Recently, in *Miller v. Miller*, we opined that “[s]ome definitions of ‘make’ include ‘to execute in an appropriate manner: draw up,’ ‘to bring about,’ and ‘to cause to exist, occur, or appear: bring to pass: create, cause.’” 17 Wn. App. 2d 888, 895, 488 P.3d 910 (2021) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1993)). In that marriage dissolution action, we concluded that the husband “made” his declaration in lieu of testimony under LCR 4.1(a) when he reviewed and signed it because that was the date he “executed or created it.” *Id.*

Here, Fraley executed or created his mediation request on September 11, 2020—the date he signed and mailed the letters. Thus, that is the date he “made” a written, good faith request for mediation and invoked the one-year tolling provision in RCW 7.70.110.

Proliance and Dr. Blair contend that we should nevertheless ignore the plain language of RCW 7.70.110 because the court in *Cortez-Kloehn*, 162 Wn. App. 166, applied CR 5’s service provisions to determine when a request was made. We disagree.

In *Cortez-Kloehn*, both parties in their briefing applied CR 5’s proof of service by mail standards to the question of whether a request was made under RCW 7.70.110. 162 Wn. App. at 174. There, the court simply assumed for the purposes of that appeal that those standards applied—it did not actually decide that CR 5 did apply. *Id.*

Here, Proliance and Dr. Blair’s reliance on *Cortez-Kloehn* is unavailing because the parties here disagree on the application of CR 5. Additionally, just one month after *Cortez-Kloehn* was decided, the Supreme Court issued its decision in *Unruh*, 172 Wn.2d 98. As discussed above, *Unruh* made clear that courts should not stray from the settled principles of statutory construction in interpreting RCW 7.70.110. 172 Wn.2d at 114. Proliance and Dr. Blair’s argument runs afoul

of the Supreme Court’s admonition because it adds words and requirements to RCW 7.70.110 that do not exist. *Nelson*, 198 Wn. App. at 110. Again, tolling under RCW 7.70.110 is deemed effective upon the “making” of a written good faith request for mediation prior to filing a cause of action—not its “receipt.”

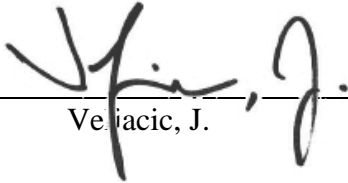
In their reply brief, Proliance and Dr. Blair also contend that, under RCW 23.95.450, service on an entity could only be deemed on the defendant or the defendant’s registered agent if it were correctly addressed. We disagree because, again, their argument would require us to add words and requirements to RCW 7.70.110 that do not exist. *Nelson*, 198 Wn. App. at 110. Under our interpretation of the statute, the making of the request is the point, not whether it was correctly addressed.

In sum, Fraley made a timely written, good faith request for mediation sufficient to toll the statute of limitations on his medical malpractice claims for one year. The tolled statute of limitations was September 2021; Fraley filed his complaint on May 29, 2021. Therefore, the trial court did not err in concluding that Fraley’s complaint was timely filed. Accordingly, we affirm the trial court’s order denying Proliance and Dr. Blair’s motion for summary judgment and remand for further proceedings.

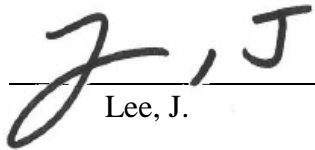
CONCLUSION

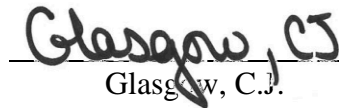
We affirm the trial court’s order denying Proliance and Dr. Blair’s motion for summary judgment and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Verjatic, J.

We concur:


Lee, J.


Glasgow, C.J.

JOHNSON GRAFFE KEAY MONIZ & WICK

June 08, 2023 - 10:04 AM

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